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REPORTS OF CASES

ARGUED AND ADJUDGED

IN THE

SUPREME COURT

OF THE

UNITED STATES,

JANUARY TERM 1828.

By RICHARD PETERS, Junior,

COUNSELLOR AT LAW, AND REPORTER OF THE SUPREME COURT OF THE UNITED STATES.

VOL. I.

THIRD EDITION.

EDITED, WITH NOTES AND REFERENCES TO LATER DECISIONS,

BY

FREDERICK C. BRIGHTLY,

AUTHOR OF THE "FEDERAL DIGEST," ETC.

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PREFACE.

THE volume of Reports now published, contains the cases decided in the Supreme Court of the United States, during the January Term, 1828.

In the execution of the trust committed to him, it has been the earnest endeavor of the reporter, to exhibit the facts of each case presented to the court, briefly and accurately; and to state such of the arguments of counsel, as, in his opinion, were required for a full and correct understanding of the important points of the case, and the decision of the court. He solicits the indulgence of his brethren of the profession, for any deficiencies in this part of the work. It has not been within the scope of his purpose, to give, at large, all the reasoning and learning addressed by them to the court.

It is freely admitted, that this volume is issued from the press, under an anxious solicitude for its favorable reception. As it is the first of a series to be published by the reporter, while holding the station assigned to him by the kind consideration of the court, he is most desirous that it shall obtain, what will be deemed by all, the highest sanction—the approbation of those whose enlightened and learned labors, it is the object of the work to record.

In the statement of the points decided in each case, a plan, somewhat novel, has been adopted. The syllabus of each case contains an abstract of all the matters ruled and adjudged by the court, and, generally, in the language of the decision, with a reference to the page of the report in which the particular point will be found. As many of the cases occupy a considerable space, this mode of reference will be found convenient to the practitioner and to the student.

It is held to be obligatory on the reporter, under the provision of the act of congress, which declares that "the decisions of the court shall be sold to the public at large, at a price not exceeding five dollars per volume," to stipulate with the publisher, that the price, per volume, shall be that sum. This has been done.

JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES,

DURING THE PERIOD OF THESE REPORTS.

Hon. JOHN MARSHALL, Chief Justice.

" BUSHROD WASHINGTON,
" WILLIAM JOHNSON,
" GABRIEL DUVALL,
" JOSEPH STORY,
" SMITH THOMPSON,
" ROBERT TRIMBLE,

} Associate Justices.

WILLIAM WIRT, Esq., Attorney-General.

WILLIAM THOMAS CARROLL, Clerk of the Supreme Court.

TENCH RINGOLD, Marshal.

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RULES AND ORDERS

OF THE

SUPREME COURT OF THE UNITED STATES.

I. That the clerk of this court do reside and keep his office at the seat of the national government, and that he do not practise, either as an attorney or counsellor, in this court, while he shall continue to be clerk of the same.

II. That (until further order) it be requisite to the admission of attorneys or counsellors to practise in this court, that they shall have been such for three years past in the supreme court of the state to which they respectively belong; and that their private and professional characters shall appear to be fair.

III. That counsellors shall not practice as attorneys, nor attorneys as counsellors, in this court.

IV. That they shall respectively take the following oath, viz: I, ——— do solemnly swear, that I will demean myself (as an attorney or counsellor of the court) uprightly, and according to law, and that I will support the constitution of the United States.

V. That (unless, and until it shall be otherwise provided by law) all process in this court, shall be in the name of the president of the United States.

VI. That the counsellors and attorneys admitted to practise in this court, shall take either an oath, or in proper cases an affirmation, of the tenor prescribed by the rule of this court on this subject, made at the February term 1790, viz: I, ——— do solemnly swear (or affirm, as the case might be) that I will demean myself, as attorney or counsellor of this court, uprightly, and according to law, and that I will support the constitution of the United States.

VII. The chief justice, in answer to the motion of the attorney-general, informs him, and the bar; that this court consider the practice of the court of king's bench and of chancery, in England, as affording outlines for the practice of this court; and that they will, from time to time, make such alterations therein as circumstances may render necessary.

VIII. The court give notice to the gentlemen of the bar, that hereafter they will expect to be furnished with a statement of the material points of the case, from the counsel on each side of the cause.

IX. The court declared, that all evidence on motions for a discharge upon bail, must be by way of deposition, and not *vivâ voce.*

X. That process of *subpœna*, issuing out of this court, in any suit in equity, shall be served on the defendant sixty days before the return-day of the said process ; and further, that if the defendant, on such service of the *subpœna*, should not appear at the return-day contained therein, the complainant shall be at liberty to proceed *ex parte.*

XI. That the clerk of the court to which any writ of error shall be directed, may make return of the same, by transmitting a true copy of the record, and of all proceedings in the cause, under his hand and the seal of the court.

XII. That no record of the court be suffered by the clerk to be taken out of his office, but by the consent of the court ; otherwise, to be responsible for it.

XIII. That the plaintiff in error be at liberty to show, to the satisfaction of this court, that the matter in dispute exceeds the sum or value of $2000, exclusive of costs ; this to be made to appear by affidavit, and ——— days' notice to the opposite party, or their counsel, in Georgia. Rule as to affidavits to be mutual.

XIV. That counsellors may be admitted as attorneys in this court, on taking the usual oath.

XV. That in every cause, when the defendant in error fails to appear, the plaintiff may proceed *ex parte.*

XVI. That where the writ of error issues within thirty days before the meeting of the court, the defendant is at liberty to enter his appearance, and proceed to trial ; otherwise, the cause must be continued.

XVII. In all cases where a writ of error shall delay proceedings on the judgment of the circuit court, and shall appear to have been sued out merely for delay, damages shall be awarded at the rate of ten per centum per annum, on the amount of the judgment.

XVIII. In such cases, where there exists a real controversy, the damages shall be only at the rate of six per centum per annum. In both cases, the interest is to be computed as part of the damages.

XIX. § 1. All causes, the records of which shall be delivered to the clerk on or before the sixth day of the term, shall be considered as for trial in the course of that term. Where the record shall be delivered after the sixth day of the term, either party will be entitled to a continuance.

§ 2. In all cases where a writ of error shall be a *supersedeas* to a judgment, rendered in any court of the United States (except that for the district of Columbia), at least thirty days previous to the commencement of any term of this court, it shall be the duty of the plaintiff in error to lodge a copy of the record with the clerk of this court, within the first six days of the term ; and if he shall fail to do so, the defendant in error shall be permitted, afterwards, to lodge a copy of the record with the clerk, and the cause shall stand for trial, in like manner as if the record had come up within the first six days ; or he may, on producing a certificate from the clerk, stating the cause, and that a writ of error has been sued out, which operates as a *supersedeas* to the judgment, have the said writ of error docketed and dismissed. This rule shall apply to all judgments rendered by the court for the district of Columbia, at any time prior to a session of this court.

§ 3. In cases not put to issue at the August term, it shall be the duty of the plaintiff in error, if errors shall not have been assigned in the court below, to assign them in this court, at the commencement of the term, or so soon thereafter as the record shall be filed with the clerk, and the cause placed on the docket; and if he shall fail to do so, and shall also fail to assign them, when the cause shall be called for trial, the writ of error may be dismissed at his cost; and if the defendant shall refuse to plead to issue, and the cause shall be called to trial, the court may proceed to hear an argument on the part of the plaintiff, and to give judgment according to the rights of the cause.

XX. That all parties in this court, not being residents of the United States, shall give security for the costs accruing in this court, to be entered on the record.

XXI. That upon the clerk of this court producing satisfactory evidence, by affidavits, or the acknowledgment of the parties, or their sureties, of having served a copy of the bill of costs, due by them respectively in this court, on such parties or their sureties, an attachment shall issue against such parties or sureties respectively, to compel payment of the said costs.

XXII. That upon the reversal of a judgment or decree of the circuit court, the party in whose favor the reversal is, shall recover his costs in the circuit court.

XXIII. That only two counsel be permitted to argue for each party, plaintiff and defendant, in a cause.

XXIV. That in all cases where further proof is ordered by the court, the depositions which shall be taken, shall be by a commission to be issued from this court, or from any circuit court of the United States.

XXV. Whenever it shall be necessary or proper in the opinion of the presiding judge in any circuit court, or district court exercising circuit court jurisdiction, that original papers of any kind should be inspected in the supreme court, upon appeal, such presiding judge may make such rule or order for the safe-keeping, transporting and return of such original papers, as to him may seem proper; and this court will receive and consider such original papers in connection with the transcript of the proceedings.

XXVI. In all cases of admiralty and maritime jurisdiction, where new evidence shall be admissible in this court, the evidence by testimony of witnesses, shall be taken under a commission, to be issued from this court, or from any circuit court of the United States, under the direction of any judge thereof; and no such commissions shall issue, but upon interrogatories to be filed by the party applying for the commission, and notice to the opposite party, or his agent or attorney, accompanied with a copy of the interrogatories so filed, to file cross-interrogatories, within twenty days from the service of such notice: Provided, however, that nothing in this rule shall prevent any party from giving oral testimony in open court, in cases where by law it is admissible.

XXVII. After the present term, no cause standing for argument will be heard by the court, until the parties shall have furnished the court with a printed brief or abstract of the cause, containing the substance of all the material pleadings, facts and documents, on which the parties rely, and the points of law and fact, intended to be presented at the argument.

XXVIII. Whenever, pending a writ of error or appeal in this court,

either party shall die, the proper representatives in the personalty or realty, of the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the suit, and thereupon, the cause shall be heard and determined, as in other cases; and if such representatives shall not voluntarily become parties, then the other party may suggest the death on the record; and thereupon, on motion, obtain an order, that, unless such representatives shall become parties, within the first ten days of the ensuing term, the party moving for such order, if defendant in error, shall be entitled to have the writ of error or appeal dismissed; and if the party so moving shall be plaintiff in error, he shall be entitled to open the record, and, on hearing, have the same reversed, if it be erroneous: Provided, however, that a copy of every such order shall be printed in some newspaper at the seat of government, in which the laws of the United States shall be printed by authority, three successive weeks, at least sixty days before the beginning of the term of the supreme court, then next ensuing.

XXIX. In all cases where a writ of error or an appeal shall be brought to this court, from any judgment or decree rendered thirty days before the term to which such writ of error or appeal shall be returnable, it shall be the duty of the plaintiff in error or appellant, as the case may be, to docket the cause, and file the record thereof, with the clerk of this court, within the first six days of the term; on failure to do which, the defendant in error or appellee, as the case may be, may docket the cause, and file a copy of the record with the clerk, and thereupon, the cause shall stand for trial, in like manner as if the record had been duly filed within the first six days of the term; or, at his option, he may have the cause docketed and dismissed, upon producing a certificate from the clerk of the court, wherein the judgment or decree was rendered, stating the cause, and certifying, that such writ of error or appeal had been duly sued out and allowed.

XXX. No cause will hereafter be heard, until a complete record shall be filed, containing in itself, without references *aliunde*, all the papers, exhibits, depositions and other proceedings, which are necessary to the hearing in this court.

XXXI. No *certiorari* for diminution of the record, shall be hereafter awarded in any cause, unless a motion therefor shall be made in writing, and the facts on which the same is founded, shall, if not admitted by the other party, be verified by affidavit. And all motions for such *certiorari*, shall be made at the first term of the entry of the cause, otherwise, the same shall not be granted, unless upon special cause shown to the court, accounting satisfactorily for the delay.

XXXII. In all cases of equity and admiralty jurisdiction, heard in this court, no objection shall hereafter be allowed to be taken to the admissibility of any deposition, deed, grant or other exhibit, found in the record, as evidence, unless objection was taken thereto in the court below, and entered of record; but the same shall otherwise be deemed to have been admitted by consent.

XXXIII. On Saturday of each week, during the sitting of the court, motions in cases not required by the rules of court to be put upon the docket, shall be entitled to preference, if such motions shall be made before the court shall have entered upon the hearing of a cause upon the docket.

XXXIV. That after the present term, no original record shall be taken from the supreme court-room, or from the office of the clerk of this court.

CASES DETERMINED

IN THE

SUPREME COURT OF THE UNITED STATES.

JANUARY TERM, 1828.

CLEMENT S. HUNT, Appellant, *v.* CHRISTOPHER RHODES, WILLIAM ENNIS and RICHARD K. RANDOLPH, administrators of LEWIS ROUSMANIERE, deceased, Appellees.

Equity.—Mistake.

It is a principle of equity, that when an instrument is drawn and executed, which professes, or is intended, to carry into execution an agreement, whether in writing or by parol, previously entered into; but which, by mistake of the draftsman, either in fact or in law, does not fulfil, or which violates, the manifest intention of the parties to the agreement; equity will correct the mistake, so as to produce a conformity of the instrument to the agreement. p. 13.

The execution of instruments, fairly and legally entered into, is one of the peculiar branches of equity jurisdiction; and a court of equity will compel a delinquent party to perform his agreement, according to the terms of it, and to the manifest intention of the parties. p. 13.

So, if the mistake exist, not in the instrument which is intended to give effect to the agreement, but in the agreement itself, and is clearly proved to have been the result of ignorance of some material fact; a court of equity will, in general, grant relief, according to the nature of the particular case in which it is sought. p. 13.

If an agreement was not founded on a mistake of any material fact, or if it is executed in strict conformity with itself, it would be unprecedented, for a court of equity to decree another security to be given, different from that which has been agreed upon; or to treat the case as if such other security had, in fact, been agreed upon and executed. p. 14.

Courts of equity may compel parties to execute their agreements, but it has no power to make agreements for them.[1] The death of one of the parties, and the consequent inefficiency of the security selected, intended to be valid and complete, but which was not so, will not give the right of interference. p. 14.

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[1] In Oliver *v.* Mutual Commercial Marine Ins. Co., 2 Curt. 298–9, the judge said, "there is a wide distinction between a case where an instrument is what the parties agreed it should be, but its legal effect is unexpected, and a case where an instrument was designed to carry into effect an existing binding agreement, but, by mistake, fails to do so. In the former case, the party never had a right to anything more than he has got; he may be disappointed in finding that what he has acquired was less valuable then he expected, but he acquired all he bar-

*A mistake arising from ignorance of law is not a ground for reforming a deed founded on such mistake; except in some few cases, and those of peculiar character.[2] p. 15.

If the obligee of a joint bond, by two or more, agree with one obligor to release him, and do so, and all the obligors are thereby discharged at law, equity will not afford relief against the legal consequences; although the release was given under a manifest misapprehension of the legal effect of it, in relation to the other obligors. p. 16.

It seems, that there may be cases in which a court of equity will relieve against mistake, arising from ignorance of law; but where parties, upon deliberation and advice, reject one species of security, and agree to select another, under a misapprehension of the law as to the nature of the security thus selected, a court of equity will not, on the ground of misapprehension, and the insufficiency of the security, in consequence of a subsequent event not foreseen, direct a security of a different character to be given, or decree that to be done, which the parties supposed would have been effected by the instrument, which was finally agreed upon. The court would be much less disposed to interfere, in such a case, in favor of a particular creditor, against the general creditors of an insolvent estate. p. 17.

Hunt *v.* Rousmaniere, 3 Mason 294, affirmed.

Appeal from the Circuit Court of Rhode Island. The appellant filed a bill on the chancery side of the circuit court of the United States for the district of Rhode Island, setting forth, that, in January 1820, Louis Rousmaniere obtained from him two loans of money, amounting, together, to $2150; and at the time the first loan was made, Rousmaniere offered to give, in addition to his notes, a bill of sale, or mortgage, of his interest in the brig Nereus, then at sea, as a collateral security for the repayment of the money. A few days after the delivery of the first note, dated 11th of January 1820, he executed a power of attorney, authorizing the plaintiff to make and execute a bill of sale, of three-fourths of the Nereus, to himself, or to any other person; and in the event of the loss of the vessel, to collect the money which should become due on a policy, by which the vessel and freight were insured. In the power of attorney, it was recited, that it was given as collateral security for the payment of the notes, and was to be void on their payment; on the failure of which, the plaintiff was to pay the amount and all expenses, and to return the residue to Rousmaniere. On the 21st of March 1821, an additional sum of $700 was loaned, for which a note was taken, and similar power of attorney given, to sell his interest in the schooner Industry; this vessel being also still at sea.

On the 6th of May 1820, Rousmaniere died intestate and insolvent, having paid $200 on account of the notes; and the plaintiff gave notice of his claim to the commissioners of insolvency, appointed under the authority of the insolvent law of Rhode Island. The plaintiff, in his bill, alleged, that, on

*3] the return of the Nereus and Industry, he took *possession of them, and offered the interest of the intestate in them, for sale; and the

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gained for, and there is no ground upon which a court of equity can give him anything more. On the contrary, in the latter case, the party had a complete right, by an existing contract, to something which, by mistake, he has failed to get; and this contract, and the right under it, still subsists, in point of equity; because, though the parties attempted to execute the contract, by mistake, they failed to execute it; and therefore, a court of equity interferes and, upon the footing of an existing contract, unexecuted, proceeds to put the party in that condition to which his contract entitled him; and in this class of cases, I apprehend, it is wholly immaterial, whether the party has failed to obtain that to which he was entitled, through a mistake of fact or of law." And see United States *v.* Ames, 99 U. S. 46.

[2] United States Bank *v.* Daniel, 12 Pet. 55–6. And see United States *v.* Price, 9 How. 92; Snell *v.* Insurance Co., 98 U. S. 90.

defendants having forbidden the sale, this bill was brought to compel them to join in it.

To this bill, the defendants demurred ; and their demurrer was sustained in the circuit court ; but leave was given to the plaintiff to amend. An amended bill was then filed, in which it was stated, that it was expressly agreed between the parties, that Rousmaniere was to give specific security on the Nereus and Industry, and that he offered to execute a mortgage on them. Counsel was consulted on the subject, who advised that the power of attorney, which was actually executed, should be taken in preference to a mortgage, because it was equally valid and effectual as a security, and would prevent the necessity of changing the papers of the vessels, or of taking possession of them on their return to port. These securities were, it was alleged, executed, with a full belief that they would, and with intention that they should, give to the plaintiff, as full and perfect a security, as would be given by a mortgage.

The defendants having also demurred to the amended bill, the circuit court decided in favor of the demurrer, and dismissed the bill ; and an appeal was entered to this court. At the February session 1823, this court considered that the appellant might be entitled to the relief prayed for in equity, but the respondents were permitted to withdraw their demurrer, and to file an answer in the court below. (8 Wheat. 174.) The answer of the defendants admitted the loans of money, and the delivery of the promissory notes, and that but $200 were paid, before the death of the intestate. The execution of the powers of attorney was also admitted, but it was denied that possession of the vessels was taken by the appellant ; and they alleged their resistance of the attempt to take possession of them. The answer also asserted ignorance of any agreement for a specific lien on the vessels, except that imported by the language of the powers of attorney ; that they had heard and believed, that the appellant meant to be concerned, as a partner, in a voyage of one of the vessels, which was relinquished, and that afterwards he offered to loan the money on security ; upon which, the intestate offered to give a mortgage, but the appellant preferred taking the powers of attorney, to avoid inconvenience, and took the powers of attorney, by advice of counsel. The answer also stated, that a bill of sale of the vessels, dated the day before the death of the intestate, by which the vessels were intended to be conveyed to one Bateman, and which the respondents stated, they had heard and believed, was intended to be executed on the evening of that day. The answer also alleged the insolvency of Rousmaniere, and that it existed a long time before his death; which they asserted must have been known to the appellant, and that the intestate resorted to improper modes to keep up his credit. [*4

The evidence taken in the case, consisted of the deposition of Mr. Hazard, the counsel who drew the papers, and in which he stated, that they were intended by both parties to have the effect of a specific lien or mortgage, and he advised them, they would have that effect ; and also the deposition of Mr. Merchant, to show that the appellant admitted, that the motive by which he was induced to make the loan, was to compensate Rousmaniere for the disappointment sustained by his not uniting with him in a voyage of one of his vessels ; and, accordingly, an agreement was made, by which the appellant was to let Rousmaniere have a sum of money, and that

he was to give a bill of sale of a certain vessel; but that afterwards he refused to take the same, on account of the inconvenience and difficulties which might attend the same; and that he had consulted with Mr. Hazard, upon the subject, who told him, that he could or would draw an irrevocable power of attorney to sell, which would do as well, or words to that effect; and which was accordingly done.

The circuit court pronounce a decree, declaring, that the appellant had no specific lien or security upon either of the vessels, and no equity to be relieved respecting them, and dismissing the bill, with costs; from which decree, an appeal was entered to this court.

On the part of the appellants, it was contended, that the decree ought to be reversed, and a decree entered for the appellant. That the answers to the bill did not respond to the only material facts in the cause; it being fully proved, that the powers of attorney were intended to have the effect of a specific lien, the appellant was entitled to the relief he sought, upon the principles laid down in the former decisions of this court.

The cause was argued by *Kimball* and *Webster*, for the appellant; and by *Wirt*, Attorney-General, and *Robbins*, for the appellees.

For the *appellant*:—The court, in concluding their opinion in the former case between these parties, as reported in 8 Wheat. 174, use this language, "We find no case which we think precisely in point, and are unwilling, where the effect of the instrument, the power of attorney, is acknowledged to have been entirely misunderstood by both parties, to say that a court of equity will not grant relief." In the opinion of the court, the plaintiff having been, in equity, entitled to the relief he prayed for, the principal question now is, one of fact.

*5] *It is insisted, that no essential averment in the bill is contradicted by the answer. The only real difference between them, relates to the possession of the vessels. It is not denied, that it was the express agreement and deliberate intention of the parties, that the plaintiffs should have a specific security; the defendants only say they are ignorant of this fact. The testimony of the plaintiff, then, is sufficient to entitle him to a decree, unless the defendants have introduced other facts, that are clearly inconsistent with it.

Admitting the origin of the loan to the intestate, to be such as the appellees say they have heard and believe it to be; this may be reconciled with the alleged intention of the parties, that one should give, and the other receive, a specific security. If the appellant did assign the reasons which the defendants say they have heard and believe, he assigned, for not taking a bill of sale, that circumstance does not contradict the testimony of the plaintiff's witness. A refusal to take a specific legal security, surely, does not necessarily exclude an agreement for a specific equitable security. The fact mentioned in the answer, may import simply a reference to a *legal* right, as those stated by the plaintiff's witness, manifestly do to an *equitable* right. There is, then, no contradiction apparent. As to the bill of sale, found among Rousmaniere's papers, it obviously discloses a design to commit a fraud.

None of the distinct averments contained in the answer, are in opposition to the allegations of the bill; and none of them, with the exception of the

bill of sale, are derived from the personal knowledge of the defendants. The general rule of equity, therefore, that declares the testimony of a single witness against a positive averment of the answer, to be insufficient for a decree in favor of the plaintiff, does not comprehend the present case. It does not apply, where the answer contains no direct denial, nor where the facts stated, are not, or cannot, be within the defendant's own knowledge. But if it did embrace this cause, the answer ought not to prevail against this bill. Where a single witness in support of the bill, is corroborated by circumstances, it is sufficient for a decree in favor of the plaintiff; and this is the fact in this case. *Clark's Ex'rs* v. *Van Riemsdyk*, 9 Cranch 160; *Cooth* v. *Jackson*, 6 Ves. 40; *Heffner* v. *Miller*, 2 Munf. 43; *Walton* v. *Hobbs*, 2 Atk. 19, case 17; *Hart* v. *Ten Eyck*, 2 Johns. Ch. 92.

The power of attorney was a part of plaintiff's security; and a letter of attorney, that is part of a security, is irrevocable. This was so declared, in the former case of *Hunt* v. **Rousmaniere*, also in *Walsh* v. *Whitcomb*, 2 Esp. 565. [*6 L

It has been ruled, that the answer containing the denial, may also contain in itself the circumstances, giving greater credit to a single witness, sufficient for a decree against the defendant. In a case cited by Chancellor KENT, in *Hart* v. *Ten Eyck*, 2 Johns. Ch. 92, the fact mentioned in the answer, that the plaintiff declined taking a bill of sale, from an unwillingness to have his name appear on the vessel's papers, &c., and took, upon advice of counsel, a letter of attorney, in preference, implies, of itself, that a specific security was meditated by the parties; and tends to show, that the plaintiff took the power of attorney, on the recommendation or assurance of his legal adviser, that it would constitute a security as effectual as a bill of sale; insuring the advantages, without producing the inconvenience of that conveyance. The circumstances of the appellant declining to take the bill of sale, for the reasons assigned, and that the powers of attorney were intended to give a specific lien, come in aid of the appellant's witness, and he has also an auxiliary in Merchant's evidence; and the circumstances altogether, establish the fact, that a specific security was designed and agreed upon. It is an elementary principle of equity, that where parties have, by contract, given a right, but have not provided a sufficient remedy, courts of equity will interfere.

Where the remedy is void in law, a court of equity has decreed not only against simple-contract, but against judgment creditors. *Burgh* v. *Francis*, cited in *Finch* v. *Earl of Winchelsea*, 1 P. Wms. 279, and *Taylor* v. *Wheeler*, 2 Vern. 564, ca. 513. But there are no judgment-creditors here, to be affected by a decree in favor of the plaintiff. Mr. Fonblanque, in the first volume of his Treatise upon Equity, suggests, in a note, page 38, whether, in the case of *Burgh* v. *Francis*, the second incumbrancer had not notice of the former incumbrance. But nothing can be collected from the case as reported, in favor of this suggestion; the presumption is entirely the other way. The plaintiff agreed and contracted for a lien on the vessels, and the other creditors of Rousmaniere trusted to his general credit, and are entitled only to what property belonged to him, subject to the lien, which a court of equity would have enforced against Rousmaniere himself.

It was the manifest intention of the parties to create a specific lien. But to accomplish their object, they unhappily adopted an instrument, the legal

effect of which, they misunderstood. It was a mutual mistake, and this
*7] court appear *already to have decided, that, notwithstanding this mistake in law, the plaintiff is entitled to relief. The case is one of an agreement between parties, which has not been performed, an agreement for a specific security for a loan of money; this has been proved by the testimony of one witness, corroborated by circumstances, and not denied in the answer. It is not, therefore, within the influence of the principle, which requires something beyond the testimony of one witness, to sustain the allegations of a bill which are denied in the answer. It is a case of mutual errors, as to the law, and not one where parties have run their risks of the law. It is an agreement to lend money, not on a note, but on the vessels; and if the court would enforce the lien against Rousmaniere, they should do it now, as the creditors are not third persons, but have no other right than he would have if alive.

For the *appellees*:—The whole of the proceedings, and the decisions of the court below, upon the case, will be found in 2 Mason 244, 8 Wheat. 174, and 3 Mason 294. It is now a question between creditors, and is, whether the court will attach a lien, when none existed? It is a case where a party having rejected a security, now avers, and asks the court to give him the security he refused. The allegations in the bill are denied by the answer, and they are proved by one witness only. This is insufficient, and such evidence is dangerous. *Poole* v. *Cabanes*, 8 T. R. 328.

Upon the question, whether the court will relieve against a mistake in law: In 2 Johns. Ch. 51, 60, this was expressly decided not to be within the power of a court of equity. Taking the fact to be as stated by him, the appellant is not entitled to relief. This court have decided, in this case, that the agreement made by the appellant with Rousmaniere, created no lien upon the vessels in question, though they intended it should, and thought it would create a lien; that Rousmaniere parted with no title; that the plaintiff acquired none in the vessels. The reason why this decision did not finally dispose of this case, was, that the court entertained a doubt, whether this intention to create a lien, which was not, in fact, created, did not constitute a ground of relief in the case. And this case stands now to be argued upon this doubt.

The question is, whether a court of equity can relieve against a mistake made by the parties, in making their contract, not in matter of fact, but in matter of law, and relieve, to the prejudice of a title vested by law in third parties? Whether equity can create a title where none does exist, and destroy a title where one does exist? This is beyond the province and
*8] *power of equity; beyond the legitimate power of a sovereign legislator, and can only be done by that despotic power, which is limited only by its own will. If the parties make their agreement, and make it exactly as they intended, and it creates no title, will the court make the title?

If it should be asked, why a court of equity should relieve against a mistake in matter of fact, and not in matter of law, the reason is obvious. When a mistake of fact is committed by the parties, in making their contract, the mistake is corrected, or supposed to be corrected, and the relief is given according to that corrected statement. Equity, then, does what the

law would have done, had there been no such mistake. The court keeps to its office of merely pronouncing the law upon the fact, as it was understood, and meant to be, between the parties. But when a mistake of the law is made by the parties, in making their contract, if relief is given, it is given, not upon the fact, as understood and meant by the parties, but upon the conception of the parties as to the legal effect of that fact. No mistake is corrected, or supposed to be corrected, that relief might be given according to law; but the mistake is to stand, and the law is to be bent and accommodated to it. Equity is to consider the law not to be what it is, but what the parties conceived it to be, and to decree relief accordingly. It is a principle of jurisprudence, that every one in his acts and contracts, is presumed to be conversant with the law; or, if ignorant, that he is to be made to abide the consequences. This principle is essential, if not to the existence, at least, to the well-being of society. *Lepard* v. *Vernon*, 2 Ves. & B. 51–3.

But suppose, that a mistake of the law was a general ground of relief, would it avail the plaintiff, in this case? Here is only equity on his side; but on the other, there is law and equal equity combined. And it is a settled principle, that a naked equity, is never to prevail against both law and equity. The appellant never having acquired any title to the vessels, by his agreement, nor by any proceedings under it, has only a naked equity. He parted with his money, trusting to his agreement, as constituting a security therefor, upon the vessels; this is his equity. The title of the vessels being Rousmaniere's, to his death, at his death, passed to his legal representatives, who the respondents are; the legal title, then, is in them. His estate being insolvent, is in them as trustees for his general creditors; and being greatly insolvent, they are sufferers as well as the appellant; trusting to his property for their indemnity. In their equity, he shares equally with them, and has received it; but by agreement to be without prejudice to this suit; *but from his equity they are excluded. The court will take notice, that, by the laws of Rhode Island, no priorities or preferences take [*9
place among creditors, in the distribution of intestate estates; whether solvent or insolvent.

A naked equity is never to prevail against equal equity and title combined. The respondents are the creditors, for they hold in trust for the creditors. If, then, it were to be admitted, that, if mistake of the law was a principle of relief, subject to this limitation, that it does not extend, and cannot be extended, to a stranger to the contract in which the mistake was committed; this case does not come within the principle; for it is excluded by this limitation.

Washington, Justice, delivered the opinion of the court.—This case was before this court in the year 1823, and is reported in 8 Wheat. 174, and was then argued at great length, by the counsel concerned in it. After full consideration, it was decided, that the power of attorney given by Rousmaniere, the intestate, to the appellant, Hunt, authorizing him to make and execute a bill of sale of three-fourths of the Nereus and of the Industry, to himself, or any other person, and in the event of their being lost, to collect the money which should become due under a policy upon them and their freight, was a

naked power, not coupled with an interest, which, though irrevocable by Rousmaniere, in his lifetime, expired on his death.

That this species of security was agreed upon, and given, under a misunderstanding, by the parties, of its legal character, was conceded, in the argument of the cause, by the bar and bench; and the second question, for the consideration of the court, was, whether a court of equity could afford relief in such a case, by directing a new security, of a different character, to be given? or by decreeing that to be done, which the parties supposed would have been effected by the instrument agreed upon? After an examination of the cases, applicable to the general question, it was stated by the chief justice, who delivered the opinion of the court, that none of them asserted the naked principle, that relief could be granted, on the ground of ignorance of law, or decided, that a plain and acknowledged mistake in law, was beyond the reach of a court of equity. The conclusion, to which he came, is expressed in the following terms: "We find no case, which we think precisely in point; and are unwilling, where the effect of the instrument is acknowledged to have been entirely misunderstood, by both parties, to say, that a court of equity is incapable of affording relief." *The decree
*10] was, accordingly, reversed; but the case being one in which creditors were concerned, the court, instead of giving a final decree on the demurrer, in favor of the plaintiff, directed the cause to be remanded, that the circuit court might permit the defendants to withdraw their demurrer, and to answer the bill.

After the cause was returned to that court, the demurrer was withdrawn, and an answer was filed, in which the defendants, after admitting the loans mentioned in the bills, by the plaintiff to their intestate, and the notes given for the same, by the latter, and their non-payment; assert their ignorance of any agreement between the plaintiff and their intestate, that the former should have a specific security, other than the powers of attorney, to sell vessels and to collect the proceeds, or, the amount of the policies, in case they should be lost; but express their belief, that the powers of attorney were selected by the plaintiff, in preference to the other securities, which were offered by the intestate. The answer further states, that the estate of Rousmaniere is greatly insolvent, and had been so before his death; that the plaintiff had exhibited and proved his demand, as stated in his bill, before the commissioners of insolvency, duly appointed upon the estate of Rousmaniere; and that his dividend thereon declared, or to be declared, the defendants were, and would be ready, to pay, according to law.

The principal deposition, taken in the cause, is that of Benjamin Hazard, counsellor at law, who deposes, that he drew the powers of attorney, annexed to the original bill; that on the day the first power was executed, Hunt and Rousmaniere came to his office, when the latter stated, that the former had loaned, or agreed to loan, to him, a sum of money, upon security to be given by him, on his interest in the brig Nereus, and that he was desirous the security should be as ample and available to Hunt, as it could be made; that he wished, and was ready, to give a bill of sale of the property, or a mortgage on it, or any other security, which Mr. Hunt might prefer. Both the parties declared, that they had called upon the witness, to request him to draw the writings, and to obtain his opinion, as to the kind of instrument which would give the most perfect security to the lender. That the deponent

then told the parties, that a bill of sale, or mortgage, would be good security, but that an irrevocable power of attorney, such as was afterwards executed, would be as effectual and good security, as either of the others; and would prevent the necessity of changing the vessel's papers, and of Hunt's taking possession of the vessel, upon her arrival from sea. That the parties then requested him to draw such an *instrument, as, in his opinion, would most effectually and fully secure Mr. Hunt; and that the plaintiff [*11 frequently asked him, whilst he was drawing the power, and after he had finished, and read it to the parties, if he was quiet certain, that the power would be as safe and available to him, as a bill of sale or mortgage, and that upon his assurances that it was, it was then executed. The witness then proceeds to express his opinion, from his knowledge of the parties, and from their declaration at the time, that Rousmaniere would readily have given an absolute bill of sale of the property, or any other security which could have been asked; and that Hunt would not have accepted the one which was afterwards executed, if he had not considered it to be as extensive and perfect a security, in all respects, as an absolute bill of sale; and he adds, more positively, that such was the understanding and agreement of both the parties. It appears, by the testimony of this witness, that he drew the power of attorney concerning the Industry, for securing the second loan made by the plaintiff to Rousmaniere, and that the circumstances attending that transaction, were essentially the same as those which have been stated, in respect to the first loan.

We find another deposition in the record, which deserves to be noticed, as it consists of declarations, made by the plaintiff, after the powers of attorney were executed, and may serve, in some measure, to explain the more positive testimony given by Mr. Hazard. This witness, William Merchant, deposes, that after the decease of Rousmaniere, the plaintiff stated to him, and to a Mr. Rhodes, that in consequence of his declining to engage in an enterprise in one of the vessels of Rousmaniere, to which he had at one time consented, and of the complaints of Rousmaniere, on that account, he was induced to offer to Rousmaniere a loan of money. That an agreement was accordingly made, by which he, Hunt, was to let Rousmaniere have a certain sum on loan, and Rousmaniere was to give him a bill of sale of a certain vessel; but that, afterwards, Hunt, reflecting, that if he took that security, he would have to take out papers at the custom-house, in his own name, be subject to give bonds for the vessel, and perhaps, be made liable for breaches of law committed by others, he consulted with Mr. Hazard upon the subject; who told him, that he could, or would, draw an irrevocable power of attorney to sell, which would do as well, and which was accordingly done.

The cause coming on to be heard in the court below, and that court being of opinion, that the plaintiff had no lien or specific security upon these vessels, and no equity to *have such lien or security created, against the general creditors of Rousmaniere, dismissed the bill; [*12 from which decree, the cause has been brought, by appeal, to this court. It must be admitted, that the case, as it is now presented to the court, is not materially variant from that which we formerly had to consider; except in relation to the rights of the general creditors, against the insolvent estate of a deceased debtor, in opposition to the equity which a particular creditor

seeks, by this bill, to set up. The allegations of the bills, filed in this cause, which were, on the former occasion, admitted by the demurrer to be true, are now fully proved, by the testimony taken in the cause.

Before proceeding to state the general question, to which the facts in this case give rise, or the principles of equity which apply to it, it will be necessary, distinctly, to ascertain, what was the real agreement concluded upon between the plaintiff and the intestate, the performance of which, on the part of the latter, was intended to be secured by the powers of attorney? Was it, that Rousmaniere should, in addition to his notes for the money agreed to be loaned to him by the plaintiff, give a specific and available security on the Nereus and the Industry, or was the particular kind of security selected by the parties, and did it constitute a part of the agreement? It is most obvious, from the plaintiff's own statement, in his amended bill, as well as from the depositions appearing in the record, that the agreement was not closed, until the interview between the parties to it, with Mr. Hazard, had taken place. The amended bill states, that the specific security which Rousmaniere offered to give, was a mortgage of the two vessels, for which irrevocable powers of attorney were substituted, by the advice of Mr Hazard, and for reasons, which it would seem, were approved of and acted upon by the plaintiff. From the testimony of Mr. Merchant, it would appear, that the security proposed by Rousmaniere was a bill of sale of the vessels, which the plaintiff declined accepting, for reasons of his own, uninfluenced by any suggestions of Mr. Hazard, who merely proposed the powers of attorney as a substitute for the other forms of security which had been offered by Rousmaniere. The difference between these statements is not very material, since it is apparent, from both of them, that the proposed security, by irrevocable powers of attorney, was selected by the plaintiff, and incorporated into the agreement, by the assent of both the parties. The powers of attorney do not contain, nor do they profess to contain, the agreement of the parties; but was a mere execution of that agreement, so far as it stipulated to give to the plaintiff, a specific security on the two vessels, in the mode selected and approved of by the parties; to *which extent, it was a complete consummation of the agreement. Such was the opinion of this court, upon a former discussion of this cause, in the year 1823, and such is its present opinion. Upon this state of the case, the general question to be decided, is the same now that it formerly was, and is that which has already been stated.

*13]

There are certain principles of equity, applicable to this question, which, as general principles, we hold to be incontrovertible. The first is, that where an instrument is drawn and executed, which professes, or is intended, to carry into execution an agreement, whether in writing or by parol, previously entered into, but which, by mistake of the draftsman, either as to fact or law, does not fulfil, or which violates, the manifest intention of the parties to the agreement, equity will correct the mistake, so as to produce a conformity of the instrument to the agreement. The reason is obvious: the execution of agreements, fairly and legally entered into, is one of the peculiar branches of equity jurisdiction; and if the instrument which is intended to execute the agreement, be, from any cause, insufficient for that purpose, the agreement remains as much unexecuted, as if one of the parties had refused, altogether, to comply with his engagement; and a court of equity

will, in the exercise of its acknowledge jurisdiction, afford relief in the one case, as well as in the other, by compelling the delinquent pary fully to perform his agreement, according to the terms of it, and to the manifest intention of the parties. So, if the mistake exist, not in the instrument, which is intended to give effect to the agreement, but in the agreement itself, and is clearly proved to have been the result of ignorance of some material fact, a court of equity will, in general, grant relief, according to the nature of the particular case in which it is sought. Whether these principles, or either of them, apply to the present case, must, of course, depend upon the real character of the agreement under consideration. If it has been correctly stated, it follows, that the instrument, by means of which the specific security was to be given, was selected by the parties to the agreement, or rather by the plaintiff; Rousmaniere having proposed to give a mortage or bill of sale of the vessels, which the plaintiff, after consideration, and advice of counsel, thought proper to reject, for reasons which were entirely satisfactory to himself. That the form of the instrument, so chosen by the plaintiff, and prepared by the person who drew it, conforms not, in every respect, to the one agreed upon, is not even asserted in the bill, or in the argument of counsel. The avowed object of the plaintiff was, to obtain a valid security, but in such a manner, as that the legal interest in the property should remain with *Rousmaniere, so that the plaintiff might be under no necessity [*14
to take out papers at the custom-house, in his own name, and might not be subject to give bonds for the vessels, or to liabilities for breaches of law, committed by those who were intrusted with the management of them. That the general intention of the parties was, to provide a security, as effectual as a mortgage of the vessels would be, can admit of no doubt; and if such had been their agreement, the insufficiency of the instruments to effect that object, which were afterwards prepared, would have furnished a ground for the interposition of a court of equity, which the representatives of Rousmaniere could not easily have resisted. But the plantiff was not satisfied to leave the kind of security which he was willing to receive, undetermined; having finally made up his mind, by the advice of his counsel, not to accept of a mortgage, or bill of sale, in nature of a mortgage. He thought it safest, therefore, to designate the instrument; and having deliberately done so, it met the view of both parties, and was as completely incorporated into their agreement, as were the notes of hand for the sum intended to be secured. In coming to this determination, it is not pretended, that the plaintiff was misled by ignorance of any fact, connected with the agreement which he was about to conclude. If, then, the agreement was not founded in a mistake of any material fact, and if it was executed in strict conformity with itself; we think it would be unprecedented, for a court of equity to decree another security to be given, not only different from that which had been agreed upon, but one which had been deliberately considered and rejected by the party now asking for relief; or to treat the case, as if such other security had in fact been agreed upon and executed. Had Rousmaniere, after receiving the money agreed to be loaned to him, refused to give an irrevocable power of attorney, but offered to execute a mortgage of the vessels, no court of equity could have compelled the plaintiff to accept the security so offered. Or, if he had totally refused to execute the agreement, and the plaintiff had filed his bill, praying that the defendant might be compelled to execute a

mortgage, instead of an irrevocable power of attorney ; could that court have granted the relief specifically asked for? We think not. Equity may compel parties to perform their agreements, when fairly entered into, according to their terms ; but it has no power to make agreements for parties, and then compel them to execute the same. The former is a legitimate branch of its jurisdiction, and in its exercise, is highly beneficial to society ; the latter is without its authority, and the exercise of it would be not only an usurpation of power, but would be highly mischievous in its consequences.

*15] *If the court could not have compelled the plaintiff to accept, or Rousmaniere to execute, any other instrument than the one which had been agreed upon between them, the case is in no respect altered, by the death of the latter, and the consequent inefficiency of the particular security which had been selected ; the objection to the relief asked for, being in both cases the same, namely, that the court can only enforce the performance of an agreement, according to its terms, and to the intention of the parties ; and cannot force upon them a different agreement. That the intention of the parties to this agreement, was frustrated, by the happening of an event, not thought of, probably, by them, or by the counsel who was consulted upon the occasion, is manifest. The kind of security which was chosen, would have been equally effectual, for the purpose intended, with a mortgage, had Rousmaniere lived until the power had been executed; and it may, therefore, admit of some doubt, at least, whether the loss of the intended security is to be attributed to a want of foresight, in the parties, or to a mistake of the counsel, in respect to a matter of law. The case will, however, be considered in the latter point of view.

The question, then, is, ought the court to grant the relief which is asked for, upon the ground of mistake arising from any ignorance of law? We hold the general rule to be, that a mistake of this character is not a ground for reforming a deed founded on such mistake ; and whatever exceptions there may be to this rule, they are not only few in number, but they will be found to have something peculiar in their characters.

The strongest case which was cited and relied upon by the appellant's counsel, was that of *Lansdowne* v. *Lansdowne*, reported in Moseley. Admitting, for the present, the authority of this case, it is most apparent, from the face of it, that the decision of the court might well be supported, upon a principle not involved in the question we are examining. The subject which the court had to decide, arose out of a dispute between an heir-at-law, and a younger member of the family, who was entitled to an estate descended ; and this question the parties agreed to submit to arbitration. The award being against the heir-at-law, he executed a deed in compliance with it, but was relieved against it, on the principle, that he was ignorant of his title. If the decision of the court proceeded upon the ground, that the plaintiff was ignorant of the fact that he was the eldest son, it was clearly a case proper for relief, upon a principle which has already been considered. If the mistake was of his legal rights, as heir-at-law, it is not going too far, to presume,

*16] that the opinion of the court *may have been founded upon the belief, that the heir-at-law was imposed upon by some unfair representations of his better-informed opponent ; or that his ignorance of a legal principle, so universally understood by all, where the right of primogeniture forms a part of the law of descents, demonstrated a degree of mental imbecility, which might well entitle him to relief. He acted, besides, under the pres-

sure of an award, which was manifestly repugnant to law, and for aught that is stated in this case, this may have appeared upon the face of it. But if this case must be considered as an exception from the general rule which has been mentioned; the circumstances attending it, do not entitle it, were it otherwise objectionable, to be respected as an authority, but in cases which it closely resembles.

There is a class of cases which, it has been supposed, forms an exception from this general rule, but which will be found, upon examination, to come within the one which was first stated. The cases alluded to, are those in which equity has afforded relief against the representatives of a deceased obligor, in a joint bond, given for money lent to both the obligors, although such rep-representatives were discharged at law. The principle upon which these cases manifestly proceed, is, that the money being lent to both, the law raises a promise in both to pay, and equity considers the security of the bond as being intended, by the parties, to be co-extensive with this implied contract by both to pay the debt. To effect this intention, the bond should have been made joint and several; and the mistake in the form, by which it is made joint, is not in the agreement of the parties, but in the execution of it by the draftsman. The cases in which the general rule has been adhered to, are, many of them, of a character which strongly test the principle upon which the rule itself is founded. Two or three only need be referred to. If the obligee, in a joint bond, by two or more, agree with one of the obligors, to relieve him from his obligation, and does accordingly execute a release, by which all the obligors are discharged at law, equity will not afford relief against this legal consequence, although the release was given under a manifest misapprehension of the legal effect of it, in relation to the other obligors. So, in the case of *Worrall* v. *Jacob*, 3 Meriv. 271, where a person having a power of appointment and revocation, and, under a mistaken supposition, that a deed might be altered or revoked, although no power of revocation had been reserved, executed the power of appointment, without reserving a power of revocation; the court refused to relieve against the mistake. The case of *Lord Irnham* v. *Child*, 1 Bro. C. C. 92, is a very strong one in support of the general rule, and closely *resembles the present, in most of the material circumstances attending it. The object of the suit was to set up a clause containing a [*17
power of redemption, in a deed granting an annuity, which, it was said, had been agreed upon by the parties, but which, after deliberation, was excluded by consent, from a mistaken opinion, that it would render the contract usurious. The court, notwithstanding the omission manifestly proceeded upon a misapprehension of the parties as to the law, refused to relieve, by establishing the rejected clause.

It is not the intention of the court, in the case now under consideration, to lay it down, that there may not be case in which a court of equity will relieve against a plain mistake, arising from ignorance of law. But we mean to say, that where the parties, upon deliberation and advice, reject one species of security, and agree to select another, under a misapprehension of the law as to the nature of the security so selected, a court of equity will not, on the ground of such misapprehension, and the insufficiency of such security, in consequence of a subsequent event, not foreseen, perhaps, or thought of, direct a new security, of a different character, to be given, or

decree that to be done, which the parties supposed would have been effected by the instrument which was finally agreed upon.

If the court would not interfere in such a case, generally, much less would it do so in favor of one creditor, against the general creditors of an insolvent estate, whose equity is, at least, equal to that of the party seeking to obtain a preference, and who, in point of law, stand upon the same ground with himself. This is not a bill asking for a specific performance of an agreement to execute a valid deed for securing a debt; in which case, the party asking relief, would be entitled to a specific lien; and the court would consider the debtor as a trustee for the creditor, of the property on which the security was agreed to be given. The agreement has been fully executed, and the only complaint is, that the agreement itself was founded upon a misapprehension of the law, and the prayer is to be relieved against the consequences of such mistake. If all other difficulties were out of the way, the equity of the general creditors to be paid their debts equally with the plaintiff, would, we think, be sufficient to induce the court to leave the parties where the law has placed them. The decree is to be affirmed, with costs.

Decree affirmed.

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*18] *Daniel Carroll, of Dudington, Plaintiff in error, *v.* Joshua Peake, Defendant in error.

Evidence.—Pleading.

When a party to an agreement, signed by the other contracting party, had delivered to such party a copy of the agreement, in his own handwriting, but not signed by him, and from the nature of the instrument, it was fairly to be presumed, the original was in his custody, notice to produce the original paper, in order to give the copy in evidence, is not necessary:[1] such a copy, when offered to charge the party by whom the same was made, and who, by the tenor of the agreement, was to perform certain acts therein stated, may be considered, not as a copy, but as an original, in relation to the obligations of the party giving the copy, and be so given in evidence. p. 22.

Where letters, a part of the evidence in the court below, have become lost or mislaid, everything is to be presumed to have been contained in them, to support the opinion of the court, in relation to their contents; and the party who denies that the letters authorized the decision of the court upon them, must show, by evidence, their contents. p. 22.

Surplusage in pleading, does not, in any case, vitiate, after verdict. p. 23.

In a declaration, upon an agreement by way of lease, by which the lessor stipulated to let a farm, from the 1st of January 1820, to remove the former tenant, and that the lessee should have the tenancy and occupation of the farm from that day, free from all hindrance; the assignment of breaches was, that, although specially requested, on the said 1st of January, the defendant refused, and neglected, to turn out the former tenant, who then was, or had been, in the possession and occupancy of the land, and to deliver possession thereof to the plaintiff: this assignment is sufficient. p. 23.

It is sufficient, that the averment should state the plaintiff's readiness and offer, and his request, on the first day of January, generally, and not at the last convenient hour of that day; and if an avertment of a personal demand is made, it need not have been on the land. p. 24.

The strict doctrines relative to averments in pleading, have been applied to special pleas in bar, of tender, and some others, of a peculiar character and depending upon their own particular reasons. p. 24.

Declarations containing general averments of readiness and request, have been held sufficient, especially after verdict, unless in very peculiar cases. p. 24.

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[1] Where the form of action, or the pleadings, give the party notice to be prepared to produce a writing if necessary, no other notice to produce is requisite. Harden *v.* Kretzinger, 17 Johns. 293; Story *v.* Patten, 3 Wend. 486; Hammond *v.* Hopping, 13 Id. 505; Hotchkiss *v.* Mosher, 48 N. Y. 478.

Carroll v. Peake.

Error to the Circuit Court for the District of Columbia. In the court below, the defendant in error instituted a suit against the plaintiff in error, to recover damages arising out of alleged breaches of an agreement, in the nature of a lease, dated 18th of December 1819. The declaration stated the agreement; and the damages claimed were as an indemnity for expenses incurred by the plaintiff, under the agreement, for losses of profits, and for not turning out the tenant who was in possession of the property, when the agreement was made.

To support the issue on his part, the plaintiff offered to read in evidence to the jury, the following copy of a paper (the original of *which was signed by Joshua Peake), and which was admitted to be wholly in the handwriting of the plaintiff in error: [*19

"I agree to rent of Daniel Carroll, of Dudington, the land rented heretofore to Wilfred Neale, the same being in St. Mary's county, for which I oblige myself to pay, on the first day of January 1821, for one year, from the 1st of January 1820, six hundred dollars ($600), and to pay all taxes on the same, independent of the above rent; and also I oblige myself to keep the premises in good repair, and not to commit, nor suffer to be committed, any waste on the said premises. Witness my hand, this 18th day of December 1819.

"It is agreed, that the taxes shall be paid by Joshua Peake, and the said Carroll will allow the same on the tax-bill, receipted, out of the rent.

(Signed) Joshua Peake."

"Witness—William Dudley Digges."

To the admission of this paper, by the court, the counsel for the plaintiff objected, but the court allowed it to be read by the jury, upon which, they tendered a bill of exceptions; and by writ of error, the cause was brought before this court; and was argued by *Key* and *Coxe*, for the plaintiff in error; and by *Jones*, for the defendant.

For the *plaintiff* in error, it was said: 1. That the declaration sets forth the agreement of lease, that the possession of the property was to be given, the expenses to which the lessee was exposed; and that the plaintiff in error did not perform any of the acts necessary to turn out the tenant, who was in possession of the land when the lease was to commence. The declaration should have averred a readiness on the part of the lessee to comply with his contract, as to time and place. *Savary* v. *Goe*, 3 W. C. C. 140. The proper day to deliver possession, was the day on which the lease was to commence; and the declaration should have averred, that the lessee was at the place in person, or by attorney, at that time, to receive it. Instead of this, the breach is laid, if anywhere, in the county of Washington, and the property described in the lease, is in the county of St. Mary's; nor is it averred, that, by the lease, the plaintiff in error was bound to turn out the person in possession, although damages are claimed for not doing this.

2. The party who gives a lease, is not bound to turn the prior tenant out of possession. The lessor has, by the lease, parted with the control of the property; and the lessee should proceed, under the law of Maryland, to obtain the possession; but if it was the duty of the lessor to obtain the possession *for the lessee, the lessee should have required this of him; and his non-compliance with the demand should have been averred. [*20

3. The paper admitted in evidence, was a copy ; and the copy of a deed is not evidence, unless the original be destroyed or lost. It is not said, the paper was a true copy ; and the original, if in possession of Peake, might have been produced; or, if in the possession of the plaintiff in error, might have been called for.

Jones, for the defendant in error, contended : 1. That, by the operation of the statute of *jeofails*, the verdict of the jury had cured all the defects of the declaration, if any existed ; and that the declaration contained every necessary statement and averment for the plaintiff's case. When the condition in an agreement is precedent, special performance must be set out and averred ; and when a tender is pleaded, it is necessary to set forth minutely, everything of time and place. In this case, it was not required to declare specially.

2. The act of assembly of Maryland gives to the landlord only, and not to the lessee, a right to proceed for possession, against persons "holding over."

3. The "copy" of the paper, which copy was wholly in the handwriting of the plaintiff in error, and who must have kept the original paper, was primary, and not secondary evidence, *quoad* the matters in controversy. It was evidence against the lessor, and was in the nature of a counterpart of the agreement ; and necessary to charge the lessor, who had not signed the lease, and who, it must be presumed, retained the possession of it.

Trimble, Justice, delivered the opinion of the court.—This is a writ of error to a judgment of the circuit court for the district of Columbia, held in the county of Washington.

Joshua Peake brought this action on the case, in that court, upon a special agreement, against Daniel Carroll, who pleaded the general issue ; and upon the trial, a verdict and judgment were rendered for the plaintiff therein. A bill of exceptions was taken by the defendant, in the court below ; which states, that the plaintiff, to support the issue on his part, offered to read in evidence to the jury, the following *copy* of a paper (the execution of the original of which was admitted), signed by Joshua Peake, which copy is admitted to be wholly in the handwriting of the defendant, to wit :

"I agree to rent of Daniel Carroll, of Dudington, the land rented heretofore to Wilfred Neale, the same being in St. Mary's county ; for which I oblige myself to pay, on the 1st day of January 1821, for one year, from
*21] the 1st day of January 1820, six *hundred dollars ($600), and to pay all taxes on the same, independent of the above rent ; and also oblige myself to keep the premises in good repair, and not to commit, nor suffer to be committed, any waste on the said premises. Witness my hand, this 11th day of December 1819.

"It is agreed, that the taxes shall be paid by Joshua Peake, and the said Carroll will allow the same, on the tax-bill, receipted, out of the rent.

Joshua Peake."

"Witness—William Dudley Digges."

Which paper was so offered in evidence, in connection with three letters from defendant to the plaintiff, as a component part of the sum of evi-

dence relied on, to prove the contract as laid in the declaration; which letters are in these words and figures, following, &c. [The letters were mislaid.]

To the reading of which paper, the defendant, by his counsel, objected, as not being competent and legal evidence, to charge the defendant in this case; but the court permitted the said paper to be read in evidence to the jury, &c., to which opinion of the court, the defendant, by his counsel, excepted, &c. The plaintiff, then, further to support the issue on his part offered in evidence to the jury, the said letters, from defendant to plaintiff, and admitted to be in the handwriting of the defendant; as component parts, in connection with the said paper before admitted, of the evidence of the agreement on which this action is founded; to the admission of said letters, as part of said agreement, the defendant, by his counsel, objected; but the court overruled said objection, and permitted said letters to be read to the jury, as part of said agreement; to which opinion of the court, the defendant, by his counsel, excepted. It is insisted by the counsel for the plaintiff in error, that these opinions are erroneous; and that the judgment of the circuit court should, for that cause, be reversed.

The bill of exceptions does not put the objection to the paper offered in evidence, distinctly upon the ground, that being a copy, it could not be used, without timely notice to produce the original. Although some doubt exists, whether the objection ought not to have been placed on that ground, in the court below, in order to make it available here; yet, as the whole argument in this court, has proceeded upon the assumption, that the question is sufficiently raised upon the bill of exceptions, we will so consider it. The principle relied upon is, that a copy cannot be given in evidence, if the original be in the possession of the adverse party; unless timely *previous notice has been given him, to produce it at the trial. This is certainly true, as a general rule. But in examining the numerous adjudged cases to be found in the books. in which this general rule has been asserted and applied, we have been able to find no case like this. They are all cases where the copy offered, had not been made by the party, against whom it was attempted to be used. This is a case in which the execution of the original is distinctly admitted; and the paper called a copy, is admitted to be wholly in the defendant's handwriting. From the nature of the transaction, he was entitled to, and must be presumed to have, the custody of the original. The copy, made out by himself, must be presumed to have come to the plaintiff's possession, by the defendant's own act; and, by making and delivering it to the plaintiff, the defendant consents that it shall be considered genuine and true. We think, that, under such circumstances, this case forms a just exception to the general rule; and that it is not competent for the defendant below, to allege, against his own acts and admissions, that this paper does not, nor may not, contain all the verity and certainty of the original. [*22

So far, we have considered this paper as if it ought to be regarded in the light of a copy. But we think, that is not its true character, as it was presented to the court and jury. We think, that, under the circumstances, and to the purposes for which it was offered, it may fairly be regarded as an original. As relates to Peake's contract to pay rent, &c., it was a copy; but was it a copy, as respects Carroll's agreement to let the farm? If so,

it was a copy, without an original—for the original paper was not signed by Carroll, and contained no contract on his part.

The paper was offered in evidence, in connection with the three letters from the defendant to the plaintiff, as a component part of the evidence, to prove the defendant's agreement to let the farm to the plaintiff, and the terms of that agreement. The clerk certifies, that the letters referred to, are not on file in the cause, and they are not transcribed into the record. In their absence, if there be a supposable case, in which they, and the paper called a copy, were legitimate evidence, regarding that paper, as an original, and not as a mere copy, it must be so regarded. We are bound to presume everything in favor of the correctness of the decision of the court below, until the contrary appears. If the letters, which are admitted to be in the defendant's handwriting, were relevant to the matter in controversy (and in their absence, that must be presumed), no doubt can exist, of their being competent and legitimate evidence, to prove the contract sued on, so far as they spoke on that subject. It has been already remarked, that the
*23] paper called a copy, was *admitted to be in the defendant's handwriting, and that it must have come to the plaintiff's hands, by the defendant's act. Let it be supposed, then, that having copied, in his own hand, Peake's agreement to pay rent, &c., he had inclosed that paper in one of those letters, and referring to it, the letter had stated, that he (Carroll) agreed to let and lease the farm to Peake, upon terms expressed in the inclosed paper. It is plain, that, in the case supposed, the inclosed paper, although it might be a mere copy, as respected Peake's part of the contract, yet, as respected the contract on Carroll's part, would be truly an original document, by adoption and incorporation with the letter, as much as the letter itself; it would be a part of the letter. We do not say, the paper was thus inclosed, and referred to, in the letters, or either of them; but it might have been, for ought that appears; and that is enough. Upon the principle assumed as correct, that the opinion of the court below must be regarded as sound, until its incorrectness is made to appear, the plaintiff in error cannot prevail; unless he can show, in the absence of the letters, that no case could have existed, they being present, in which the paper objected to, could be considered in the light of an original document. The case first shows, that such a case might have existed, and have been proved, upon the trial. It is, by no means, a strange supposition, to presume that such was the aspect of the case; for it is perfectly consistent with a known and familiar manner of transacting business, where the parties reside, at a distance, or where, for other causes, the mode of contracting by correspondence, is resorted to.

It is objected, that the declaration shows no cause of action; and it is insisted, the judgment shall be reversed, for that cause. The declaration is very loosely drawn, and a great deal of matter is crowded into it, which is impertinent, or, at most, only in aggravation of damages. But surplusage in pleadings, does not vitiate, in any case, after verdict; and wholly disregarding the impertinent and irrelevant matter, the declaration contains enough to support the action. The declaration, in substance, alleges, that the defendant below agreed to rent, and to farm let, to the plaintiff, the farm, for one year from the 1st of January 1820, and agreed to remove the former tenant, and that the plaintiff should have the possession and occu-

pancy of the farm, from the 1st of January aforesaid, free from the let, hindrance or disturbance of any one. The declaration then proceeds to aver, that on the said first of January 1820, at the county aforesaid, the plaintiff was ready and willing, and offered to the said Daniel (the defendant) to take possession of the said land and farm, and to rent and occupy the same, &c., and afterwards assigns breaches (*inter alia*) in this, that *although specially requested so to do, on the said 1st day of January 1820, [*24 the defendant refused and neglected to turn out the tenant, who then was, and had been, in the possession and occupancy of the said land and farm, and to deliver the possession thereof to the said Joshua.

The specific objections, urged in argument, are, that the plaintiff should have averred his readiness and offer, and his request; not on the 1st day of January, generally, but at the last convenient hour of that day; and that instead of charging a personal demand, it ought to have been averred to have been made on the land. It must occur to every one, that an offer and request upon the land, in the absence of the defendant, would be a very idle and useless ceremony, and that an offer and request to him, personally, was much better calculated to enable him to perform his duty, and fulfil his agreement. We cannot admit that it was necessary the offer and request should be made, at the last convenient hour of the day. The strict doctrines contended for, have been applied to special pleas in bar, of tender, and some others of a peculiar character, and depending upon their own particular reasons; but there is no analogy between them and this case. In declarations, general averments of readiness and request, on the day, have always been held sufficient, especially, after verdict.

We are of opinion, there is no error in the judgment and proceedings the circuit court, and the same is affirmed, with damages and costs.

Judgment affirmed.

*The President and Directors of the Bank of Washington, Plaintiffs in error, *v.* Philip Triplett and Christopher Neale, trading under the firm of Triplett & Neale, Defendants in error.

Banks.—Bills of exchange.

The deposit of a bill in one bank, to be transmitted to another for collection, is a common usage, of great public convenience, the effect of which is well understood; and the duty of a bank receiving such a bill for collection, is precisely the same, whoever may be the owner thereof; and if it were unwilling to undertake the collection, without precise information on the subject, the duty ought to have been declined. p. 30.

If, in any case, in which testimony was offered by the plaintiff, the court ought to instruct the jury, that he had no right to recover, such instruction certainly ought not to be granted, if any possible construction of the testimony would support the action. p. 31.

By failing to demand payment of a bill, held for collection, the bank makes the bill its own, and becomes liable to its real owner for the amount.[1] p. 31.

The allowance of days of grace for the payment of a bill of exchange or note, is now universally understood to enter into every bill or note of a mercantile character; and so to form a part of the contract, that the bill does not become due until the last day of grace. p. 31.

It is the usage of the Bank of Washington, and of other banks in the district of Columbia, to demand payment of a bill, on the day after the last day of grace; and this usage has been sanctioned by the decisions of this court. This usage is equally binding on parties who were not acquainted with its existence, but who have resorted to the bank governed by such usage, to make the bill negotiable. p. 32.

The usage of the place on which a bill is drawn, or where payment is demanded, uniformly regulates the number of days of grace which must be allowed. p. 34.

The failure of a bank, holding a bill, payable after date, for collection, to give notice to the drawer, that the drawee was not found at home, when called upon to accept the bill, is not such negligence as discharges the drawer from his liability. p. 35.

A bill of exchange, payable after date, need not be presented for acceptance, before the day of payment; but, if presented, and acceptance be refused, it is dishonored, and notice must be given. The absence from his home, of the drawee of a bill, payable after date, when the holder of a bill, or his agent, calls with it for acceptance, is not a refusal to accept; but such absence, when the bill is due, is a refusal to pay, and authorizes a protest. p. 35.

In a suit instituted by the holder of a bill, against the bank, for negligence in relation to demand, or notice of non-payment of the bill, the court, although required, is not bound to declare the law as between the holder and the drawer. The bank was the agent of the holder, and not of the drawer, and might, consequently, so act, as to discharge the drawer, without becoming liable to its principal. p. 36.

Error to the Circuit Court for the District of Columbia. Triplett & Neale, the appellees, instituted a suit in the court below, against the
*26] *President and Directors of the Bank of Washington, the appellants; for mal-agency in relation to an inland bill of exchange, dated Alexandria, 19th June 1817, drawn by W. H. Briscoe, for $625.34, at four months after date, in favor of Triplett & Neale, upon Peter A. Carnes, Esq., "Washington City."

About the 19th of July 1817, the plaintiffs, being the holders and the proprietors of the bill, placed it in the hands of the cashier of the Mechanics' Bank of Alexandria, for the purpose of its being transmitted to a bank in Washington for collection, they indorsing it in blank for the purpose. The

[1] A bank in which a note is deposited for collection is bound to give notice of non-payment to all the indorsers; and if, through its neglect, one of them be discharged, it is responsible to the *owner* of the note. Smedes *v.* Bank of Utica, 20 Johns. 372; s. c. 3 Cow. 662; McKinster *v.* Bank of Utica, 9 Wend. 46; s. c. 11 Id. 473; Ayrault *v.* Pacific Bank, 47 N. Y. 570. And see Bank of Delaware County *v.* Broomhall, 38 Penn. St. 135.

bill, after being indorsed by the cashier of the bank, to the order of "S. Elliott, jr., Esq.," was sent by mail to the Bank of Washington, of which Mr. Elliott was then cashier, together with other bills and notes, without any statement of interest or ownership in the same by Triplett & Neale. On the 19th of October 1817, the cashier of the Mechanics' Bank of Alexandria, informed the cashier of the Bank of Washington, that "the holder of the draft desired, that if the draft should not be paid, a notary should send a notice to P. A. Carnes, Baltimore, and to Mr. W. H. Briscoe, at Leesburg, provided the bill should not be paid in Washington." On the 24th October 1817, the draft was returned to the Mechanics' Bank of Alexandria, it having been protested for non-payment, on the 23d of October; the drawer and indorser having been regularly notified of the non-payment, by the notary. When the bill was received in Washington, on the 21st July 1817, the drawee was not to be found; one of the officers of the bank having sought him, in order to present the bill to him, and who was informed that he was Baltimore. This inquiry was repeated, three or four days afterwards, with the same results, of which the cashier was informed. No notice of the non-acceptance of the bill was given by the Bank of Washington to the drawer or to the indorser. Evidence was given, by the defendants below, of the custom in the banks of the city of Washington, and particularly of the defendants, as to the mode of treating bills, when the drawee could not be found, and as to the practice of protesting or not protesting such bills for non-acceptance. Evidence was also offered, as to the incompetency of Carnes and Briscoe to discharge the bill, at the time of its non-payment; and that since the said period, Briscoe had inherited an estate.

The appellants, on the trial of the cause, requested the court to instruct the jury:—1st. That on the evidence, if believed by the jury, the plaintiffs could not recover. 2d. That the plaintiffs are not entitled to recover, for any loss of recourse against Briscoe, the drawer of the bill. *3d. That the failure of the defendants, after having called at the resi- [*27 dence of the drawee of said bill, to obtain his acceptance thereof, as stated in the evidence of Reilly, and not finding him or any other person there, to accept the said bill, to notify the drawer of that circumstance, was not such a negligence as discharged the said drawer from his liability on said bill; and entitles the plaintiffs to recover. 4th. That if they believe, from the evidence, that the defendants conformed to their former usage in regard to such bills as the one in question, in calling on the drawee for acceptance, the said drawee being from home, and not noting the same as dishonored, and giving notice thereof to the parties on the said bill; then, their failure to treat the said bill as dishonored, and to give notice accordingly, of its non-acceptance, did not discharge the drawer thereof from his liability to the plaintiffs. All of which instructions were refused by the court, and a verdict was given against the Bank of Washington, for the whole amount of the claim. The defendants below took a bill of exceptions, to the opinion of the court, upon the propositions stated; and thereupon, prosecuted this writ of error.

Key, for the plaintiffs in error.—1. There was no privity between the plaintiffs below and the Bank of Washington; the bill was sent to the Bank of Washington, by the Mechanics' Bank of Alexandria, and it was not known

that Triplett & Neale were in any manner interested in it. Before a contract can be presumed to have been made with them, to collect the bill, their interest should have been communicated. 2 Caines 341. The plaintiff in error should have had the opportunity to accept or reject the agency, as the collection of the draft was only an act of courtesy. The law is with the plaintiffs in error on this point. 6 Taunt. 147; 1 Ves. jr. 291; 2 Johns. 204. In the last case, a notary-public gave notice of the non-payment of a note to one indorser, and failed to notify a prior indorser; the last indorser having paid the note, it was decided, that a suit could not lie against the notary-public for *laches*, he being liable only to the holder of the note.

2d. Negligence, and loss in consequence of it, must be shown. The bill was payable four months after date, and it is not necessary to present such a bill for acceptance. Chitty on Bills 205 (Phila. ed. 1821). As to responsibility, where prejudice has not arisen; Beawes Lex Merc. 544, 491, was cited; as to the mode of presentation of such a bill, Stark. Evid. part 4, 456.

3d. If the Bank of Washington was bound to present the bill, the negli-
*28] gence of the plaintiffs in error to do this, should *have been stated specially in the declaration; and the loss thereby specially averred; 2 Esp. 16; 2 Wils. 325.

4th. The conduct of the bank was according to their established custom, and to the practices in other banks, and if they acted *bonâ fide*, they should not be charged with the amount of the bill. The usage is, to protest the bill on the fourth day after the nominal day of payment, and the day after the three days of grace. The rule and practice as to non-accepted bills, is the same in this particular, with those which have been accepted.

Jones, for defendants in error.—The claim of the defendants in error, is founded upon the gross negligence of the bank; and this is fully made out by the testimony.

1. As to the absence of privity between the parties of this suit. The custom to collect notes for individuals, which prevailed among all banks, and the fact that no other interest existed in the bill, but that of Triplett & Neale, are sufficient to establish privity between the parties to the action. A suit upon a contract made by an agent, may be brought in the name of the principal; although his interest in the contract does not appear on its face.

2. Negligence is charged in the declaration throughout; and by the usages of the bank, particularly of the present Bank of the United States, if the drawee be absent, when the bill is received, and does not call at the bank and accept, after notice left at his residence, the bill is protested, and notice given. In this case, the bill should have been protested on the day it became due, without waiting the days of grace, which are only allowed, when the bill has been accepted. Mr. *Jones* cited the case of *Mc Gruder* v. *Bank of Washington*, 9 Wheat. 598.

Marshall, Ch. J., delivered the opinion of the court.—This is a writ of error, to a judgment of the United States circuit court of the district of Columbia, for the county of Alexandria.

On the 19th of June 1817, William H. Briscoe, of Alexandria, drew a bill on Peter A. Carnes, of Washington, payable four months after date, to the order of Triplett & Neale. The payees of the bill indorsed it in blank,

and delivered it to the cashier of the Mechanics' Bank of Alexandria, for the purpose of being transmitted, through the said bank, to a bank in Washington, for collection. The cashier of the Mechanics' Bank of Alexandria indorsed the bill to the order of the cashier of the Bank of Washington, and transmitted it to him for collection, in a *letter of the 19th of July 1817. Neither of the banks had any interest in the bill. The [*29 bill was protested for non-payment; and this suit was brought by Triplett & Neale, against the Bank of Washington, to recover its amount. The declaration charges, that the bank did not use reasonable diligence to collect the money mentioned in the said bill, nor take the necessary measures to charge the drawer; but neglected to present the bill, either for acceptance or payment, and to have the same protested; whereby the plaintiffs have lost their recourse against the drawer.

It was proved, on the part of the bank, that either on the day the bill was received, or the succeeding day, one of its officers called with the bill, at the house of the said Peter A. Carnes, for the purpose of presenting it for acceptance, and was told, that he was in Baltimore. He called again, three or four days afterwards, for the same purpose; and was again told, that he was in Baltimore. These answers were reported to the cashier. On the 9th of October 1817, the cashier of the Mechanics' Bank of Alexandria, addressed the following letter to the cashier of the Bank of Washington:

"Dear Sir.—The holder of the draft on Peter A. Carnes, for $625.34, desires me to inform you, that if the draft is not paid, to make the notary send a notice to P. A. Carnes, Baltimore, and likewise to W. H. Briscoe, Leesburg, provided it is not paid at his residence, in Washington."

On the 13th of the same month, the cashier of the Bank of Washington, in answer to this letter, stated, that the bill had not been accepted, because the drawee could not be found; and that the directions given, in the letter of the 9th, should be observed. On the 24th of October, the fourth day after that expressed on the face of the bill, as the day of payment, it was protested for non-payment, and returned, under protest, to the Mechanics' Bank of Alexandria. Notice was given to the drawer, who has refused to pay the same."

On the trial, the counsel for the defendant, moved the court to instruct the jury: 1st. That upon this evidence, if believed, the plaintiffs are not entitled to recover. 2d. That the plaintiffs are not entitled to recover for any loss of recourse against Briscoe, the drawer of the said bill. 3d. That the failure of the defendants (after having called at the residence of the drawee of the said bill to obtain his acceptance, and not finding him, or any person there to accept it) to notify the drawer of that circumstance, was not *such negligence as discharged the said drawer, from his [*30 liability on the said bill, and entitles the plaintiffs to recover. 4th. That if they believed, from the evidence, that the defendants conformed to their former usage, in regard to such bills, as the one in question, in calling on the drawee for acceptance (the said drawee being from home), and not noting the same as dishonored, and giving notice thereof to the parties on the said bill; then, their failure to treat the said bill as dishonored, and to give notice accordingly, of non-acceptance, did not discharge the drawer thereof, from his liability to the plaintiffs. The court refused to give either of these instructions; to which refusal, the counsel

for the defendants excepted; and a verdict and judgment were rendered for the plaintiffs.

The plaintiffs in error insist, that the circuit court ought to have given the instructions first asked, because, 1st, no privity existed between the real holder of the bill and the Bank of Washington; that bank was not the agent of Triplett & Neale, but was the agent of the Mechanics' Bank of Alexandria. Some cases have been cited, to show, that if an agent employed to transact a particular business, engages another person to do it, that other person is not responsible to the principal. On this point, it is sufficient to say, that these cases, however correctly they may have been decided, are inapplicable to the case at bar. The bill was not delivered to the Mechanics' Bank of Alexandria for collection, but for transmission to some bank in Washington, to be collected; that bank would, of course, become the agent of the holder. By transmitting the bill, as directed, the Mechanics' Bank performed its duty, and the whole responsibility of collection devolved on the bank which received the bill for that purpose; the Mechanics' Bank was the mere channel through which Triplett & Neale transmitted the bill to the Bank of Washington.

The deposit of a bill in one bank, to be transmitted for collection, to another, is the common usage, of great public convenience, the effect of which is well understood. This transaction was, unquestionably, of that character; and there is no reason for suspecting that the Bank of Washington did not so understand it. The duty of that bank was precisely the same, whoever might be the owner of the bill; and if it was unwilling to undertake the collection, without precise information on the subject, that duty ought to have been declined. The custom to indorse a bill put in bank for collection, is universal; and the Bank of Washington had no more reason for supposing that Triplett & Neale had ceased to be the real holders, from their indorsement, than for supposing that the *cashier of the Bank of Washington, had become the real holder, by the indorsement to them. It is the customary proceeding for collection, in such cases; and is for the advantage of the party interested. At any rate, the letter of the 9th of October disclosed the real party entitled to the money; and the answer to that letter assumes the agency, if it had not been previously assumed. The court is desidedly of opinion, that the Bank of Washington, by receiving the bill for collection, and, certainly, by its letter of the 13th of October, became the agent of Triplett & Neale, and assumed the responsibility attached to that character.

*31]

The first prayer of the defendants in the circuit court, being to instruct the jury, that upon the whole evidence, the plaintiff ought not to recover; if it might properly have been granted, in any case, in which any testimony was offered; certainly, ought not to have been granted, if any possible construction of that testimony would support the action.

The liability of the bank, for the bill placed in its hands for collection, undoubtedly, depends on the question, whether reasonable and due diligence has been used, in the performance of its duty. To maintain the charge of negligence, the counsel for Triplett & Neale have alleged the failure to give notice of the non-acceptance of the bill, and failure to demand payment in proper time. The counsel for the bank have brought the first question more distinctly into view, by a more definite instruction respecting

it, which was afterwards asked ; and its consideration will be deferred, until that prayer shall be discussed ; but the first must be disposed of, under the general prayer.

Unquestionably, by failing to demand payment in time, the bank would make the bill its own, and would become liable to Triplett & Neale for its amount. The inquiry, therefore, is into the fact. The demand was made on the fourth day after that mentioned on the face of the bill, as the day of payment. The defendants in error insist, that if the bill was never presented for acceptance, payment ought to have been demanded, on the day mentioned on its face. If this be not so, then, it ought to have been demanded, on the third day afterwards, which is the last day of grace. The allowance of days of grace is a usage, which pervades the whole commercial world. It is now universally understood to enter into every bill, or note of a mercantile character, and to form so completely a part of of the contract, that the bill does not become due, in fact or in law, on the day mentioned on its face, but on the last day of grace. A demand of payment, previous to that day, will not authorize a protest, or charge the drawer of the bill. *This is universally admitted, if the bill has been accepted. If it has been noted for non-acceptance, but has been held up, it would not be protested for non-payment, until the last day of grace. Why, then, should a bill, never presented, be demandable, at an earlier day, than if it had been accepted, or if acceptance had been refused? Whatever might have been the original motive for the indulgence, it is now taken into consideration, both by the drawer and payee of the bill. The amount is consequently, estimated, on the calculation, that it becomes really due, on the last day of grace. Neither party can foresee, when the bill is drawn, whether it will be paid or not ; nor, if it be payable, after date, whether it will be presented or not. Their calculation, therefore, as to the day when it becomes really due, and is to be paid, is independent of these considerations. No sufficient reason is perceived, for the distinction. It is, however, a law dependent on usage. The books which treat on the subject, concur in saying, that payment must be demanded when the bill falls due, and that it falls due on the last day of grace. The distinction between a bill which has, and which has not, been presented, has never been taken ; and it is apparent, that a bill is never drawn, with a view to this distinction. The fact, that the question has never been made, is a strong argument against it. The point has never, so far as we can find, been brought directly before a court ; and we have seen only one case, in which it has been even incidentally mentioned. In *Anderton* v. *Beck & Pearson*, 16 East 248, a bill was drawn, payable two months after date, and was not presented for acceptance. It was protested for non-payment, and a suit was brought by the holder against the drawer. He resisted the demand, and the opinion of the court proceeds on the admission, that the bill fell due on the last day of grace. This case consists, we believe, with the opinions and practice of commercial towns. [*32

But if a bill, payable after date, and not presented for acceptance, falls due on the same day as if it had been accepted, the defendants in error insist, that payment ought to have been demanded on the last day of grace. It was proved at the trial, that the settled usage of the Bank of Washington, at that time, and of all the other banks in Washington and Georgetown, was, to demand payment on the day succeeding the last day of grace ; and

this usage, so far as it respects notes negotiable in a particular bank, has been sanctioned by the decisions of this court. *Renner* v. *Bank of Columbia*, 9 Wheat. 582, was a suit brought in the circuit court of the district of Columbia, against the indorser of a *promissory note, which had been negotiated in the Bank of Columbia. Payment was demanded, and the note protested, on the fourth day after that mentioned in the note as the day on which it became payable. This was proved to have been in conformity with the custom of the bank; and the defendant moved the court to instruct the jury that the demand was not in time, and that the indorser was not liable for the note. This instruction was refused, and the defendant brought the judgment in this court by writ of error. The judgment, on great deliberation, was affirmed. In this case, the custom of the bank was known to the parties to the note. But the question arose afterwards, in a case in which the custom was not known to the parties. *Mills* v. *Bank of the United States*, 11 Wheat. 430, was a suit brought by the bank against the plaintiff in error, and others, on a note indorsed by him, and negotiated in the office of discount and deposit of the Bank of the United States, which was protested for non-payment, on the day of the last day of grace. It was proved at the trial, that this was according to the usage of that bank. The counsel for the defendant moved the court to instruct the jury, that this usage could not bind the indorser, unless he had personal knowledge of it, at the time he indorsed the note. The court refused to give the instruction, and the jury found a verdict for the bank, on which judgment was rendered. That judgment was brought before this court, and affirmed. The court said, that "when a note is made payable or negotiable at a bank, whose invariable usage it is to demand payment, and give notice on the fourth day of grace, the paties are bound by that usage, whether they have a personal knowledge of it, or not." In the case of such a note, the parties are presumed, by implication, to agree to be governed by the usage of the bank, at which they have chosen to make the security itself negotiable.

*33]

These cases decide that under consideration, unless there be a distinction between a bill and a note made negotiable in a particular bank. In the case of a note negotiable in a particular bank, the parties may very fairly be presumed to be acquainted with the usage of that bank. As the decisions which have been cited, depend upon that presumption, it will become necessary to inquire, how far the same presumption may be justified, in the case of a bill drawn on a person residing in a place where this usage is established. If a promissory note were made in the city of Washington, payable to a person residing in the same place, though not purporting to be payable and negotiable in bank, it would very probably be placed in a bank for collection. It is a common *practice, and the parties would contemplate such an event as probable, when the note was executed. The same reason seems to exist for applying the usage of the bank, to such a note, as to one expressly made payable and negotiable in bank. Such notes are frequently discounted, and certainly, the person who discounts them, or places them in bank for collection, stands in precisely the same relation to the bank, as respects its usage, as if the notes purported on their face to be negotiable in bank. The maker of a negotiable paper, in such a case, may fairly be presumed to be acquainted with the customary law which governs that paper, at his place of residence.

*34]

In the case at bar, however, the bill was drawn at Alexandria, on a person residing at Washington. Does this circumstance vary the law of the case? The usage by which questions of this sort are governed, is different in different places; it varies from three to thirty days—and the usage of the place on which the bill is drawn, or where payment is to be demanded, uniformly regulates the number of days of grace which must be allowed. This bill being drawn on a person residing in Washington, and being protested for non-payment, in the same place, is, according to the law-merchant, to be governed by the usage of Washington. Could this be questioned, still the holder of the bill, who placed it, by his agent, in the Bank of Washington for collection, who has made that bank his agent, without special instructions, submits his bill to their established usage. The cases, then, which have been cited, are not different in principle from this—and payment having been demanded, according to the invariable usage of the bank, was demanded in time. If, then, the objections to the conduct of the bank were confined to the demand of payment, and protest for non-payment, the first instruction asked by the defendants in the circuit court, ought to have been given. But they are not confined to the demand of payment, and to the protest for non-payment; they extend to the steps taken by the bank, concerning the presentation of the bill.

The second instruction asked for, is in terms which are in some degree equivocal. It may imply, either that the recourse against the drawer of the bill was not lost, or that, if lost, that circumstance would not entitle the plaintiff to recover against the bank; as its decision is not essential to the cause, it will be passed over.

The third is more specific. The court is asked to say, that the failure of the bank to give notice to the drawer, that the drawee was not found at home, when called upon to accept *the bill, is not such negligence as discharged the drawer for his liability, and entitles the plaintiff to [*35 recover. The question suggested by this prayer, is one on which no decision is found in the books. It depends on analogy, so far as it is to be decided by adjudged cases. Such a bill need not be presented; but if presented, and acceptance be refused, it is dishonored, and notice must be given. Had the bank taken no step whatever to obtain an acceptance, no violation of duty would, acoording to these decisions, have been committed. Can any unsuccessful attempt to do that which the law does not require, place the agent in the same situation that he would have stood in, had the drawee been found, and had positively refused acceptance? Absence from home, with a failure to make provision for payment, when a bill becomes due, is a failure to pay; but absence from home, when the holder of a bill, or his agent, offers it for acceptance, is in no respect culpable. Had the drawee received advice of the bill, he could not have known, that it would be presented for acceptance, because the law did not require it, and is, consequently, not blamable for his absence, when the officers of the bank came to present it for acceptance. Had the bill, under such circumstances, been protested for non-acceptance and returned, the drawer might not have been liable for it. The bill, then, on general principles, ought not to have been protested; and the absence of the drawee, ought not to be considered as equivalent to his refusal to accept. It might have been a prudent precaution, to have given information that the bill was not accepted, because the

drawer had not been found, but we cannot say, that the omission would subject the agent to loss, unless such was the special usage of this bank.

The fourth prayer is for an instruction to the jury, that, if they believe, from the evidence, that the defendants conformed to their former usage, in regard to such bills, in calling on the drawee for acceptance (the said drawee being from home), and not noting the same as dishonored, and giving notice thereof to the parties on the said bill, then, their failure to treat the said bill as dishonored, and to give notice accordingly, of non-acceptance, did not discharge the drawer thereof from his liability to the plaintiff. The court has already indicated the opinion, that this omission to treat the bill as dishonored, in consequence of not finding the drawee at home, if the usage of the bank was not to notice such a circumstance, did not discharge the drawer; consequently, this instruction ought to have been given, unless it should be supposed foreign to the case in which it was asked.

*36] In a suit brought by the holder against the bank, the *court was not bound to declare the law as between the holder and the drawer, unless the liability of the bank was determined by the liability of the drawer. Although, in the general, the one question depends on the other, yet, it may not be universally so. The bank was the agent of the holder, not of the drawer, and might consequently so act, as to discharge the drawer, without becoming liable to its principal. In this case, however, as the agent received no specific instructions, but was left to act according to the law-merchant; a course of proceeding which did not discharge the drawer, could not render the agent liable to the principal. This prayer was, therefore, essentially the same with that which preceded it, with this difference—the third prays an instruction, whatever might be the usage of the bank; the fourth prays essentially the same instruction, provided the conduct of the bank conformed to its usage. This instruction, therefore, ought to have been given, as prayed.

Upon a review of the whole case, the court is of opinion, that if the bank acted in conformity with its established usage, in not noting the bill, and giving notice thereof, when the ineffectual attempt was made to present it for acceptance, this action could not be supported. With respect to this usage, the testimony is contradictory, and ought to have been submitted to the jury, in conformity with the last prayer made by the counsel for the bank. The court erred, in not giving this instruction, as prayed. The judgment, therefore, is to be reversed, and the case remanded for a new trial.

This cause came on, &c.: On consideration whereof, this court is of opinion, that the circuit court erred, in refusing to instruct the jury, that if they believed that the defendants conformed to their former usage, in regard to such bills as the one in question, in calling on the drawee for acceptance (the said drawee being from home), and not noting the same as dishonored, and giving notice thereof to the parties on the said bill, then, their failure to treat the said bill as dishonored, and to give notice accordingly, of non-acceptance, did not discharge the drawer thereof from his liability to the plaintiffs: It is, therefore, considered by the court, that the said judgment be reversed and annulled, and that the cause be remanded to the said circuit court, with directions to award a *venire facias de novo*, and to proceed therein according to law.

*George R. Gaither, Plaintiff in error, *v.* Farmers' and Mechanics' Bank of Georgetown (for the use of Thomas Corcorran), Defendants in error.

Usury.

C. & Co. discounted their notes with the F. & M. Bank of Georgetown, at thirty days; and in lieu of money, they stipulated to take the post-notes of the bank, payable at a future day, without interest, while post-notes were at a discount of one and one-half per cent. in the market, at the time of the transaction: such a contract is usurious.

The indorsement of a promissory note of a stranger to the transaction, which was passed to the bank as a collateral security for the usurious loan, although the note itself is not tainted with the usury, yet the indorsement is void, and passes no property to the bank, in the note; and the subsequent payment of the original note, for which the security was given, and the repayment of the sum received as usury, will not give legality to the transaction. p. 43–4.

When an action is in its origin instituted in the name of A., for the use of B., the *cestui que use* is, by the law of Maryland, regarded as the real party to the suit. p. 42.

If a note be free from usury in its origin, no subsequent usurious transactions respecting it, can affect it with the taint of usury, although an indorser of the note, whose property in it was acquired through a usurious transaction, may not be able to maintain a suit upon it.[1] p. 33.

The act of assembly of Maryland declares "all bonds, contracts and assurances whatever, taken on an usurious contract, to be utterly void:" the indorsement of a promissory note, for a usurious consideration, is a contract within the statute, and void.[2] p. 43.

Farmers' & Mechanics' Bank *v.* Gaither, 3 Cr. C. C. 440, reversed.

Error to the Circuit Court for the District of Columbia. This suit was instituted by the defendants in error, against George R. Gaither, as the maker of a promissory note, dated Georgetown, 24th July 1822, for $1513.96, payable six months after date, to the order of W. W. Corcorran & Co. Indorsers, W. W. Corcorran & Co., and Thomas Corcorran.

Before the swearing of the jury in the case, it was stated by the counsel of both plaintiff and defendant, to one of the judges of the court (who, being a stockholder in the bank, objected to sitting in the case); and the same was also stated to the court, before the jury was sworn, that the bank was not interested in the event of the cause; and on the trial, it was also shown to the court, by the clerk, that this suit, standing on the docket in the name of the bank, was, by direction of the plaintiff, on the morning of and just before the cause was called for trial, entered for the use of Thomas Corcorran; and the jury were sworn to try the cause standing on the docket, to the use of Thomas Corcorran.

W. W. Corcorran & Co,, merchants of Alexandria, were in the frequent receipt of large discounts from the bank, upon their own notes, indorsed by Thomas Corcorran, for which *other notes, payable to them, were, from time to time, deposited in bank as collateral securities for the [*38 notes discounted; which collateral notes were kept in deposit by the bank, and, as collected, were passed to the credit of the borrowers; and the collateral notes, a short time before they became due, were so entered in the deposit book of the bank, as that the bank became the collectors upon their own account, of their respective amounts, to be appropriated as stated. The note of the plaintiff in error was treated in this manner; and, before it became due and was protested, it had been entered on the deposit book of the bank, and had remained in possession of the bank, until the day of the

[1] See Nichols *v.* Fearson, 7 Pet. 103; Oates *v.* National Bank, 100 U. S. 249.

[2] See Dill *v.* Ellicott, Tan. Dec. 233; Thomas *v.* Watson, Ibid. 497.

trial of the cause. The discounts of the bank for W. W. Corcorran & Co. were not, generally, to a large extent in cash; but when large discounts were made, it was with an understanding, that the proceeds of the same should be received in post-notes, having some time to run, without any rebate for the time being allowed by the bank, but the bank retaining the usual discount of six per cent. per annum, on the amount of the discounts; and the post-notes were made payable at various periods, from twenty to ninety days, but, most generally, payable when the note discounted, or the note received, as a collateral security, became due. The amount of discounts received by W. W. Corcorran & Co., from the 24th of July 1822, to the 22d of February 1823, was $77,732; and during that time, the post-notes issued for their use, by the bank, exceeded $59,000.

The post-notes, at the time they were received, were at a discount of one per cent. per month in the market; and some of those received by W. W. Corcorran & Co. were sold at that rate. The bank always held the note of the defendant below, as a collateral security for the notes discounted for W. W. Corcorran & Co.; and the defendant paid to the bank, on the 1st day of February 1823, $500 on account of the note. Within two days of the trial, when the bank having collected as much money as reduced the debt due by W. W. Corcorran & Co. to a small sum; they ordered the suit to be marked for the use of Thomas Corcorran, under authority of an order, dated February 17th, 1823, signed by W. W. Corcorran & Co., "to deliver to him what notes of theirs might remain in possession of the bank, after the debt due by them, for which they were left as collateral security, should be paid." The defendant below also proved, that the name of Thomas Corcorran was not upon the note, when it was passed to the bank, nor until after the note became due; and he produced, and offered in evidence to set off the promissory notes of W. W. Corcorran & Co., which had
*39] been transferred to him, *by the payee thereof, after the note upon which this suit was brought had been transferred to the bank, but before this suit was brought, and before they fell due, which was after the 17th of February 1823.

The plaintiff below offered W. S. Nicholls, admitted to be one of the stockholders of the bank, as a witness, who was objected to, as being interested in the event of the suit; but the court overruled the objection, and he was sworn and examined.

The defendants prayed the court to instruct the jury, that, if they believed the evidence of the transaction between the bank and W. W. Corcorran & Co. were usurious, the plaintiff could not recover; which instruction the court refused to give. The court refused to suffer the defendants to give the evidence of set-off, which they proposed to exhibit.

To these decisions of the court, a bill of exceptions was tendered, and the case was brought up to this court by writ of error.

Taylor and *Key*, for the plaintiff in error.—The admission of W. S. Nicholls as a witness, was erroneous, on two grounds: 1. He was interested in the event of the suit: 2. He was one of the parties plaintiff, on the record, he being a stockholder in the bank.

1. The suit was originally brought for the use of the Mechanics' Bank of Alexandria, and the bank is responsible for the costs of suit, to which the

witness will, as a stockholder, be obliged to contribute, on the failure of the suit. 2 Camp. 354. Phil. Ev. 57. Under the law of Maryland, the party to whose use the suit may be brought, is liable for costs; but he is only a security for the costs with the nominal plaintiff. The declaration of the counsel, that the bank had no interest in the cause, was made, in order to induce the judge, who was a stockholder, to sit, and whose high character placed him above the influence of interest. It was not intended to authorize the introduction of an interested witness, as to the effect of the declaration of parties or counsel. 1 Stark. part 4, 34.

2. If this suit can be sustained, it must be upon a legal title of the bank in the note; and as the note was made payable to W. W. Corcorran & Co., they must have indorsed it to the bank, in the course of their transactions with the bank, and for a usurious consideration. The facts make out a case from which the jury might have presumed usury, and there is nothing which will prevent the plaintiff in error from availing himself of this defence. They show that the notes of W. W. Corcorran & Co. were discounted by the bank, and no money paid for them, but the proceeds of the discount were paid in post-notes, generally payable when the notes discounted *by the bank became due, and upon which no rebate or reduction was made for the times the notes had to run. In the course of these [*40 transactions, and as a part of them, the note of the plaintiff in error was indorsed over to the bank by the borrowers, upon these usurious contracts. This was usury. Chitty on Bills (Phila. ed. 1821) 112. The statute makes the contract upon which usury is taken, void; and no title can be obtained under it. It is not the validity of the note which is questioned, but that of the transfer of the note by the indorsement. The plaintiff in error is liable to pay the note, but not to those who claim under an invalid transfer of it; no one can claim under such an indorsement. 1 Stark. 385; Chitty 105, 692. The bank having held the note under an invalid transfer, and instituted a suit upon it, the case cannot be altered, as to the right of the person to whose use it is marked. This change in the suit does not alter the relations of the parties, and give a right to the *cestui que use* which the plaintiffs in the suit did not possess. The whole of the evidence shows that the bank held the note for their own use; that it became theirs, through the usurious dealings with W. W. Corcorran & Co., and they could pass no right in it to any person.

3. Upon the evidence, the set-off ought to have been admitted. The law of Virginia authorizes a set-off to be allowed in such a case. A set-off is allowed against the party really claiming in the suit, although another may be nominally the plaintiff. Chitty 12; 1 T. R. 39; 4 Ibid. 341; 7 Ibid. 663; 16 East 36.

Jones and *Coxe*, for the defendants in error.—The question as to the interest of the bank in the event of the suit, and therefore, of the admission of W. S. Nichols, as a witness, was closed by the declarations of the counsel, before the cause came on for trial. The counsel had power to bind the parties by their admission, and the court below was bound to consider anything done to release the interest of the bank that could be done. The real party to the suit was the *cestui que use*, and, by a court of law, he would be so treated; and he has full power over the cause, in the same manner as if he

was the only party on the record. As to the nature of the interest of a witness who is nominal plaintiff. 4 Stark. 751, 770, 775, 776. When a corporation can be a witness. 4 Ibid. 1061, 426. By the laws of Maryland, 1796, ch. 43, § 13, the party for whose use the suit is marked, is liable to costs. Act of 1794, ch. 54, § 10. The bank held the note of Gaither, as trustees for W. W. Corcorran & Co., and the stockholders would have no interest in the same.

*41] *2. If there was usury between W. W. Corcorran & Co. and the bank, it cannot affect the claim in this suit. A usurious transaction between the payee of a note and the indorsee, will not discharge the maker; and the only danger to which he would be exposed, might be that of a double recovery—1st, by the payee, who had not legally passed away the note, and 2d, by the usurious indorsee. The law is settled, that the usury must affect the original contract, and will not affect collateral matters growing out of it. When given originally for an usurious consideration, all are affected by it; but the usury must have attached to the instrument itself, and it will not affect one given in lieu of it, to a person who was ignorant of the usury, at the inception of the first contract. 3 Esp. 22; 8 T. R. 390; 1 Camp. 165, in note; Philadelphia edition of Chitty on Bills, of 1817, page 95.

3. The note was never the property of the bank, it having been deposited as a collateral security for notes drawn by W. W. Corcorran & Co., and indorsed by Thomas Corcorran. The note was not deposited in reference to any particular negotiation, but as a security generally; and the right of the bank to it, if any existed, was not affected by subsequent transactions, although usurious. Ord on Usury 104.

4. The set-off was not admissible. It was not the subject of notice or plea; and the interest of Thomas Corcorran had attached, before any of the claims of the plaintiff in error arose.

Johnson, Justice, delivered the opinion of the court.—The plaintiff here was defendant in the court below, to an action instituted by the Farmers' and Mechanics' Bank of Georgetown, on a note made by him to W. W. Corcorran & Co., and by them indorsed in blank to the bank.

The record makes out a case for this court, of which the following is a summary: That W. W. Corcorran & Co. discounted their own notes with this bank, at thirty days; the bank expressly stipulating, that in lieu of money they should receive what they call a post-note of their own, payable at a future day, without interest. The evidence would make out that the post-notes given for this discounted note, were at thirty-five days after date; that it is, two days after the discounted note fell due; so that in fact there was no advance of money, although an interest of six per cent. per annum, was taken from the Corcorrans, and the post-notes of the bank were proved to be at a discount of one per cent. making one and a half per cent. for thirty days, or eighteen per cent. per annum. The note on which this suit was instituted, was passed to the bank as a collateral security for the dis-

*42] counted note, and was altogether unaffected with *usury in its origin. The ground on which the right of the bank is resisted, is, not that Gaither is discharged from his contract with W. W. Corcorran & Co., but that the indorsement to the plaintiff below, having been made to secure a

note given on a usurious contract, could vest no interest or cause of action in the indorsee. In order to avoid the pressure of this defence in the court below, the plaintiffs there gave in evidence a writing addressed by W. W. Corcorran & Co. to the bank, bearing date 17th February 1823, prior to the institution of that suit, in these words: "Please deliver to Thomas Corcorran what notes of ours may remain in your possession, after the debt due to the bank, for which they are left as collateral security, shall have been paid, or hold the same subject to his order." And it was further shown, that a few days before the issue was tried below, an adjustment had taken place between the bank and Thomas Corcorran (who was then indorser and assignee of W. W. Corcorran & Co.), upon which Gaither's note had been delivered to Thomas Corcorran; he then indorsed his name on Gaither's note, below that of W. W. Corcorran & Co., and thereupon, the bank, before the jury were charged, had the name of Thomas Corcorran entered on the docket, as the *cestui que use*, for whom they were prosecuting their suit, and the jury, it appears, were charged with the cause, according to the exhibition of parties, thus made upon the docket; that is, to try an issue between the bank, to the use of Thomas Corcorran, plaintiff, and Gaither, defendant. This practice is familiar with the Maryland courts, and when the action originates in that form, the *cestui que use* is regarded as the real party to the suit.

Is is now contended, that although substituted at the eleventh hour, Thomas Corcorran is to be regarded in that relation; and under that idea, this cause has been argued, as though the question of usury had been raised between Gaither and an innocent indorsee. But it is obviously impossible, in the present action, to pay any regard to Thomas Corcorran's interest or claims. The arrangement which introduced his name into the cause, was too obviously concocted for the purpose of rescuing the interests of the plaintiffs in the record, from the effects of the defence of usury. It, therefore, can pretend to no merit in the administration of justice. But if the effects of that transaction be examined, without reference to the motive, it is equally clear, it can have no bearing upon the present action. The interest in, or power over Gaither's note, was only inchoate and contingent, until all the debts due the bank should be paid, or they otherwise be induced to relinquish it to him; and this did *not take place until long posterior to the institution of the suit, and even after issue joined. The bank [*43
sue on their own interest, declare on their own right, and acknowledge no participation with Thomas Corcorran in the interest or the action, until the moment when the cause is going to trial. It was surely then too late to permit them to assume a new character, or interpose a new party; however liberally this court might be disposed to sacrifice the forms and rules of law, to the Maryland practice.

We will, therefore, put Thomas Corcorran's interest out of view, and will consider the parties, at the commencement of the action, as the parties at its close. This puts the question on the right of an innocent indorsee out of the cause; since the indorsee of Gaither's note received the usurious interest, and the indorser paid it. The only questions on the point of usury, then, are, 1st. Whether Gaither, in the relation in which he stood to these parties, could set up the usury in his defence. 2d. And whether that defence could be set up, after payment of the note on which the usury had been received.

The objection in the first point is, that as there was no usury in the concoction of Gaither's contract, he ought not to be permitted to avail himself of the usurious contract between the indorser and indorsee, to avoid a debt which he justly owes. And this is unquestionably true: for the rule cannot be doubted, that if the note be free from usury, in its origin, no subsequent usurious transactions respecting it, can affect it with the taint of usury. Nor does Gaither propose, by this defence, to relieve himself from paying the note; it goes only to his liability to pay it to this individual; and reason, analogy and adjudged cases will sustain the defence. Suppose, a note given to a woman, who marries, and then indorses it without her husband's authority; such indorsement would be void (1 East 432), and the indorsee could not recover; yet the husband and wife may recover. In a comment on the case of *Jones* v. *Davison*, in Holt's reports (1 Holt 256), a usurious note is likened to a bill of exchange on a bad stamp. If a stamp were necessary to give validity to an indorsement, it cannot be doubted, that none who claim through such an indorsement could maintain an action against the maker. The indorsement, though actual, was ineffectual for the purpose of transferring an interest in the note; it was a void act.

This case is governed by the laws of Maryland; and the act of Maryland against usury is in the words of the statute of Anne. It declares "all
*44] bonds, contracts and assurances *whatever, taken on a usurious contract," to be utterly void. Now, the indorsement of a negotiable note creates several contracts; and if, in this case, it could give a right of action against Gaither, the maker, it ought also to sustain an action against W. W. Corcorran & Co., the indorsers; but against them, it is perfectly clear, that an action could not be maintained, for they were parties to the usurious loan. It follows, that their indorsement was a void act, and the property, and, of consequence, the right of action, never passed to these plaintiffs. There is a very strong case on this subject, which we believe was not quoted in argument, to be found in the books to which we usually refer. We mean the case of *Harrison* v. *Hannell*, in Taunton's reports (5 Taunt. 780), in which the right of a collateral surety to avail himself of usury in the original transaction, is distinctly recognised, when the contract of the collateral was wholly unaffected by usury. The case was reserved for argument, and the whole court concurred in the legality of the defence. The language of the judges is strong, and applies to the case before us. One of them remarks, "that if a man lend 1000*l.* on a usurious interest, and gets from a third person a collateral security for 800*l.* only, without usurious interest, I hold that bond is void, not because it is given for securing usurious interest, but because it is given for enforcing a contract for usurious interest." And another says, "that if giving these collateral acceptances would alter the case, it would be a shift or device, by which the statutes of usury would be defeated."

With regard to the second point, it is necessary to see the force of the argument which would deduce from the payment of the discounted note, a cure to the taint with which the contract of indorsement was affected. The law declares it absolutely void; by what operation, then, is it to be rendered valid, by the payment of the discounted note? It is argued, by the payment and extinguishment of the latter note, the usury is extinct, and as if it had never existed. We cannot perceive how this reasoning can prevail,

either in point of fact or inference. In point of fact, the crime was only consummated by the payment of that note, since the bank thereby incurred a liability under the statute, to be sued for three times the sum paid them; and as to the inference, it seems very difficult to conceive, how the payment of the usurious note should operate to confirm or give birth to a contract, which the law declares never had existence, and was, *ab initio*, utterly null and void. There have been cases in which usurious contracts have been cancelled, the usury refunded, and new contracts substituted, free from the taint of usury; and the law gives to the offender this *locus pœnitentiæ*. But there is no analogy between such a *transaction and that here presented, in which the money loaned has been [*45 paid by the borrower, and only passed into the vaults of the bank, to be deposited with the usurious interest previously taken. We have not heard of the refunding of this usury; and this, at least, would have been indispensable to removing the taint. But even that would never have given validity to an indorsement, which, in the eye of the law, was, as though it had never existed.

As the decision on this point disposes of the right of action, and leaves no probability that the cause will be again brought up to this court, we deem it unnecessary to notice any other of the points made in argument.

The judgment was reversed, and the cause remanded to the circuit court, with directions to award a *venire facias de novo*.

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*George Minor, Philip H. Minor, Daniel Minor, William Minor and Smith Minor, Plaintiffs in error, *v.* The Mechanics' Bank of Alexandria, Defendants in error. [*46

Construction of statute.—Pleading.—Official bond.—Nolle prosequi

It is a general rule in the construction of public statutes, that the word "may," is to be construed "must," in all cases where the legislature means to impose a positive and absolute duty, and not merely to give a discretionary power: and in all cases, the construction should be such as carries into effect the true intent and meaning of the legislature in the enactment. p. 64.

The provision in the act of congress, incorporating "the Mechanics' Bank of Alexandria," which requires, that the capital stock of the bank shall consist of 50,000 shares, of ten dollars each, is not a condition precedent; and the bank went legally into operation, with an actual capital less than that number of shares. p. 65.

Even if fraud had existed in the original subscription of this stock of the bank, it would be extremely difficult to maintain, that such a fraud, which was private, between the original subscribers to the stock and the commissioners, could be set up to injury of the subsequent purchasers of the stock who became *bonâ fide* holders of the same, without participation in, or notice thereof. p. 66.

The law requires every issue to be founded upon some certain point, that the parties may come prepared with their evidence, and not be taken by surprise, and the jury may not be misled by the introduction of various matters. p. 67.

What defects in pleading are, and are not, cured by verdict. p. 67.

The condition of an official bond, that the officer who gives it, shall "well and truly" execute the duties of his office, includes not only honesty, but reasonable skill and diligence. If the duties are performed negligently and unskilfully; if they are violated from want of capacity, or want of care; they can never be said to have been "well and truly executed."[1] p. 69.

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[1] Union Bank *v.* Forrest, 3 Cr. C. C. 218; Rochester City Bank *v.* Elwood, 21 N. Y. 88.

Minor v. Mechanics' Bank.

The officers of a bank are held out to the public, as having authority to act according to the general usage, practice and course of their business; and their acts, within the scope of such usage, practice and course of business, would, in general, bind the bank, in favor of third persons, possessing no other knowledge.[1] p. 70.

No act or vote of the board of directors of a bank, in violation of their own duties, and in fraud of the rights and interests of the stockholders of the bank, will justify the cashier of the bank in acts which are in violation of the stipulation in his official bond, "well and truly" to execute the duties of his office. Acts done by a cashier, under the authority of such a vote, or of a usage permitted by the directors, in violation of the trusts assumed by them, are on the responsibility of the cashier, and of his sureties. p. 71.

The official bond of a cashier must be construed to cover all defaults in duty which are annexed to the office, from time to time, by those who are authorized to control the affairs of the bank; and the sureties in the bond are presumed to enter into a contract, with reference to the rights and authorities of the president and directors, under the charter and by-laws. p. 73.

*47] On a joint and several bond, the plaintiff may sue one or all of the obligors; *but in strictness of law, he cannot sue an intermediate number; he must sue all or one. But if such error be not taken advantage of, by plea in abatement, it is waived, by pleading to the merits. p. 73.

According to modern decisions, a *nolle prosequi* does not amount to a *retraxit*, but simply to an agreement not to proceed further in that suit, as to the particular person or cause of action to which it was applied. p. 74.

In an action on a joint and several bond, some of the parties' sureties severed in their pleadings from the principal, and a trial and verdict were had against them; afterwards, the principal was called upon to plead, and did so; judgment was then entered against the sureties; and a *nolle prosequi* entered against the principal; to this judgment, or the proceedings, no exception was taken in the court below, nor was a new trial asked by the sureties: The court held, that there is no decision exactly in point to the case; that there is no distinction between the entry of a *nolle prosequi*, before, and the entry after judgment, as applicable to this case. The decisions of the courts of the United States, upon this proceeding, have been on the ground, that the question is matter of practice and convenience. p. 75.

When the defendants sever in their pleadings, a *nolle prosequi* ought to be allowed against one defendant: it is a practice which violates no rules of pleading, and will generally subserve the public convenience. In the administration of justice, matters of form, not absolutely subjected to authority, may well yield to the substantial purposes of justice. p. 80.

ERROR to the Circuit Court for the District of Columbia. An act of congress was passed on the 16th of May 1812, entitled, "an act to incorporate a bank in the town of Alexandria, by the name and style of the Mechanics' Bank of Alexandria;" which institution soon afterwards went into operation; subscriptions for filling up the capital stock of the corporation and bank having been opened in the town of Alexandria, on the first Monday in June 1812, under the direction of fifteen commissioners, appointed for that purpose. On the 3d of September 1817, Philip H. Minor was elected cashier of the bank; and on the same day, by a resolution of the board of directors, it was ordered, "that the present officers of the bank do the whole duties of the bank."

In the office of cashier, Philip H. Minor was the successor of William Patton, jr., who died in August 1817; and before his appointment as cashier, Philip H. Minor (who had, several years preceding, served as an officer of the bank, for some time as discount clerk, and afterwards as book-keeper), had, in March 1817, been appointed teller for one year, ending in March 1818, from the time of his appointment; and had given approved bond and security, conditioned that he would well and truly execute the duties of the office of teller. After the appointment of Philip H. Minor, in September

[1] Case *v.* Bank, 100 U. S. 454.

1817, to be cashier of the bank; and the order of the board, on the same day, relative to the whole duties of the bank being performed by the then officers of the bank; no renewal of the appointment *of teller was made, and he usually performed the duties of cashier and teller. On [*48
the 19th day of March 1818, Philip H. Minor, and the plaintiffs in error, executed a joint and several bond, in the sum of $20,000, which contained the following condition:

"Whereas, the above-bound Philip H. Minor, hath been duly elected to the office of cashier of the Mechanics' Bank of Alexandria, the conditions of the above obligation are such, that if the above-bound Philip H. Minor shall well and truly execute the duties of cashier of the Mechanics' Bank of Alexandria, then this obligation to be void, but otherwise shall remain in full force and virtue in law.

PHILIP H. MINOR, (L. S.)
GEORGE MINOR, (L. S.)
D. MINOR, (L. S.)
WILLIAM MINOR, (L. S.)
SMITH MINOR, (L. S.)"

In the circuit court of the district of Columbia, for the county of Alexandria, the defendants in error instituted an action of debt upon this bond, against all the obligors; and the declaration filed in the same, was for the penalty, without taking notice of the condition. *Oyer* of the bond and condition having been prayed, &c., the defendants, being the sureties of Philip H. Minor, to wit, George Minor, Daniel Minor, William Minor and Smith Minor, pleaded joint pleas, separate from Philip H. Minor, the cashier of the bank. The substance of these pleas was as follows:

1. The Mechanics' Bank was not competent to sue, because the commissioners, who, by the act of incorporation, were authorized to open and take subscriptions to the capital stock of the company, and who took the subscriptions, had colluded with the subscribers to the stock, and that $180,000 of the stock had been fraudulently subscribed; and that an election for directors of the bank was fraudulently and illegally held, by which the persons named as commissioners were elected the directors of the bank; the votes of the fraudulent holders of the stock, amounting to $180,000, having been taken at the said election; that afterwards, the sums paid by the fraudulent or collusive holders of the $180,000 stock, were, by the president and directors, paid back to them; and thereby the capital was diminished to $320,000; and by the said proceedings, the capital stock of the bank was reduced below $500,000, as was collusively held out *to the public; [*49
without this, that the plaintiffs, the obligees in the bond, or any other person whatsoever, at the time and times of making the said bond, and of commencing the suit thereon, or at any time whatsoever, used, claimed or exercised, or yet use, claim or exercise, the name and style, privileges and capacities, of the said supposed corporation, or ever claimed to compose the same, otherwise, or by any other ways or means, or in any other manner or form whatsoever, than in virtue of the said subscription, conducted and concluded as aforesaid; and so the said defendants say, the said supposed writing obligatory, in manner and form aforesaid made, is utterly inoperative and void in law; and this they are ready to verify, &c.

2. The second plea stated, that the defendants ought not to be charged,

&c., because the plaintiffs demand the said debt, and bring this action, as pretending and claiming to be a corporation aggregate, in and by virtue of the act of congress, mentioned in the first plea, by the name of the Mechanics' Bank of Alexandria, to be composed of the subscribers to the said Mechanics' Bank of Alexandria, which subscribers were not in being at the time of the passing of the said act, but were to be composed of such persons only, as thereafter might subscribe thereto, according to the provisions of the act; whereas, the subscriptions were not taken according to the said provisions, so as to entitle the persons pretending to be subscribers to the said bank, and their successors and assigns, to compose the said corporation, wherefore, there was not any person authorized, or lawfully competent, to take the bond, which is the subject of this suit; nor was there any such person, at the commencement of this suit, capable of instituting and prosecuting the same, but that the said persons did, unjustly and illegally, arrogate to themselves to compose the said corporation, without the capital stock having been filled by subscription, or the supposed corporation having been composed of actual subscribers to the bank, pursuant to the directions of the said act of congress, or other lawful warrant whatsoever, contrary to the purview and effect of the said act of congress; and so the defendants say, that the said writing obligatory was, at the time of making the same, and is, utterly void in law, &c.

3. The third plea alleged, that the cashier had well and truly performed the condition of the bond, according to the tenor and effect, and the true intent and meaning of it.

4. The fourth plea alleged, that the cashier had performed the condition of the bond, "to the best of his ability, skill and judgment," without any fraud, deceit, or wilful default or breach of duties, whatever.

*50] 5. The fifth plea alleged, that the cashier had performed his *duties, in obedience to, and in pursuance of, the rules, orders, usages and customs of trade and business, ordained, established and practised in the bank, by authority of the president and directors thereof.

6. The sixth plea asserted, that although the duties of the cashier had not been performed by him, yet the non-performance was by the wrong, connivance and permission of the president and directors of the institution.

7. The seventh plea stated, that the bank had not been damnified by the acts of the cashier.

8. The eighth plea was, that although the bank was damnified by the acts of the cashier, yet it was by the wrong and connivance of the president and directors, &c.

9. The ninth plea stated, that the business and affairs of the company, and the conduct and duties of the cashier, were performed under the regulation and management of the president and directors, who had been chosen according to the provisions of the act of incorporation; and if, at any time, the corporation has sustained damage, since the making of the writing obligatory, by reason of any matter contained therein, it has been by the wrong, connivance or permission of the said president and directors.

To the first and second pleas, the plaintiffs below put in general demurrers, and on each of the seven remaining pleas, issue was taken by general

replications; all precisely in the same terms, as follows: "And the said Mechanics' Bank of Alexandria, by Thomas Swann, their attorney, say, they ought not to be precluded, &c., because they say, that the said cause of action, in the declaration mentioned, did accrue as in the said declaration and breaches are set forth; without that, that the matters set forth in the said plea, are true; and this they pray may be inquired of by the country, and the defendants likewise." But at the next term, the plaintiffs withdrew these general replications as to the 3d and 4th pleas; and to these two pleas put in special replications, leaving the issues on the remaining five to stand on the general replications and issues as above. The replications thus put in to the 3d and 4th pleas, and rejoinders of the defendants taking issue upon the same (being precisely in the same terms, *mutatis mutandis*, to each), were as follows:

"And the said Mechanics' Bank of Alexandria, by Thomas Swann, their attorney, say, that they ought not to be precluded from having and maintaining their action aforesaid against the said defendants, George Minor, Daniel Minor, William Minor and Smith Minor, by anything alleged by the said defendants in their third plea, pleaded as aforesaid: because they say, *that the board of directors of the said Mechanics' Bank of Alexandria, in pursuance of the authority granted to them by the act of congress, incorporating the said bank, did duly make and declare sundry by-laws for the government of the said bank, its officers and affairs, and among other laws so made and declared as aforesaid, they did enact and declare, in substance, as follows, to wit: [*51

Section 2d, article 5th. It shall be the duty of the cashier to countersign at the bank, all the bills or notes to be signed by the president, by order of the directors; carefully to observe the conduct of the persons employed under him; duly to examine into the settlement of the cash-account at the bank; count the money deposited in the vaults, every evening; compare the amount thereof with the balance of the cash-account of that day, and in case of disagreement, report the same to the next meeting of the directors; to see that all deeds appertaining are duly recorded; and to do and perform all other duties that may, from time to time, be required of him by the president or board of directors relative to the affairs of the institution.

Article 6th. It shall be the duty of every other officer, clerk and servant of the bank, to do and perform all other duties that may, from time to time, be required of them respectively by the president and cashier; and in no case to divulge the transactions of the bank.

Article 8th. That no officer of the bank, the president excepted, shall leave the bank, after it closes, until the cashier's account shall be found to agree, or if it does not agree, until a strict examination be made to discover the error.

Section 3d, article 3d. That no discount shall be made, without the consent of a majority of the directors present; nor shall any reason be required by the directors to each other, nor assigned to the public, for refusing discounts.

Which said by-laws, so made, enacted and declared as aforesaid, were, at the time of the sealing and delivery of the writing obligatory in the declaration mentioned, in full force and effect. And the said plaintiffs say,

that the said Philip H. Minor, in the said writing obligatory mentioned, was duly appointed cashier of the said Mechanics' Bank of Alexandria; and in virtue of his said appointment, did accept the office of said cashier; and on the day of the date of the said writing obligatory in the declaration mentioned, did thereupon enter upon the duties of the said cashier; and the said plaintiffs further say, that the said Philip H. Minor did not well and truly execute the duties of the said Mechanics' Bank, as cashier of the said bank, according to the true intent and meaning *of the condi- *52] tion of the said writing obligatory, but violated his duty as cashier aforesaid, and broke the condition of the said writing obligatory, in the following instances, that is to say:

1. That during the period that the said Philip H. Minor acted as cashier of the said Mechanics' Bank, under the writing obligatory, as aforesaid, he, the said Philip, as cashier aforesaid, received into his custody and keeping the moneys of the said bank, amounting to very large sums, that is to say, amounting altogether to $500,000 and upwards; which said moneys, so received as aforesaid, the said Philip, although often required, hath failed to account for, or to pay over to the said bank, or to make a correct report of the same, from time to time, to the board of directors of the said bank.

2. And further, that he, the said Philip, during the period aforesaid, and in his capacity of cashier aforesaid, wrongfully, and contrary to the duty of his office of cashier aforesaid, did waste, and suffer to be wasted, of the moneys of the said bank, in his care and custody, as cashier aforesaid, the sum of $30,000 and upwards, whereby the same became entirely lost to the said bank.

3. And the plaintiffs further say, that the said Philip, during the period aforesaid, and in his capacity of cashier aforesaid, wrongfully, and contrary to the duty of his office of cashier aforesaid, and without the authority of the said bank, did apply and appropriate, of the proper money of the said bank in his care and custody, as cashier aforesaid, to his own proper use, the sum of $5728, and to the use of Thomas J. Minor and himself, the said Philip H. Minor, the further sums of $3179.00, 1898.63 — 5077.63

so that the said sums were entirely lost to the said bank.

4. And the plaintiffs further say, that the said P. H. Minor, during the period aforesaid, and in his capacity of cashier aforesaid, wrongfully, and contrary to the duty of his office of cashier aforesaid, and without the authority of the said bank, did pay away, and did suffer and permit to be paid away, of the proper moneys and funds of the said bank in his care and keeping, as cashier aforesaid, to Jabez B. Rooker, divers sums of money, amounting altogether to the sum of $4967.30; and to one Francis Adams, divers others sums, amounting altogether to the sum of $1884.18; and to William F. Thornton, divers other sums of money, amounting altogether to the sum of $7407.25; and to Benjamin G. Thornton, divers other sums of money, amounting altogether to the sum of $4810.74; and to Lewis *Hipkins, *53] the sum of $2375; and to Robert Young, divers other sums of money, amounting altogether to the sum of $9294.44; so that the said several sums of money were entirely lost to the said bank.

5. And the said plaintiffs further say, that the said Philip H. Minor, dur-

ing the period aforesaid, and in his capacity of cashier aforesaid, and without the authority of the said bank, did indorse upon a certain check, drawn by Lewis Hipkins upon the said Mechanics' Bank, in favor of "note in city or bearer" for $3000, that the same was "good;" when in fact and in truth, the said Lewis Hipkins had no money or funds in the said Mechanics' Bank, at the time of the said indorsement, to pay the said check, nor has he, at any time since, had in the said bank any money or funds to pay the said check, so indorsed as aforesaid, and the said bank have actually paid and taken upon themselves the payment of the same.

7. And the said plaintiffs further say, that Benjamin G. Thornton, on the 18th day of December 1818, drew a certain bill or draft upon a certain bank in the state of Ohio, called the Bank of New Lancaster, which bill or draft was in substance as follows:

"Alexandria, December 18, 1818. Cashier Bank of New Lancaster, Ohio. Pay to the order of W. F. Thornton, ten days after sight, four thousand seven hundred and fifty dollars, and charge the same as per advice, to yours, &c. B. G. Thornton."

And the said plaintiffs say, that the said Philip H. Minor, while he acted as cashier aforesaid, under the writing obligatory aforesaid, wrongfully, and contrary to the duty of his office of cashier aforesaid, and without the authority of the said bank, did advance and pay, upon the credit of the said draft or bill, to William F. Thornton and Lewis Hipkins, the amount of the said draft, that is to say, the sum of $4750; by means of which said advancement, so made as aforesaid, the said sum has been entirely lost to the said bank.

8. And the said plaintiffs further say, that the said Philip H. Minor, while he acted as cashier aforesaid, under the writing obligatory aforesaid, wrongfully, and contrary to his duty as cashier, and with a view to deceive and mislead the board of directors of the said bank, did make sundry false and erroneous entries in the books of the said bank, in his care and custody as cashier aforesaid; and among others, the following, to wit, a charge against the Bank of Alexandria, of the date of the 31st of August 1818, for the fum of $1791; and another against the Bank of Potomac, of the date *of the 31st of August 1818, for the sum of $2581.25; and another against the Bank of Washington, of the date of the 2d of March [*54
1818, for $1000; when in fact and in truth, at the periods aforesaid, there was nothing due from the said last-mentioned banks to the said Mechanics' Bank; by means of which said false entries and charges, the said Mechanics' Bank have lost the said several sums of money. All which said several matters and things the said plaintiffs are ready to verify. Wherefore, &c.

To these pleas, the plaintiffs in error put in the following replication: "And the said defendants, George Minor, Daniel Minor, William Minor and Smith Minor say, that the said Mechanics' Bank of Alexandria ought not to have or maintain their aforesaid action against the said defendants, by reason of anything by the said Mechanics' Bank of Alexandria, in their said replication to the said third plea of the defendants, above, in replying, alleged; because they say, that the said Philip H. Minor, in the said plea and replication named, did not violate his duty as cashier aforesaid, and break the said condition of the said writing obligatory, in the instances by the said Mechanics' Bank of Alexandria, in their said replication above

pleaded and alleged, nor in any of them, with or by means of any fraud, or deceit, or wilful default whatsoever ; and this they pray may be inquired of by the country. And the said Mechanics' Bank of Alexandria in like manner."

At the same term, the demurrer to the first and second pleas, and the issues on the remaining seven, between the plaintiffs and the four sureties, were respectively argued and tried ; the first and second pleas were adjudged insufficient, on general demurrer ; the issues were found for the plaintiffs, and damages, in gross, upon all the issues and breaches, assessed against the four sureties, at $8607.30 ; and upon the motion of the plaintiffs, a rule was then laid on the principal obligor and co-defendant, Philip H. Minor, to plead to issue on the morrow. In compliance with which rule, he did, within the time prescribed, plead five several matters in bar ; the same, *mutatis mutandis* as the third, fourth, fifth, seventh and ninth of the aforesaid pleas, put in by the co-defendants, his sureties. A day was given at the next ensuing term, to the plaintiffs, to reply ; at which term, the plaintiffs took a judgment on the verdict against the four defendants, with whom the several issues had been tried as aforesaid ; and then entered a *nolle prosequi* as against the co-defendant, Philip H. Minor, who thereupon recovered judgment for costs against the plaintiffs.

On the trial of the cause in the circuit court, a bill of exceptions was taken to the opinion of this court, upon certain *instructions which *55] the court was requested to give to the jury. The court instructed the jury, according to the expressed desire of the plaintiffs below, except as hereafter stated, but refused to charge the jury, as requested by the counsel of the defendants. The instructions given by the court, on the motion of the plaintiffs' counsel, and on the evidence given in the cause, were :

1. If the jury, from the evidence aforesaid, should be of opinion, that the said Philip H. Minor, upon his leaving the Mechanics' Bank of Alexandria, that is to say, on the 9th day of March 1819, failed to pay over, or to account to the said bank for, any portion of the moneys of the said bank, received by him as cashier of the said bank, while he acted as cashier of the said bank, under the writing obligatory in the declaration mentioned, then, the jury may and ought to infer, that the said moneys, so unaccounted for, were wilfully wasted by the said Philip H. Minor, or applied to his own use ; and that, under such circumstances, the defendants are liable to the bank, for the moneys which he so failed to pay over, or account for, to the said bank.

2. And the said plaintiffs requested the court further to instruct the jury, that if, from the evidence aforesaid, they should be of opinion, that the said Philip H. Minor, while he acted as cashier aforesaid, under the writing obligatory aforesaid, did wilfully pay or apply, or did, knowingly and wilfully, suffer or permit to be paid away or applied to the use of Thomas J. Minor and himself jointly, or to himself individually, any portion of the funds or moneys of the said bank, without the authority of the board of directors of the said bank, so that the said sums, or any part thereof, were lost to the said bank ; that the said defendants are liable for the said moneys or funds so paid away, or applied and lost.

3. And the said plaintiffs prayed the court further to instruct the jury, that if, from the evidence aforesaid, they should be of opinion, that the said

Philip H. Minor, while he acted as cashier aforesaid, under the writing obligatory aforesaid, wilfully paid away or appropriated, or knowingly suffered or permitted to be paid away, or appropriated to the use of Jabez B. Rooker, William F. Thornton, Benjamin G. Thornton, Lewis Hipkins and Francis Adams, or to either of them, the moneys and funds of the said bank, without the authority of the board of directors of the said bank, so that the said moneys or funds, or any part thereof, were entirely lost to the said bank; then the said defendants are liable for the said moneys so paid away, or appropriated, and lost.

Upon the first and second issues, being the issues under the *third and fourth pleas—and upon the third, being the issue joined on the [*56 fifth plea, the court gave the instructions as prayed for, by the counsel for the bank. Upon the third issue, being the issue joined in the fifth plea, the court gave the first instruction, with the addition of the following words—"unless such failure to pay over, or account for, the money so received, by the said Philip H. Minor, was in obedience to, and in pursuance of, the directions, rules, orders, usages and customs of trade and business, ordained, established and practised, in the said bank, by the authority of the said president and directors."

Upon the fourth issue, being the issue joined under the sixth plea, the court gave the instructions prayed for, adding in each instruction, after the words "directors of the said bank," the words "and without the wrong, connivance or permission of the said president and directors."

Upon the fifth issue, being the issue joined in the seventh plea, the court gave the first instruction, adding the words, "if the jury should be also satisfied, by the evidence, that moneys, which the said Philip H. Minor so failed to pay over, or account for, were thereby lost to the bank;" and upon this issue also, the court gave the second and third instructions.

Upon the sixth and seventh issues, the court gave the second and third instructions, adding the words, to make them applicable, to the fourth issue; and upon the sixth issue, the court also gave the second and third instructions, adding, in each instruction, after the words "directors of the said bank," the words, "and without the wrong, connivance or permission of the said president and directors."

The counsel for the defendants, then moved the court to instruct the jury: 1. That if it were the established usage and practice of the said bank, that the cashier might, in his discretion, permit customers to overdraw, and to have checks and notes charged up, without present funds in bank; and for the cashier to receive and pass, as cash, checks and drafts upon other banks; and if the said balances, so appearing against the several persons above charged on the books of said bank, arose out of the exercise of such discretion, by the said cashier, and in the course of the ordinary transactions of the said bank, and pursuant to established usage and course of business there adopted, and personally known to the said president and directors, and practised and continued, with their knowledge, for a series of years, from the commencement of the bank, to the termination of the said Philip H. Minor's cashiership; though the existence of such balances, or the particular circumstances attending them, were not formally communicated to the board of directors, *the jury may infer the appro- [*57

bation, assent and acquiescence of the said president and directors, as to such usage and the course of business.

2. That if the said balances, appearing against the several persons above charged on the books of said bank, arose in the course of the ordinary transactions of said bank, pursuant to the established usage and course of business there adopted, and known to the president and directors, and expressly and tacitly acquiesced in, and approved by them; or if the said president and a majority of the directors, were personally acquainted with such usage and course of business, purposely connived at the same, and declined investigation, then, the jury may infer, that the same were approved and permitted by the said president and directors, though no formal communications of the same were made, by the said cashier, to the board of directors, at their official meeting; and upon finding such to be the fact, the jury, as to such balances, should find for the defendants, under the issues joined on the replications to the sixth, eighth and ninth pleas. Which instructions, the court altogether overruled, and refused to give to the jury.

3. If the jury find, from the evidence, that the several officers of the said bank, annually appointed by the said president and directors as aforesaid, each gave separate bond and security, for the faithful performance of the duties of his office; that the said William Patton, so being cashier as aforesaid, died on or about the 28th of August, next ensuing his last appointment, on the 9th of March 1817; and that on the 3d day of September following, the said Philip H. Minor, having all along acted as teller, under his said appointment, as such, for one year, from March 1817, was duly appointed cashier, in the place of said Patton, and gave bond and security in the usual form, for the faithful performance of his duties as such cashier; being at the same time under bond and security for the faithful performance of his duties, as teller, for the year ending in March 1818, as above stated; that he continued to be such cashier, under his said appointment, till the 9th of March 1818, when he was again appointed cashier for one year; and on the 19th of the same month, gave the bond now in suit; that on the said 3d of September 1817, the said president and directors duly passed the said orders, of that date, appointing the said Philip H. Minor cashier as aforesaid, and directing the then officers of the bank to do the whole duties of the bank; and did not then, or any time after the said 9th day of March 1817, make any new appointment of teller; that the said Philip H. Minor, from the time of his first appointment as cashier, usually *performed
*58] the duties of teller; which duties, as well as those of cashier, were, occasionally, and frequently, during the continuance of said Minor in the office of cashier, performed by the other officers of the said bank, whilst the said Minor was absent, and otherwise occupied with the business and affairs of said bank; that the separate office of teller was established at the first institution of said bank, by the written laws and ordinances of the president and directors, as above given in evidence; that after the said president and directors ceased to appoint a distinct person as teller, as aforesaid, all the distinct functions and duties of teller, and the forms of keeping the accounts and transacting the business by the cashier, or some other officer of said bank, in the name aud capacity of teller, were pursued, the same as when the office of teller was filled by a distinct person; the practice being still continued, of placing the money of the bank, intended to answer the cur-

rent demands of each day, in the hands of the officer as teller, of keeping separate accounts of such moneys, and of all deposits, and of all payments upon checks or otherwise, in the name and capacity of teller; such accounts being distinct and separate, and in distinct and separate books from those kept in the name and capacity of cashier; and that the said board of directors, and the proper committees of the same, in their quarterly and other examinations and reports of the state and condition of said bank, and of the accounts of its officers, still kept up the distinction between the teller's and the cashier's accounts, and the teller's and cashier's money; then, that the defendants are not chargeable in this action for the conduct of said Philip H. Minor, in the execution of the duties distinctly appertaining to the office of teller, whilst he was cashier as aforesaid. Which instruction the court refused to give, the plaintiffs having offered in evidence to the jury, the following by-law of the said president and directors, to wit:—

Article fifth, in section second, of the by-laws above given in evidence; and having also offered evidence, to prove, that, after the appointment of the said Philip H. Minor to the office of cashier, on the 9th of March 1818, he did, in fact, generally perform the duties of teller, with the knowledge of the president of the said bank; from which it was competent for the jury to infer, that he, the said Philip H. Minor, as cashier as aforesaid, was required by the president of the said bank, or by the board of directors of the said bank, to perform the duties appertaining to the office of teller.

Taylor and *Jones*, for the plaintiffs in error.—1. The plaintiffs below sue in their corporate capacity, under the act of congress of May 16th, 1812, and no such corporation ever existed; it was to exist only, on the happening *of a future event. The law does not incorporate a company already formed, but provides for the erection of the corporation, upon certain conditions, and on certain forms being complied with. The demurrer admits the facts stated in the first and second pleas, and the corrupt evasions of the act prevented the corporation ever coming into existence. The obligors in the bond were not, thereupon, estopped, as the bond was given to supposed or fictitious persons, and not to an existing corporation; and there was not one *in esse* to take the bond. An estoppel cannot be alleged against an act of parliament. 1 Chit. Pl. 435; Com. Dig., Abatement, 16; 3 Instructor Clericalis 89; Story's Pl. 24. Dealing with a pretended corporation, does not preclude a party from denying its existence; it must have existed *de jure*. It is no objection to the matter in the first and second pleas, that they are not pleaded in bar; a plea that goes to show that there never was such a person as the plaintiff, is a plea in bar. 1 Bos. & Pul. 44; 1 Chitty 425. The general rule that sealed instruments cannot be opened, has exceptions, and in cases of illegal and fraudulent considerations, and considerations *ex turpe causâ;* a fraud which is injurious to the public, cannot be precluded by any shield of law. 2 Wils. 347; 2 T. R. 171. It is not necessary to resort to a *quo warranto*, to determine the existence of the corporation. The defendant in an action on a promissory note, may call upon a corporation, if plaintiff, to show its charter, and the same principle will apply in this case. A *quo warranto*, or *mandamus*, would be proper, if the corporation had ever existed, but that was not the [*59

fact in this case; and it is not an answer to the course of proceedings, here, that it would multiply actions, for such would not be the fact.

2. As to the effect of the *nolle prosequi*. The action is upon a joint and several bond, and the obligors are sued jointly. The sureties appeared, and took a separate defence, and a verdict was obtained against them. The principal pleaded, after being ruled; and at the subsequent term, a *nolle prosequi* was entered against him, and a judgment was taken against the sureties. The proceeding was erroneous. Upon a joint and several bond, all the parties must be sued together, or each must be sued separately; and it is error, to sue less than all, unless the suit be against one only. 3 T. R. 782; 1 Hen. & Munf. 62; 3 Munf. 187; 2 Maule & Selw. 23; 2 Rand. 446, 478, 174, 313; 2 Day 387; 5 Munf. 556; 1 Wms. *Saund. 291; vol. 4, 207, n. 2; 91, note 4; 1 H. Bl. 108; 1 Bos. & Pul. 670; 1 Chitty 32, 33, 546. If a judgment could not be obtained against four obligors, on a bond given by five, in a suit so instituted, it cannot be obtained by the entry of a *nolle prosequi* against one. 1 Saund. 207; 1 Chit. Pl. 35, 38, 546; *Jaffray* v. *Frebain*, 5 Esp. 47; *Chandler* v. *Parkes*, 3 Ibid. 76. The cases which impugn the doctrine contended for, are *Noke* v. *Ingham*, 1 Wils. 89; 5 Johns. 160. If the parties to a joint and several bond are joined in an action, they never can be separated; and if one is discharged, all are discharged, except in cases of infancy and bankruptcy. 1 H. Bl. 108; 1 Bos. & Pul. 630. The *rationale* of the rule is, that the party having made it a joint contract by his suit, cannot afterwards make it a several contract. 3 Taunt. 307; 4 Ibid. 468.

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The most important inquiry in this case, is, upon the instructions given by the court.

Swann and *Wirt*, Attorney-General, for the defendants.—The instructions first given, sustain the action, and sweep away the defence, taking it entirely from the jury. The words "well and truly" in the condition of the bond, mean only integrity, not capacity (10 Johns. 271); and the instruction given considers the words as requiring skill. The cashier acted according to the instructions of the president and directors, and to the usage of the bank. The instruction given precludes mistake, and denies that it constitutes a defence.

The demurrers to the first and second pleas, were not on the ground of an admission of the facts, but the pleas were considered invalid. It was not obligatory on the bank, that the capital should be $500,000, as the expression that it "may" consist of $500,000, authorizes it to be less, if it shall be deemed proper; and even admitting the collusion charged, as to the creation of a false capital, to the amount of $180,000, the remaining capital of $320,000 was sufficient, under the charter. The pleas are also insufficient, as, although collusion is set up, there is no certainty in the charge or allegation of the persons concerned in it, or the place of the same. The whole purpose of the law is, to limit the amount of trading by the bank; and it is not a fair construction of the act of incorporation, to interpret the terms "may consist" into "must consist." The company went into existence in 1812, and the cashier was appointed in 1817, after many successive years of business by the bank, which could not be affected by the proceedings of 1812.

2. The plaintiffs in error are estopped, by having executed this *bond to the bank, from denying the existence of the corporation. [*61
Willes 11, 12; 14 Johns. 238. Where the matter which constitutes the ground of an alleged estoppel is new, it is necessary to state it by plea, but not so, when it is contained in the declaration. 1 Chit. Pl. 575.

The proper mode of contesting the existence of the corporation, would have been by an information, in the nature of a *quo warranto;* and it does not rest with every one dealing with a corporation, to inquire, when called upon to comply with his contract, whether it exists? It was not necessary to set out breaches, until the defendants, the obligors in the bond, had alleged performance, and then the pleas are insufficient; no breaches need be set out. 1 Chit. 598; 1 Saund. 103; Archb. 262; 2 Chit. 481. But if there are any omissions or defects in the pleadings, they are cured by the verdict, according to the laws of Virginia.

The instructions given by the court, upon the replication, and on the evidence, were such as the court were bound to give, and were in strict conformity to the facts; and if the court refused to give the instructions asked for by the plaintiffs in error, they did so upon the authority of the by-laws of the bank, and the orders of the board of directors relative to the duties of the officers of the bank. Because the custom and practice might have been to overdraw the bank, and for its officers to abuse their trust, was this custom to excuse the conduct of the cashier?

As to the effect of the *nolle prosequi*, all the cases referred to by the plaintiffs in error, are cases of joint contract, and where the trial was joint. But in this, the four sureties severed from the principal, and, on their own choice, went to trial alone, upon pleas put in separate from the principal. The verdict has been given against the plaintiffs in error, on a trial of their own selection; and they suffered judgment to be entered against them, without any objection, before the principal in the bond had appeared and pleaded. The entry of a *nolle prosequi*, does not admit that the plaintiff had no cause of action, it is not a *retraxit* or a release, and does not preclude the commencement of another suit. 1 Wms. Saund. 207; Arch. Pract. 87; 1 Saund. 291; 2 Maule & Selwyn 444; 1 Wils. 89; 5 Johns. 160.

Although the law is well stated to be, that a suit on a joint and several bond must be brought against all, or against one, and that you cannot sue four, when there are five joint obligors, yet the objection must be taken by plea in abatement; and if there is no such plea, and judgment, the consent of the defendants will be inferred. The following cases were also cited *in the argument: *Walsh* v. *Bishop*, Cro. Car. 239; Ibid. 243; [*62
Carth. 98.

Story, Justice, delivered the opinion of the court.—This is a writ of error to the circuit court of the district of Columbia, sitting at Alexandria. The plaintiffs in error were the original defendants in the cause, and the suit is now before this court, upon the judgment of the court below, upon certain pleas of the defendants, to which there was a demurrer, and also, upon the instructions given and refused by the court, upon the trial of certain issues of fact, joined by the parties.

The action is debt upon an official bond, given by Philip H. Minor, cashier of the bank, and by four other persons, as his sureties, upon condition, that Minor "shall well and truly execute the duties of cashier" of the bank; and was originally brought against all the parties to the bond. The declaration proceeds for the penalty of the bond, without any notice of the condition, and avers, by way of breach, the non-payment of the penalty. The sureties, after *oyer* of the bond and condition (which thereby became part of the declaration), severed themselves from the principal, and pleaded nine several pleas. To the first two of these pleas, demurrers were put in; and the court below, upon consideration, gave judgment upon the demurrers in favor of the bank; and the correctness of this decision constitutes the first subject of inquiry.

Exceptions have been taken both to the matter and the form of these pleas; and if the matter of them, or either of them, might constitute a good bar to the action, it may then be necessary to consider, whether that matter is pleaded with due propriety and certainty, according to the established rules of pleading, so as to escape objection upon the general demurrer. Both of them are, in effect, though not in form, special pleas of *nul tiel corporation*. The first plea, in substance, avers, that, by the charter granted by the act of congress, of the 16th of May 1812, ch. 87, the capital stock of the bank was, by the charter, fixed and limited, to consist of $500,000 *bonâ fide;* that the whole capital stock was not *bonâ fide* filled up and subscribed for, but on the contrary, by a collusion between the commissioners, under whose direction the subscriptions were taken, and the subscribers, a large portion of the capital stock, to wit, 18,000 shares, amounting to $180,000, were filled up, by false and colorable subscriptions; the ostensible subscribers, after payment of the first instalments, were fraudulently permitted to withdraw the same; and future payments by them were dispensed with, while they were still rated and held out as stockholders, for
*63] the purpose of *colorably filling up the subscription of the whole capital stock, and electing a board of directors; and that, in this manner, and by these means, and by no other, the bank was put into operation. This plea is meant to rest upon two grounds, to sustain its legal propriety. First, that the subscription of the whole capital stock of $500,000, was a condition precedent to the putting of the bank into operation as a corporation. Secondly, that the collusion between the commissioners and the subscribers, for the 18,000 shares, being fraudulent, made their subscriptions a mere nullity.

Various answers have been given at the bar, to the legal sufficiency of the matters thus pleaded. In the first place, it is said, that the defendants are estopped, by the bond, to deny the legal existence of the corporation; in the next place, that the charter does not make the subscription of the whole capital stock, a condition precedent to the establishment of the bank; in the next place, that the question, whether the bank was regularly, and *bonâ fide*, put into operation, is matter not inquirable into, in a suit of this nature, but only upon a *quo warranto*, instituted by the government; and in the last place, that the whole stock being, in fact, subscribed, the fraudulent intention and acts of the parties, did not make the subscription of the 18,000 shares a nullity. Let us, then, consider what is the true construction of the charter itself, upon the points raised at the argument, supposing it to

have been (which in terms it is not) incorporated into the plea, and therefore, judicially before us. The first section of the act of the 16th of May 1812, ch. 87, provides, "that the subscribers to the Mechanics' Bank of Alexandria, their successors and assigns, shall be, and hereby are created, and made a body politic, by the name and style of the Mechanics' Bank of Alexandria; and by such name and style, shall be, and are hereby made able and capable in law, to have, purchase, &c., lands, &c., and the same to sell, &c., to sue and be sued, &c.; subject to the rules, regulations, restrictions, limitations and provisions, hereinafter prescribed and declared." In this section, there is no limitation as to the number of the subscribers necessary to constitute the corporation. The subscribers, whether many or few, are declared to be incorporated; and unless there be some restriction or limitation elsewhere in the act, it is most manifest, that the court cannot intend that any particular amount of subscriptions is indispensable.

The second section provides, "that the capital stock of said corporation, *may* consist of $500,000, divided into shares of $10 each, and *shall* be paid in the following manner, *that is to say: one dollar on each share, at the time of subscribing, one dollar on each share, at sixty days, and one dollar on each share, ninety days after the time of subscribing; the remainder to be called for, as the president and directors may deem proper; provided they do not call for any payment in less than thirty days, nor for more than one dollar on each share, at any one time." The argument of the defendants is, that "may," in this section, means "must;" and reliance is placed upon a well-known rule in the construction of public statutes, where the word "may," is often construed as imperative. Without question, such a construction is proper, in all cases where the legislature mean to impose a positive and absolute duty, and not merely to give a discretionary power. But no general rule can be laid down upon this subject, further than that that exposition ought to be adopted in this, as in other cases, which carries into effect the true intent and object of the legislature in the enactment. The ordinary meaning of the language must be presumed to be intended, unless it would manifestly defeat the object of the provisions. Now, we cannot say, that there is any leading object in this charter, which will be defeated by construing the word "may" in its common sense, as importing a power to extend the capital stock to $500,000, and not an obligation, that it shall be that sum and none other. It is by no means clear, from this section, that the legislature contemplated that there should be a capital of $500,000, on which the bank was to commence, or carry on its operations. On the contrary, three instalments only are required to be absolutely paid in, and the residue of the capital stock is to be paid in, only when the president and directors may deem it proper. So that the capital stock, except at the discretion of the board, may never extend beyond the amount of $150,000, for any practical purposes, either as security to the public, or as the basis of discounts. Now, the plea itself does not attempt to deny that all but 18,000 shares of the stock were, *bonâ fide*, subscribed for; so that, for aught that appears, the capital stock, on which the bank carried on its operations, may have far exceeded that sum. It has been urged, that public policy requires such an imperative construction of the clause, for the public security. But it is a sufficient answer to that suggestion, that no such public policy is avowed, or can be inferred, from the general terms of the act. When the legislature [*64

intends to restrict the capital stock of a bank, or to require any portion of stock or stockholders to be indispensable for its legal existence and operations, it is not uncommon to incorporate such a restriction into the charter. The omission to do so, is quite as *significant, that the legislature did not deem such a restriction subservient to any manifest public policy. The legislature might well presume, after prescribing the maximum to which the capital stock should extend, that the actual capital to be employed might safely be left to the discretion of the stockholders, or its agents. The 13th section of the charter contains provisions for the security of the public against over-issues by the bank, and if any such restriction had been intended, as the argument supposes, it would naturally there have found a place. It declares, that no stockholder shall be answerable for any losses, deficiencies or failure of the capital stock, for any larger sum than the amount of the stock belonging to him ; excepting, that if the total amount of the debt of the bank shall exceed twice the amount of its capital stock, over and above deposits, then the directors shall, in their private capacities, be liable for the excess ; and if the directors shall not have property to pay the amount of excess, then every stockholder shall be liable for their deficiencies, in proportion to their shares in the bank. Whether, therefore, the capital stock be great or small, if there be debts due from the bank, exceeding twice the amount of the capital stock ; which may fairly be construed to mean the capital stock actually paid in ; the stockholders become ultimately liable for the excess ; and this liability furnishes, if not an ample, at least a reasonable security against the public evils, which the argument supposes might result from not requiring the whole capital to be subscribed for. At all events, we cannot perceive any clear legislative intention to make the subscription of the whole capital stock, a condition precedent to the corporate existence of the bank, and unless it is so made by the charter, the matter of the plea falls, and cannot sustain the defence.

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If, however, this interpretation of the charter could not be supported, and the subscription of the whole capital stock were a condition precedent, the result, so far as the first plea goes, would not be varied. The fraud and collusion asserted in that plea, if admitted in its fullest manner, does not lead to the conclusion which it seeks to establish. If the subscription were fraudulently made, with a view to evade the provisions of the charter, the law will hold the parties bound by their subscriptions, and compellable to comply with all the terms and responsibilities imposed upon them, in the same manner as if they were *bonâ fide* subscribers. It will not make the subscription itself a nullity, but it will deprive the subscribers of the power of availing themselves of the same. The third section of the act manifestly contemplates cases of fraudulent subscription, and provides, "that all the subscriptions and shares obtained in consequence thereof, shall be *deemed and held to be for the sole and exclusive use and benefit of the persons subscribing, or in whose behalf the subscriptions respectively shall be declared to be made, at the time of making the same ; and all bargains, contracts, promises, agreements and engagements, in any wise contravening this provision, shall be void ; and the person, &c., subscribing, &c., shall have, enjoy and receive the share or shares respectively, &c., and all the interest and emoluments thence arising, as freely, fully and absolutely, as if they had severally and respectively paid the consideration therefor ;

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any such bargain, &c., to the contrary notwithstanding." This section seems to us conclusive upon the point. It avoids all bargains contravening the provisions in respect to subscriptions, and gives to the subscriptions the same effect as if they were *bona fide* made for the real use and benefit of the subscribers; and independently of this provision, it would be extremely difficult to maintain, upon general principles of law, that a private fraud, between the original subscribers and commissioners, could be permitted to be set up, to the injury of subsequent purchasers of the stock, who became *bonâ fide* holders, without any participation or notice of the fraud. For these reasons, we are of opinion, that the matter of the first plea, even if it had been well pleaded, would constitute no bar to the action.

The second plea is disposed of, by the construction of the charter already intimated, and is further open to fatal objections, from its deficiency of proper averments, and want of legal certainty. It makes no averment of the amount of the capital stock, or of the necessity of the whole being subscribed for, before the bank is to be put in operation. It asserts no fraudulent combination or subscription; but in the most general terms, without any certainty as to facts and circumstances, alleges, that the capital stock was not filled up by any subscription, opened and conducted in pursuance of the act, so as to entitle the subscribers to bring the action; and that the subscribers did, unjustly and unlawfully, arrogate to themselves the corporate name, style and privileges, without the capital stock having been filled up by subscription, or the corporation having been constituted and composed of actual subscribers, pursuant to the direction of the act. In point of substance, as well as form, it is bad, upon the established rules of pleading. This view of the case renders it wholly unnecessary to consider the point made as to the estoppel, and the necessity of a *quo warranto;* on which, therefore, we give no opinion.

The third and fourth pleas are intended to be pleas of general performance. The third is so, in fact, and pursues the *condition of the bond. [*67
The fourth is argumentative, and assumes a particular legal interpretation of the condition, that is to say, that the condition covers only wilful defaults, and breaches of duty, and is no security for competent skill and reasonable diligence in the discharge of duty, but only for honesty. To these pleas, special replications were filed, assigning special breaches of duty, upon which the parties were at issue, and upon this, and all the other issues in the cause, the jury returned a verdict for the plaintiffs. No exception has been taken to the sufficiency of these replications.

The fifth plea states a general performance of duty, in obedience to, and in pursuance of, the "directions, rules, orders, usages and customs of trade and business, ordained, established and practised in the said bank, by the authority of the said president and directors." It is, therefore, argumentative, and supposes that compliance with the rules, orders, usages, &c., established and practised by the president and directors, whatever they may be, whether within the scope of their power or not, would be a good and true discharge of duty. To this plea, a general replication was put in, "that the said cause of action, in the declaration mentioned, did accrue, as in the said declaration and breaches are set forth, without this, that the matters set forth in the said plea, are true," and this the plaintiffs pray may be inquired of by the country; and the defendants joined in the issue; upon

which a verdict was found in favor of the plaintiffs. An exception has been taken at the argument to this replication, upon the ground, that it ought to have assigned a special breach, and that the omission is not cured by the verdict. There is no question that the replication is not drawn with technical accuracy and correctness; and if the plea be a good plea of general performance, it is clear, both upon principle and authority, that a special breach ought to have been assigned in the replication; and the objection, if insisted upon by way of demurrer, for that cause, would have been insuperable. The reason is, that the law requires every issue to be founded upon some certain point; that the parties may come prepared with their evidence, and not be taken by surprise, and the jury may not be misled by the introduction of various matters. A covenant or condition for general performance is broken, by any single omission of duty, and no inconvenience can arise from stating the particular breach with suitable certainty. But it does not follow, that if not so stated, the objection may be taken in any stage of the suit. The rule as to certainty in pleadings, is framed for the benefit of the parties, and may be waived by them, and in many cases, both at common law, and by the statute of *jeofails*, defects in this particular are cured by a verdict. It is true, that in *a declaration upon a covenant for general performance of duty, if no breach be assigned, or a breach which is bad, as not being in point of law within the scope of the covenant, the defect is fatal, even after verdict. Com. Dig. Plead. p. 14. But that is not the present case. Here, the declaration does assign a good breach, by the non-payment of the penal sum stated in the bond. The defendants disclose the condition of the bond upon *oyer*, and set up a general performance of it; and the replication, though inartificially drawn, puts in issue the whole matter of the defence, and denies the performance of it. The verdict has found that the condition was not performed, and consequently, upon the whole record, the non-payment of the penal sum is admitted, and the excuse for it is negatived; the replication, then, does assert a breach, though in too general a form. It ought to have assigned a special breach; but the general breach includes it, and the verdict having found the general breach, there is, upon principle, no reason shown against the plaintiff's right of recovery. It is exactly like the case of a declaration upon a general covenant of the like nature, where a particular breach ought to be assigned; and yet, if a general breach be assigned, the defect is cured, by a verdict for the plaintiff. Com. Dig. Plead. 48. The objection, then, to the replication to the fifth plea, cannot now be sustained.

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It is not necessary to notice the remaining pleas, upon which issues were joined, because a verdict has been found in all of them in favor of the plaintiffs, however liable to objection some of them may be, and particularly the seventh plea of *non damnificatus*, as an answer to the declaration. They set up special defences, and the plaintiffs were not bound to do more than traverse them.

The instructions of the court, given and refused at the trial, constitute the next subject of inquiry. It is conceded, that if the instructions given on the prayer of the plaintiffs were correct, as to the issues on the third and fourth pleas, the qualifications annexed to them by the court, in their applications to the other issues, were perfectly proper. The first instruction is, in substance, that if Minor, upon his leaving the bank, failed to pay over or

to account to the bank for any portion of the moneys of the bank, received by him as cashier, then the jury may, and ought to infer that the moneys so unaccounted for, were wilfully wasted by Minor, or applied to his own use; and under such circumstances, the defendants are liable for the same. We can perceive no error in this instruction; the presumption of a wilful waste or misapplication of the funds of the bank by the cashier, was a natural conclusion, from his failure to pay over *or account for the same. It was not put to the jury as a presumption incapable of being rebutted [*69 by evidence showing a loss by negligence or accident. If such a loss actually occurred, it was incumbent on the cashier to prove it, and his total omission to offer any such proof, which, from the nature of the case, must be more within his own power, than that of the bank, ought to lead the jury to the presumption of the non-existence of any such negligence, or accidental loss. It has been argued, that this instruction is the more material and injurious to the defendants, because it proceeds, in the latter part, upon a misconstruction of the true import of the condition of the bond. The condition, that Minor shall "well and truly execute the duties of cashier" of the bank, is said to be merely a stipulation for honesty, in the discharge of the duties, and not for skill, capacity or diligence. We are of a different opinion. "Well and truly to execute the duties of the office," includes not only honesty, but reasonable skill and diligence. If the duties are performed negligently and unskilfully—if they are violated, from want of capacity or want of care—they can never be said to be "well and truly executed." The operations of a bank require diligence, with fitness and capacity, as well as honesty, in its cashier; and the security for the faithful discharge of his duties, would be utterly illusory, if we were to narrow down its import, to a guarantee against personal fraud only.

The remarks already made, dispose of the second and third instructions prayed for by the plaintiffs. These instructions, in substance, declare, that the sureties are liable upon the bond, for any wilful or permissive misapplication of the moneys of the bank, which the cashier knowingly made, or suffered, without authority, whereby the same moneys have been lost to the bank. There seems no ground, upon which to rest any reasonable objection to such a direction to the jury.

We may now proceed to the consideration of the three instructions prayed for, in behalf of the defendants. The first is, in substance, that if it were the established usage and practice of the bank, that the cashier might, in his discretion, permit customers to overdraw, and to have checks and notes charged up, without present funds in the bank; and for the cashier to receive and pass, as cash, checks and drafts upon other banks; and if the balances appearing against such persons charged in the books of the bank, arose out of the exercise of such discretion by the cashier, in the course of the ordinary transactions of the bank, and pursuant to the established usage and course of business there adopted, and generally known to the president and directors, practised and continued with their knowledge, for a series of years, from the commencement of the bank, to the the termination *of Minor's cashiership, though the existence of such balances, or the [*70 particular circumstances attending them, were not formally communicated to the board of directors; the jury may infer the approbation, assent and acquiescence of the president and directors, as to such usage and course of

business. The refusal of this instruction, is matter of no small embarrassment and difficulty to this court, from the terms in which it is couched, and the issues on the sixth, eight and ninth pleas, to which alone it can be properly applied. Those issues put to the jury the question, whether the acts of the cashier, whatever might be their character or kind, were, or were not, done by the wrong, connivance and permission of the president and directors of the bank. The point of the instruction is, that the established usage and practice of the bank, for a long period, known to the president and directors, does afford a presumption of the approbation, assent and acquiescence of the president and directors, as to such usage and practice; though the balances resulting therefrom, were not formally communicated to the directors. From the shape of the prayer, it is undoubtedly meant, that such usage and practice was known to the president and directors, as a board, and in their official character, and received their approbation as such. In a general view, with reference to the principles of the law of evidence, we are not prepared to admit, that such a presumption would not ordinarily arise. The ordinary usage and practice of a bank, in the absence of counter-proof, must be supposed to result from the regulations prescribed by the board of directors; to whom, the charter and by-laws submit the general management of the bank, and the control and direction of its officers. It would be not only inconvenient, but perilous, for the customers, or any other persons dealing with the bank, to transact their business with the officers, upon any other presumption. The officers of the bank are held out to the public as having authority to act, according to the general usage, practice and course of their business; and their acts, within the scope of such usage, practice and course of business, would, in general, bind the bank, in favor of third persons possessing no other knowledge. In the case of the *Bank of the United States* v. *Dandridge*, 12 Wheat. 64, the subject was under the consideration of this court; and circumstances, far less cogent than the present, to found a presumption of the official acts of the board, were yet deemed sufficient to justify their being laid before the jury, to raise such a presumption. If, therefore, the usage and practice alluded to, in the instruction, were within the legitimate authority of the board, and such as its written vote might justify, there would be no question, in this court, that it ought to have been given.

*71] *The pertinency of such a presumption, to these issues, cannot admit of dispute. But the real difficulty remains to be stated. Assuming, that the court, upon these issues, ought to have given the instruction prayed for, the question is, whether, upon the whole record, that is such an error as now justifies this court in a reversal of the judgment. If the instruction had been given, and thereupon, a verdict upon these issues had been found for the defendants, could any judgment have been given upon these issues, in favor of the defendants; or ought the judgment, *non obstante veredicto*, to have been for the plaintiffs? If it ought, then the error becomes wholly immaterial; since, in no event, could the instruction, in point of law, have benefited the defendants. Upon deliberate consideration, we are of opinion, that the pleas, on which these issues are founded, are substantially bad. They set up a defence for the cashier, that his omission "well and truly to perform" the duties of cashier, was, by the wrong, connivance and permission of the board of directors. The question then

comes to this, whether any act or vote of the board of directors, in violation of their own duties, and in fraud of the rights and interest of the stockholders of the bank, could amount to a justification of the cashier, who was a *particeps criminis*. We are of opinion, that it could not. However broad and general the powers of the directors may be, for the government and management of the concerns of the bank, by the general language of the charter and by-laws, those powers are not unlimited, but must receive a rational exposition. It cannot be pretended, that the board could, by a vote, authorize the cashier to plunder the funds of the bank, or to cheat the stockholders of their interest therein. No vote could authorize the directors to divide among themselves the capital stock, or justify the officers of the bank in an avowed embezzlement of its funds. The cases put are strong, but they demonstrate the principle only in a more forcible manner. Every act of fraud, every known departure from duty, by the board, in connivance with the cashier, for the plain purpose of sacrificing the interests of the stockholders, though less reprehensible in morals, or less pernicious in its effects, than the cases supposed, would still be an excess of power, from its illegality, and, as such, void, as an authority to protect the cashier, in his wrongful compliance. Now, the very form of these pleas, sets up the wrong and connivance of the board as a justification ; and such wrong and connivance cannot, for a moment, be admitted as an excuse for the misapplication of the funds of the bank, by the cashier.

The instruction prayed for, proceeds upon the same principle, as the pleas. It supposes, that the usage and practice of *the cashier, under the sanction of the board, would justify a known misapplication of [*72 the funds of the bank. What is that usage and practice, as put in the case? It is a usage to allow customers to overdraw, and to have their checks and notes charged up, without present funds in the bank—stripped of all technical disguise, the usage and practice, thus attempted to be sanctioned, is a usage and practice to misapply the funds of the bank ; and to connive at the withdrawal of the same, without any security, in favor of certain privileged persons. Such a usage and practice is surely a manifest departure from the duty, both of the directors and the cashier, as cannot receive any countenance in a court of justice. It could not be supported by any vote of the directors, however formal ; and therefore, whenever done by the cashier, is at his own peril, and upon the responsibility of himself and his sureties. It is anything but "well and truly executing his duties, as cashier." This view of the matter disposes of this embarrassing point, and also of the second instruction prayed for by the defendants ; which substantially turns upon the like considerations.

The third instruction prayed for, in effect, was, that the court would instruct the jury, that the defendants are not chargeable in this action for the conduct of Minor, in the duties distinctly appertaining to the office of teller, whilst he was cashier in the bank, although those duties were duly assigned to him ; because it constituted a distinct office, and the accounts and proceedings of the teller, were at all times kept distinct, and in separate books, from those of the cashier. In our judgment, this instruction was properly refused. By the fifth article of the second section of the by-laws of the bank, the duties of the cashier are generally pointed out ; and among other things, it is provided, that he shall "do and perform all other duties

that may, from time to time, be required of him by the president or board of directors, relative to the affairs of the institution." On the appointment of Minor as cashier, who had previously acted as teller, the directors passed a vote, "that the present officers of the bank, do the whole duties of the bank." From the other circumstances of the case, the inference is irresistible, that the duties of teller were, under this vote, assigned to the cashier. If so, then, the performance of these duties constituted thenceforth a part of the duties of the cashier, as such ; and as much so, as if they had been originally affixed to the office of cashier. There is nothing in the nature of the duties of teller, incompatible with those of cashier ; on the contrary, as is well known, cashiers often perform the functions of both. The circumstance, that the office of teller, and distinct accounts and books, were still kept up,

*73] does *not vary the legal result. It was a matter of mere convenience and regularity, for the government of the bank, in its own business; and probably, had no higher or other origin, than to preserve the same forms and series of accounts, which the bank had adopted at its first institution. The office of teller had a nominal, but not a real, existence ; and from the time of the union of the duties in the cashier, as such, there was a legal extinguishment of the separate official character. If the cashier had originally had the duties of book-keeper and accountant assigned to him, and in consequence thereof, had kept distinct account-books in the bank, no one would have imagined, because he kept separate account-books, as cashier, for his own convenience, or, according to the ordinary usage of banks, that he would not, under his bond, have been responsible for malconduct, in keeping the general account-books of the bank, to its loss or injury. The bond of the cashier must be construed to cover all defaults in duty, which are annexed to the office, from time to time, by those who are authorized to control the affairs of the bank ; and sureties are presumed to enter into the contract, with reference to the rights and authorities of the president and directors, under the charter and by-laws.

The remaining inquiry is, as to the effect of the *nolle prosequi*, which the plaintiffs entered against Minor, after he had pleaded, and after judgment was given against the sureties, in favor of the plaintiffs, upon all the pleadings interposed by the sureties. The pleas of Minor were, *mutatis mutandis*, the same as the third, fourth, fifth, seventh and ninth pleas, put in by the sureties ; and the question arises, whether under such circumstances (no objection to the judgment appearing to have been made by the sureties), this proceeding is an error, for which that judgment ought to be reversed. It is material to state, that the bond on which the suit is brought is a joint and several bond. Under such circumstances, the plaintiff might have commenced suit against each of the obligors, severally, or a joint suit against them all. But in strictness of law, he has no right to commence a suit against any intermediate number ; he must sue all, or one. The objection, however, is not fatal to the merits, but is pleadable in abatement only; and if not so pleaded, it is waived, by pleading to the merits. The reason is, that the obligation is still the deed of all the obligors who are sued, though not solely their deed ; and therefore, there is no variance in point of law, between the deed declared on, and that proved. It is still the joint deed of the parties sued, although others have joined in it. This doctrine is laid down, and very clearly illustrated, in Mr. Serjeant Williams's note

to the case of *Cabell* v. *Vaughan* (1 Saund. *291, note 2), where all the leading authorities are collected. If, therefore, the present suit had been brought against the four sureties only, and they had omitted to take the exception, by a plea in abatement, the judgment in this case would have been unimpeachable. Is the legal predicament of the plaintiffs changed, by having sued all the parties, and subsequently, entered a *nolle prosequi*, against one of the obligors? If not, in general, then, is there any legal difference, where the party in whose favor the *nolle prosequi* is entered, is not a surety, but a principal in the bond? not indeed, so named in the bond, but the suretyship resulting as a necessary inference from the nature and terms of the condition.

These questions must be decided by authority, if any such exist; if none can be found, then, they must be decided by analogy and principle. It may be proper, in this view, again to notice the fact, that this suit is on a joint and several bond; that the defendants severed in their pleas from the principal; that the trial of the issues (which undoubtedly ought to have been, by the regular course of practice, deferred, until the cause was at issue as to all the parties, or the steps of the law taken to bring them into default) does not appear upon the record to have been opposed, and that no motion was made in arrest of judgment, or for a postponement, until a trial of the issues upon the pleas of the principal might have been had. What would have been the proper proceedings, under such circumstances, whether to try all the issues by the same jury, and have damages assessed at the same time against all the defendants; or whether there might have been several trials, and several assessments of damages; and whether, if such several assessments had been made, and differed in amount, any, and what judgment, ought to have been entered; are points upon which the court does not think it necessary to give any opinion.

The nature and effect of a *nolle prosequi* was not well defined or understood, in early times; and the older authorities involve contradictory conclusions. In some cases, it was considered in the nature of a *retraxit*, operating as a full release and discharge of the action, and, of course, as a bar to any future suit. In other cases, it was held not to amount to a *retraxit*, but simply to an agreement not to proceed further in that suit, as to the particular person, or cause of action, to which it was applied. And this latter doctrine has been constantly adhered to, in modern times, and constitutes the received law. In cases of tort against several defendants, though they all join in the same plea, and are found jointly guilty, yet the plaintiff may, after verdict, enter a *nolle prosequi*, as to some of them, and take judgment against the rest. The reason is said to be, that the *action is in its nature joint and several; and as the plaintiff might originally [*75 have commenced his suit against one only, and proceeded to judgment and execution against him alone, so he might, after the verdict against several, elect to take his damages against either of them: *à fortiori*, the same doctrine applies where the defendants sever in their pleas. Indeed, in tort, as we shall hereafter see, it does not seem to have been denied, that cases might exist, in which, if the defendants severed in their pleas, the plaintiff might, after judgment against one, have entered a *nolle prosequi* as to the others. The doubt was, whether he could do so, before judgment, which was finally settled in favor of the right, and in such cases, where several

damages were assessed against the different defendants, the difficulty was afterwards cured, by entering a *nolle prosequi* as to all but one defendant. And in the same manner, a misjoinder of improper parties is sometimes aided. The authorities on this subject, will be found summed up with great accuracy, in a note of Mr. Sergeant Williams, to the case of *Salmon* v. *Smith*, 1 Saund. 207, note 2. In the same note, the learned editor adds, "If an action is brought upon any contract, against several defendants, who join in their pleas, and a verdict is found against them, it is apprehended, the plaintiff cannot enter a *nolle prosequi* against any of them; because the contract being joint, the plaintiff is compellable to bring his action against all the parties thereto; and he shall not, by entering a *nolle prosequi*, prevent the defendants against whom the recovery has been had, from calling upon the other defendants for a ratable contribution."

So far as this reason goes, it is inapplicable to the present case; for the defendants are entitled not only to a ratable, but a full, contribution over, for the entire sum, against the party in whose favor the *nolle prosequi* has been entered; and consequently, the *nolle prosequi* does not touch their rights. It is observable also, that the language is qualified by the words "*who join in their pleas*," which are printed in italics, and may, therefore, fairly be presumed to have been inserted, by the learned editor, *ex industriâ*, with a view to point out an implied distinction between cases, where there is a severance, and where there is a joinder in the pleas. If there be any such distinction, it is favorable to the present case; for the sureties severed in their pleas from their principal. The learned editor proceeds to state, that "If, in such actions, the defendants sever in their pleas, as, where one pleads some plea which goes to his personal discharge, such as bankruptcy, *ne unques executor*, and the like, not to the action of the writ, the plaintiff may enter a *nolle prosequi* as to him, and proceed against the others; for, with respect to the bankruptcy, the statute of 10 Ann., c. 5, makes the *other defendant, who is not a bankrupt, liable for the whole debt; and therefore, in that particular instance, the case is exactly the same, as where an action is joint and several. So, the plea of *ne unques executor*, does not deny the cause of action; but only that he is one of the representatives of the testator. When the defendants sever in their pleas, with this limitation as to the extent of the pleas, in action upon contracts, it is immaterial what is the form of the action; for the plaintiff may enter a *nolle prosequi* against any of them, before verdict, and proceed against the rest."

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The learned editor is fully borne out, in the general position here stated, by the case of *Noke* v. *Ingham*, 1 Wils. 89, to which he refers. The only question is, whether there is any such qualification upon it, as that the plea should be one going exclusively in personal discharge, and not to the merits? That is the point of real difficulty. The case in 1 Wils. 89, was upon several promises made by the defendants, as partners. One of them pleaded a former judgment; and issue being taken upon the replication of *nul tiel record*, judgment was given against him, and a writ of inquiry of damages awarded, and final judgment. The other defendant pleaded his bankruptcy, and upon this, issue was joined; and afterwards, the plaintiff entered a *nolle prosequi* as to him. Upon error brought, the principal objection was, that the *nolle prosequi*, upon a joint contract of two, was a discharge of both.

Mr. Chief Justice LEE said, "it is agreed, on all hands, that in trespass against several, the plaintiff may enter a *nolle prosequi*, as to one, and that will not discharge the other; and therefore, I cannot see, why it may no be done in this case; and I do not see, how so proper an advantage can be taken upon the statute of Anne, as to the bankrupt, as is now taken by the entry of this *nolle prosequi*." WRIGHT, Justice, was of the same opinion, and so was DENISON, Justice; and the latter added, that "the plea of the bankrupt is not a plea to the action, but only a personal discharge; but that if one defendant was to plead a plea that was to go to the action of the writ, he thought it might then have a different consideration, but that this is not the case here. This case is exactly the same, as when an action is joint and several; for the statute 10 Ann., c. 15, has made the partner, not a bankrupt, liable for the whole. This case is the very same, as to this matter of entering a *nolle prosequi*, as if it had been trespass against several defendants."

It is apparent, from this summary of the reasoning of the court, that the case turned upon the consideration, that the contract, by the operation of the statute of Anne, was several as well as joint; and all the court concurred, that under such circumstances, the *nolle prosequi* would be good, being governed, *in the analogy, to trespass, where the cause of action was several as well as joint. What was stated by DENISON, Justice, was [*77 not the exclusive ground of his particular opinion, but on a suggestion, that the case might be (not would be) different, upon a plea to the merits. Now, the general reasoning comes very close to the case at bar; for here the bond is several, as well as joint, and an action might have been maintained severally against the defendants; and what is not immaterial to be considered, all the parties were retained, who had joined in their pleas, and between whom there existed a right of mutual contribution. Even in the case of bankruptcy, the practice is in England, to require all the joint contractors to be sued, as is proved by the case of *Bevil* v. *Wood*, 2 Maule & Selw. 23, which makes it really less strong than a joint and several contract.

The case of *Moravia and another* v. *Hunter & Glass*, 2 Maule & Selw. 444, which has been relied on at the bar, was *assumpsit* against four defendants, two of whom were not served; D., one the other defendants, pleaded: 1. *Non assumpsit:* 2. A special plea of bankruptcy: 3. A general plea of bankruptcy; as to whom the plaintiff entered a *nolle prosequi*. The other defendant pleaded *non assumpsit*, and a verdict was found against him. The form of the *nolle prosequi* was, that the plaintiffs, inasmuch as they "cannot deny the several matters above pleaded by the said D., freely here in court confess, that they will not further prosecute their suit against him." It was moved, in arrest of judgment, that the *nolle prosequi*, so entered, had confessed the *non assumpsit*, as well as the other pleas; and therefore, the other defendant was also discharged, and the distinction of DENISON, J., in *Noke* v. *Ingham*, 1 Wils. 89, was relied on. But the court held, that the *nolle prosequi* was, in effect, only a confession, that as far so regards D., he had a defence in the matters pleaded by him. This case does not, in terms, overrule the distinction; but it does establish, that the court upheld the *nolle prosequi*, notwithstanding the pleadings did set up a plea to the merits, and not merely a personal discharge. The contract does not appear to have been joint and several; and to have arrived at its conclusion, the court must have considered, that the confession of the plaintiffs, that they could not

deny the several matters above pleaded, ought not to be deemed an admission of the truth of the pleas, except so far as to waive further proceedings in the suit, against the party who sets them up as a defence. This conforms to the definition given in the book, of a *nolle prosequi*: "It is," as Serjeant Williams states, 1 Saund. 207, note 2, "a partial forbearance by the plaintiff to proceed *any further as to some of the defendants, or to part of the suit, but still he is at liberty to go on as to the rest." *78]

These are the only cases in England, which the researches of counsel have brought to our notice, bearing directly on the point before the court; and upon looking into the elementary treatises and books of practice, we have not been able to find any more general doctrine. Indeed, the latter confine themselves exclusively to the enunciation of the principles above stated, with the qualifications annexed to them in these authorities. (See 1 Chit. Pl. 32, 33, 546; Com. Dig. Pleader, X. 2, 3, 5; 2 Tidd's Pract. 630; 2 Arch. Pract. 219, 220; 2 Lilly's Pr. Reg. 280.) In America, the cases have gone a step further. In *Hartness* v. *Thompson*, 5 Johns. 160, where an action was brought against three, upon a joint and several promissory note, and there was a joint plea of *non assumpsit*, and the infancy of the defendants was set up at the trial; it was held no ground for a nonsuit; but the plaintiff, upon a verdict found in his favor against the other two defendants, might enter a *nolle prosequi* as to the infant, and take judgment upon the verdict against the others. In *Woodward* v. *Marshall*, 1 Pick. 500, in the supreme court of Massachusetts, upon a joint contract, and suit against two persons, one of whom pleaded infancy, it was held, that a *nolle prosequi* might be entered as to the infant, and the suit prosecuted against the other defendant. These decisions were admitted to be against the cases of *Chandler* v. *Parke*, 3 Esp. 76, and *Jaffray* v. *Frebain*, 5 Ibid. 47, but the court thought the practice adopted by themselves was most convenient, and therefore, gave it a judicial sanction. These cases were distinguishable from that in 1 Wils. 89, in the fact, that the plea went, not only in personal discharge, but proceeded upon a matter which established an original defect in the joint contract; whereas, the plea of bankruptcy was for matter arising afterwards. The distinction was not thought to be sound. Indeed, the court seem to have considered the question rather as a matter of practice, to be decided upon convenience and policy, than as a matter of principle.

Hitherto, the question has been discussed, as if the *nolle prosequi* had been entered *before*, when in fact it was entered *after* judgment against the defendants. The next inquiry is, whether this creates any substantial difference in the case. In *Lover* v. *Salkeld*, 2 Salk. 455, in trespass against two defendants, and verdict for the plaintiff, one being an infant, the plaintiff took judgment against the other, and entered a *non pros.*, after the judgment against the infants, and took out execution upon the judgment; upon error brought, it was objected, that *a *non pros.* could not be entered after judgment, for the judgment could not vary from the demand of the writ. *79] It was argued on the other side, that *torts* were several, and that a *non pros.* might be entered after, as well as before judgment, and cases to this effect were cited. Lord Holt is reported to have said, that he supposed there were interlocutory judgments, wherein it might well be; but a final judgment differed, for that being once wrong, a subsequent entry would not set it right. The case was however adjourned, and nothing more appears of

it. This case is not very accurately reported, and it may have been, that the judgment was joint, and the *nolle prosequi* afterwards, which would remove the objection to its authority. The circumstance of its being adjourned, shows that the doctrine thrown out by Lord HOLT, was not deliberately considered by him, and was deemed not clear. In truth, it is directly against the case of *Parker* v. *Lawrence*, decided in the Exchequer chamber, and reported in Hobart 70. That was trespass against three; one pleaded not guilty, and the other two, a justification, to which the plaintiff replied, and there was a demurrer to the replication. Pending the demurrer, the issue was tried, and damages and judgment given against him. After judgment, the plaintiff entered a *nolle prosequi* against the other two, and a writ of error was afterwards brought by all three; and it was alleged for error, that the *nolle prosequi* discharged all three. It was agreed by the court (in conformity with the doctrine then prevailing), that if the *nolle prosequi* had been before judgment, it would have discharged the whole action; and so it would, if the judgment had been against them all, and then the plaintiff had entered a *nolle prosequi* against the other two; for a nonsuit, or release, or other discharge of one, discharges the rest. But here the action was at an end as to the one, by the judgment against him, and no judgment was had against the others, so that they were divided from him, and are not subject to the damages found against him. It was adjudged, that he was not discharged, and there was no error. This case is of great authority, having been deliberately decided by a very high court. It is cited as authority, by Chief Baron COMYN, in his digest (Pleader, X. 5), who also cites (Pleader, X. 3) the case in Salkeld, as one in which there was a final judgment against all the defendants. The reason of the thing would seem entirely in favor of the judgment in Hobart, and it stands supported by a much earlier case, in the Year Books. (14 Edw. IV.; Bro. Abr. Trespass, pl. 331.) If the plaintiff may, in any case, recover a judgment against one, on a joint action against two, who sever in their pleadings, it is wholly immaterial to the regularity and effect of that judgment, in what stage of the cause the suit has ceased to be *prosecuted against the other. It is sufficient, that in the event, the judgment is consistent with the general principles of the action. [*80
If a *nolle prosequi* may be entered, after verdict, and before judgment, without discharging the other party, there is no good reason, why it may not be done after judgment, when there has been no proceeding, which binds the plaintiff to consummate a judgment against the party whom he wishes to dismiss. In each case, the judgment upon the whole record is consistent with the writ.

The result of this examination into authorities is, that there is no decision exactly in point to the present case; that there is no distinction between entry of a *nolle prosequi* before, and the entry after judgment, applicable to the present facts. That the authorities, and particularly the American, proceed upon the ground, that the question is matter of practice, to be decided upon considerations of policy and convenience, rather than matter of absolute principle; and that, therefore, this court is left at full liberty to entertain such a decision as its own notions of general convenience, and legal analogies, would lead it to adopt. We are of opinion, that where the defendants sever in their pleadings, a *nolle prosequi* ought to be allowed. It is a practice which violates no rules of pleading, and will generally subserve

the public convenience. In the administration of justice, matter of form, not absolutely subjected to authority, may well yield to the substantial purposes of justice.

JOHNSON, Justice. (*Dissenting.*)—The facts appearing upon the record, from the count, pleas and replications, are these: This action was on a bond given for the faithful discharge of the office of the cashier, by Philip H. Minor. It was joint and several. The defendants craved *oyer* jointly, and pleaded performance, to which plaintiff replied. They afterwards had leave to withdraw the joint pleas; and the four sureties jointly filed various pleas, to which plaintiff replied; and issue being taken, proceeded to trial, and obtained this verdict. After the verdict, the principal to the bond was ruled to plead, and he then filed a variety of pleas, similar in effect to those pleaded by the sureties. The court then gave judgment upon the verdict, and the plaintiff's attorney enters this *nolle prosequi;* and judgment is given for the principal, on the bond, that the plaintiffs take nothing by their bill, but for their false clamor, be in mercy, and that the defendant go thereof, without day, and receive his costs.

It was insisted by the defendants, that, in this state of the pleadings and record, the plaintiffs ought not to have had *judgment below—that there is error, and the judgment should be reversed. What further order this court would be bound to render upon a reversal, it is not material to inquire. I readily assent to the doctrine, that in adjudicating upon questions of practice, a court should have regard to public convenience; but it would be extending this principle to the violation of its own spirit and intent, if carried to the extent of overturning known established rules, both of law and practice. To this extent, it appears to me, the present decision goes; and that this judgment cannot be affirmed, without shaking as well established principles, as adjudged cases; and opening a door to inconveniences, which must soon compel this court to retrace its steps.

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The judgment, as it stands below, is against four out of five joint and several co obligors; and the obligor omitted, or rather who has judgment in his favor, is the cashier, for whose good conduct in office, the other three became bound. Now, this judgment is either a bar to a future suit against the principal, or it is not. If a bar, then the record exhibits the inconsistent case of four being made liable for one, who was not liable himself. And if it is not a bar, then, by possibility, it may be established by the verdict of a future jury, that the co-obligor, for whose misfeasance alone these defendants have had judgment against them, had, in fact, committed no misfeasance. A rule of practice, that may be lead to such consequences, cannot rest upon public convenience.

Nor is it more easy to reconcile it to principle. No authority need be cited, to establish, that wherever judgment ought to have been arrested below, this court is bound to reverse for error. Now, this judgment is against one of the canons of the law of contracts. It was at the option of the plaintiff, whether to treat the bond as a joint or several contract. He has elected to treat it as joint; and must, therefore, abide by the law of joint contracts as to both right and remedy; and, upon these, when under seal, it is an invariable rule, that all must be sued, if all have sealed the instrument, and are in life. It is true, that, in general, the nonjoinder of co-obli-

gors must be pleaded in abatement; but it would be oppressive and inconsistent to apply this rule to a case, in which it was impossible to plead in abatement, and that was precisely this case; since the discharge of the principal from the action, was produced by the act of the plaintiff, after judgment, at a time when it was impossible, by any form of pleadings, for the defendants to avail themselves of this right. But this case comes within an exception to the general rule on the subject of pleas in abatement; since, by the plaintiff's own showing, in his declaration *and replication, all the co-obligors named in the instrument, sealed it, and were in life at the commencement and close of the suit. [*82

This distinction, if it be necessary to cite authority for it, clearly appears from comparing the case of *Rice* v. *Shute*, 5 Burr. 2611, with the case of *Horner* v. *Moor*, noticed in the report of that case. In the one, it was necessary to plead in abatement, because the facts did not appear on record, which were necessary to maintain the defence. In the other, the judgment was arrested, because the facts, of the plaintiff's own showing, made out that he ought not to have judgment, which were—all had sealed the instrument, and all were alive. It cannot be questioned, that in a joint contract by five, where all remain equally bound, all in life, and all within reach of the process—more especially, where they have been all actually arrested—the plaintiff must recover against all or none. This is that case; and yet the plaintiff is allowed here to take judgment against four, and discharge the fifth, the principal, by *nolle prosequi*, after judgment.

It cannot be doubted, that had this *nolle prosequi* been entered before trial, the defendants must have been permitted to plead it, *puis darrien continuance*, and that the plea must have been sustained. And what reason is there, for placing them in a worse situation, by suffering the *nolle prosequi* to be entered after judgment? It is said, they severed in pleading, and suffered the cause to go to trial, without objection. But was it in the power of these defendants, to compel their co-obligors to join them in pleading? or if the plaintiff chose to proceed erroneously to trial, were the defendants under any obligation to arrest him, and set him right? It was his own folly, if he ruled them to trial, or consented to go to trial, or committed any other error, in proceeding to judgment. I have stated it to be not indispensable, in my view of the subject, that the *nolle prosequi* should be a bar in this case to a new suit against the principal. The derangement of the rights and liabilities of the parties, produced by it, appears a sufficient objection both to the principle and practice. For, certainly, it goes to enable a plaintiff to recover, by this device, against parties, who otherwise could have defeated his action by suitably pleading. By a novel practice, as it relates to joint contracts, he is here permitted to evade an important legal principle. But if this *nolle prosequi* can be shown to be a bar to his action against the principal co-obligor, it would seem to be incontestable, that this judgment ought to be reversed. And I am yet to learn, that, in a joint action in contract against several, a *nolle prosequi* as to the whole action, against one, is not a bar as to him. *The cases are very few in the books, in which the effect of a *nolle prosequi*, in such a case, has been tried by the only sufficient test—a plea in bar, to a suit upon the same contract. But so far as they have gone, they maintain the bar. [*83

If a bar, in cases in which the suit is against a single defendant, there

can be no reason assigned why it should not be a bar as against one of the several defendants. And to this point, *Beecher's Case*, reported in 9 Co. 58, Cro. Jac. 211, is direct and positive. That was a suit upon a bond, and the judgment there is nearly in the words of the judgment in this case. On a second action, upon the same contract, this was held to be a bar; and it became necessary to remove the judgment, by a writ of error, for some technical informalities, before this obligee could recover in the original contract. It is true, that Serjeant Williams has said, in his note to 1 Saund. 207 *a*, "that a *nolle prosequi* is now held to be no bar to a future action for the same cause, except in those cases where, from the nature of the action, judgment and execution against one, is a satisfaction of all the damages sustained by the plaintiff." And by reference to the next page of his note, it appears, that he exception here introduced, is intended to embrace actions for torts; and therefore, his rule is intended to apply to actions on contracts. But the authorities he cites are far from bearing him out in his doctrine. The case of *Cooper* v. *Tiffin*, 3 T. R. 511, upon which he relies, decides nothing but a question of costs; and the position, that a *nolle prosequi* is no more than a discontinuance, and the party may sue again, is only an *obiter dictum* in case where the point was not presented. So also, of his other case, in 1 Wils. 89. The facts did not raise the question on the effect of the *nolle prosequi*, as to the defendant who was discharged by it; and the judges, in considering whether the plaintiff could have judgment against some of the joint contractors, where the other was discharged by bankruptcy, expressly decide upon the ground, that he being discharged by law, leaving the other bound for the debt, produced an analogy between that case and the case of a suit in trespass, where one only might be sued separately. But it is said, and so Serjeant Williams asserts, "that the true nature and extent of a *nolle prosequi*, in civil cases, was not accurately defined and ascertained, until modern times."

My own opinion is, from all the investigation I have been able to make, that it was much better understood, in former times, than it is at this day. That if it were now better understood, we should perceive fewer of those
*84] inconsistencies which *are supposed to exist in the decisions on this subject. Thus, Serjeant Williams has mixed up the cases on torts, with those on contracts. in such a manner as could only produce confusion. To sustain the doctrine that a *nolle prosequi*, in an action of debt, is a bar to another suit on the same bond, he quotes *Green* v. *Charnock*, Cro. Eliz. 762, which was trespass *quare clausam fregit*. And for other cases which he says establish the principle "that a *nolle prosequi* is not of the nature of a *retraxit*, or a release; but an agreement only, not to proceed as to some of the defendants, or a part of the suit," without restricting the doctrine to any class of cases, he cites a string of authorities, in every one of which the decisions were in actions of trespass or tort. Yet it cannot be contended, that the use of the *nolle prosequi* in cases of tort, in which the defendants may be joined and disjoined, at the pleasure of the plaintiff, can afford precedent or authority for the use of it, in cases of joint contract; in which, the law, regarding the nature of the contract, and the rights of the parties, imposes on the plaintiff the obligation to sue them jointly.

To me it appears, that there is abundant authority to prove that the *nolle prosequi*, though entered by attorney, with the judgment that defendant

"*eat sine die*," has the effect of a *retraxit*. Lord COKE certainly places them on the same foot, both in his Institutes (1 Inst. 139), and his comment upon *Beecher's Case* (8 Co. 58), and in both instances, he describes the *nolle prosequi* as one of two kinds of *retraxit*, appropriate to different cases, but both producing a bar. And yet in one only is the term *retraxit* introduced into the entry of judgment. (See also 2 Roll. Abr., Nolle Prosequi.) In *Green* v. *Charnock*, Cro. Eliz. 762, they are certainly treated as synonymous and equivalent. That was trespass *quare clausum fregit*, against C. & S.; S. made default, and judgment of *nil dicit* was then taken against him; C. pleaded in bar, plaintiff replied, &c., and judgment on demurrer for plaintiff; a *nolle prosequi* was then entered against S., and writ of inquiry, and judgment against C. And the case proceeds, "thereupon, they brought error, and the error assigned was, because this *nolle prosequi* is against one, when judgment is taken against both; being that a *retraxit* against one is as strong as a release against the one, the which being to one defendant, is a good discharge to both." So again, in the case of *Dennis* v. *Payn*, Cro. Car. 551, P. & P. gave their joint and several bond to D., who sued the one severally, and after plea, entered a *retraxit;* he afterwards brought suit upon the bond, against the other P. who plead the *retraxit* to the first in bar. There was no question made upon its being a bar, either direct *or by estoppel; as to the obligor first sued, it is, in terms admitted. But the bene- [*85
fit of that discharge was claimed by the second P., and on this the judges divided, one maintaining that its effect was that of a release, and the other, that of an estoppel, only to be taken advantage of by him in whose favor it was rendered; and CROKE, who held it to be an estoppel, identifies it with a *nolle prosequi*, by observing that it is "*quasi* an agreement that he will no further prosecute; "*non vult ulterius prosequi*." So that both admit it to be a bar against the one discharged. So, in Hobart 70, and in 2 Keb. 332, p. 31, in the year 1674, *nolle prosequi* and *retraxit* are considered as synonymous. So, in Lilly's Practical Register, 1719, a *nolle prosequi* is defined thus: "that is, that the plaintiff will proceed no further in his action, and may be as well before as after verdict; and is stronger against the plaintiff than a nonsuit, for a nonsuit is a default for non-appearance, but this is a voluntary acknowledgment that he hath no cause of action." (Title Nolle Pros.)

So, Sergeant Salkeld, who comes down to the time of Queen Anne, refers to *Beecher's Case* for the law of *retraxit*, and gives the definition of *retraxit* in the words of the entry of a *nolle prosequi*. (3 Salk. 244.) So, in 4 Wooddes. 87, in the year 1691, it is distinctly asserted, that an entry "of *venit hic in curia, et fatitur hic in curia*, with a judgment that defendant *eat unde sine die*," is equivalent to a *retraxit*. At what period a different idea begun to prevail, I have not been able to discover; certainly, I can find no adjudged case to support it. In the case of *Walsh* v. *Bishop*, in Cro. Car. 239, 243, referred to by Serjeant Williams, as introducing a different doctrine, is directly against him. That was an action of trespass and battery against two; they severed in pleading, and after verdict against both, a *nolle prosequi* was entered against one, and the other moved in arrest of judgment. In that case, it is admitted, in terms, by the court, that as to the one, the *nolle prosequi* was an absolute bar. And by reference to the

same case, in page 239, it will be seen, that the argument rested upon the might of a plaintiff to proceed against one of several defendants in trespass.

If this plaintiff ever had a right to proceed against these four defendants, in originating this suit, I should have felt no doubt. That is the case in trespass, that is the case where one defendant is bankrupt, or an infant, or pleads *ne unques executor*. 1 Wils. 89; 3 Esp. 76. There is a modern book of practice of great respectability (I mean Sellon, tit. Nolle Prosequi), in which this doctrine is summed up to my entire satisfaction. The form of the entry is there given in words, and conforms entirely to the entry in this case, except that the words are here added, that "the plaintiffs take nothing by their *bill, but for their 'false clamors be in mercy;'" which can at least detract nothing from the effects of the judgment. Yet it is there laid down, as the law of his day, that such a judgment, when it goes to the whole cause of action, operates, in effect, as a *retraxit*. The judgment in this case goes to the whole cause of action, and as between the plaintiff and the cashier, is of the same effect, as if there had been no other defendant to the action. In a subsequent part of the article, the same author (Sellon) recognises the distinction between cases of trespass or tort, and cases of contract; and lays down the rights of the parties in each, in accordance with the views I entertain on the subject, to wit, that if the *nolle prosequi* be entered, so as to produce any derangement in the rights of the defendant, to deprive them of a legal defence, or subject them to increased difficulties or liabilities, it is error.

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The case in Maule & Selwyn, which was supposed to have overruled the previous decisions, is in perfect accordance with them; for, although the defendant had pleaded *non assumpsit*, he had also pleaded his discharge as a bankrupt. On the contrary, if the language of the court in that case be considered as affording the true *rationale* of the entry of the *nolle prosequi*, it would be fatal to the plaintiffs in this cause. The court say, it amounts to an acknowledgment that the one defendant had a defence. But what defence did this co-obligor set up, that the other defendants ought to have the benefit of? His pleas, were, in terms, those which had been pleaded by these co-obligors. If this confession of plaintiffs went to those pleas, then were these defendants discharged, since they could not be liable if he was not guilty.

It is a question of no importance—one of no influence upon the law of the case—whether a *nolle prosequi* may be entered before, or after judgment, or when it may be entered; otherwise than as it affects the legal relations of the parties, and the rules which govern suits at law. And here, I think, I may very confidently maintain, that in no case can a *nolle prosequi* be legally entered, as to one of the defendants, unless the suit might originally have been maintained against those who remain; nor, unless, the remaining defendants might have availed themselves of pleading the non-joinder of their co-obligor, if their rights were affected by his exclusion from the action. In the first class, are comprised all actions of tort, in which no prejudice is done to the defendants, since their co-defendant need not originally have been made a party. And I may add also, the case of bankrupts and infants, both of whom, when joint contractors, may be omitted as defendants, upon declaring against their co-obligors, according to the truth of the *case. They may also, without prejudice to their

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co-defendants, be discharged by *nolle prosequi;* but even as to them, it seems, the precedents imposed a restriction; for, it is not permitted, if they have blended their fate with that of their co-defendants, by joining in their pleas. They have then waived their privilege. If their pleas import no waiver of their privilege, the right of the plaintiff to his *nolle prosequi*, as to them, is conceded; because the relations of the parties are not altered, nor their rights in any way prejudiced. But I conceive the *nolle prosequi* cannot be entered at any point of time, when it would place the defendants in a worse situation, or deprive them of any advantage of making their defence.

Surely, the precedents for entering the *nolle prosequi*, after judgment in actions of trespass, against some defendants, and going on to levy satisfaction from the rest, can afford no precedent here; since it is, in the one case, what the law enjoins; in the other, what it forbids. Nor are the precedents of cases in which the one defendant never was bound, or is discharged by operation of law, without discharging the other, any better authority. In all these cases, the relative rights and liabilities of the parties remain the same. No legal absurdities can ensue, and no more is given against them, by the judgment, than what could have been legally claimed of them by the action.

There is one curious result produced by this decision, which is not among the least of the objections to rendering a judgment for the defendant in error. It cannot be contested, and the whole argument is admitted, that if the discharge of the principal produce a bar in his favor, this judgment should be reversed for error. But the conclusion, that it is no bar, is now to be deduced from a string of decisions, in every one of which, Serjeant Williams himself admits, that no recovery could be had against the defendant who has been discharged by the *nolle prosequi.* It is true, he attributes this bar to the nature of the action; by this, at least, acknowledging that the material question, in the trespass cases, never could arise in the present case. In the only case, however, even in trespass, in which the question in this case came distinctly before the court, I mean the case of *Green* v. *Charnock* (Cro. Eliz. 762), in which there was an interlocutory judgment against S., and judgment pronounced against C., and a *nolle prosequi* as to S.; it was adjudged, that the *nolle prosequi* as to S. was a release to him, and therefore to C.; and the judgment against C. was reversed on error brought, and yet there they did not join in pleading. If, in the present case, the defendants had all pleaded, whether jointly or severally, and verdict had been for the one defendant, on any plea to the merits, it is clear, that *notwithstanding a verdict had passed for the plaintiff against the remaining four, he could not have had judgment. (1 [*88
Saund. 217.) And the distinction between the actions of debt and trespass on this point, has been, until now, considered as known and established, (1 Plowd. 66 *b;* 8 Co. 120, 133; 2 Lilly Abr. 210, 107.) Upon the whole, I am very clear, that this judgment ought to be reversed, and judgment below entered for defendants.

Judgment affirmed, with costs.

*Joseph Pearson and Robert Y. Brent, executors of Robert Brent, deceased, Plaintiffs in error, *v.* The Bank of the Metropolis, Defendants in error.

Promissory note.—Notice of non-payment.—Pleading.

In an action against the indorser of a promissory note, made "negotiable in the Bank of the Metropolis," the declaration averred a demand of the same, at that bank; no other notice of the non-payment of the note was sent to the indorser, but that left for him at the Bank of the Metropolis; and it was proved, that there was an agreement, by parol, with the indorser, as to other notes discounted previously, by the bank, for his accommodation, that payment and demand of payment, should be made at the bank; the indorser residing a considerable distance from the bank. The court held, that parol evidence was admissible, to show the agreement relative to the place where payment of the note was to be demanded; although the agreement did not appear on the face of the note: such an agreement, is a circumstance extrinsic to the contract made by the note; and its proof, by parol, is regular.[1] p. 92.

The indorser of such a note is himself bound by the contract made by the maker, and by the established and known usage of the bank. p. 93.

Where it was omitted to allege, in the declaration on the note, a demand of payment on the person of the maker, but it averred a demand at the bank, "where the note was negotiable," such averment in the declaration could not be true, unless there was an agreement between the parties, that the damand should be made there; and the averment must have been proved at the trial, or the plaintiff could not have obtained a verdict and judgment: and after a verdict, the judgment will be sustained. p. 93.

Error to the Circuit Court for the District of Columbia. This action was instituted in the circuit court for the county of Washington, by the Bank of the Metropolis, on a promissory note, dated May 26th, 1819, made by George A. Carroll, and indorsed by W. Carroll and Robert Brent, for $1100, payable at sixty days, and negotiable at the Bank of the Metropolis. The declaration set out the note, and averred a demand of payment, at the Bank of the Metropolis.

In support of the issue on the part of the plaintiffs in error, evidence was offered, that the accommodation given by the said bank to George A. Carroll, on a note similarly made and indorsed with the present, was given by the bank, about three years before the date of the note on which the suit was brought, and was given with the knowledge of the indorsers thereon, and in consequence of their solicitation; and for the purpose of proving, that it was the agreement and understanding of the bank and W. Carroll, at the time of agreeing to give him his accommodation, that the note to be discounted should by payable at the Bank of the Metropolis, and the notes severally taken for the renewal of such notes, and for the continuance of the said accommodation, should be in like manner *payable and demanded at the bank, they offered to prove, by parol evidence, that the said Carroll did not reside in the district, after the winter in which W. Carroll lived in the city of Washington, and that that winter, was the winter of 1817; and that after such time, said George A. Carroll occasionally visited the city, and resided at Washington, in Maryland, about twenty miles from the city, and at Port Tobacco; and that many of the notes, taken for the continuance of the said accommodation, were expressed to be payable at the bank;

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[1] S. P. United States Bank *v.* Dunn, 6 Pet. 51; Cox *v.* National Bank, 100 U. S. 713. It may be shown by parol, that one of several joint and several makers of a sealed note, was a mere surety, so as to let in the defence, that he was discharged by giving time to the principal debtor. Miller *v.* Stern, 2 Penn. St. 286. S. P. Hubbard *v.* Gurney, 47 N. Y. 457.

and that all notes, previous to the one now sued on, were there demanded, and such demand acquiesced in, as sufficient, and subsequent notes given in renewal of the notes so demanded; that it was the custom of the said bank to require, in all cases where the maker was a non-resident, that there should be an agreement to pay such notes at the bank; that the bank never would have agreed to discount the notes, except upon such a condition, and this was the understanding of the bank, and necessarily presumed to be known to W. Carroll, and the indorsers, at the time of making such accommodation, or at the time of his removal from the city of Washington.

The counsel for the defendants objected to the evidence; but the court overruled the objection, and admitted the evidence to be given. And the counsel for the defendants prayed the court to instruct the jury, that to enable the plaintiffs to sustain their action aforesaid against the defendants, it was necessary that a personal demand should have been made upon the maker of the note, for the money in the said note mentioned; but the court refused to give the instruction; but instructed the jury, that if, from the evidence given as aforesaid, the jury should be satisfied, that it was agreed by all parties, whose names appear on the notes, and the plaintiffs, that the payment should be demanded at the Bank of the Metropolis; and that it was so demanded, at the bank, then, a personal demand of the maker, was not necessary. To which several refusals and opinions of the court, the defendants, by their counsel, excepted, and sued out this writ of error.

Swann, District-Attorney, and *Worthington*, for the plaintiffs in error. 1st. Parol evidence cannot be admitted, to show the agreement alleged to have been made: 3 Stark. Evid. 4, p. 995, 999, 1002; 3 B. & Ald. 233; 8 Taunt. 92; 4 Mass. 414; 8 Johns. 187; 2 W. Bl. 1249; 7 Taunt. 278; 1 Cow. 249; 14 Mass. 155; 1 Gow 74; 3 Camp. 57; 1 Taunt. 347.

2d. As to the custom claimed by the bank. 2 Stark. Evid. 455; 1 Phil. Evid. 429; 3 Stark. 1038–40; *Renner* v. *Bank of Columbia*, 9 Wheat. 581.

**Key*, for the defendants in error, cited the following cases Chitty on Bills 237; 12 Mass. 172; *Union Bank* v. *Hyde*, 6 Wheat. 572; also 7 Johns. 99; 4 Bos. & Pul. 172; 1 Call 250. [*91

Marshall, Ch. J., delivered the opinion of the court.—This was a suit brought in the circuit court of the United States for the district of Columbia, on a note made by G. A Carroll, and indorsed by William Carroll and Robert Brent, the testator of the plaintiffs in error, and made negotiable in the Bank of the Metropolis. The declaration set out the note, and averred a demand of the same, "at the Bank of the Metropolis," where the said note was payable.

At the trial, the plaintiffs below proved that the accommodation given by the bank to said G. A. Carroll, on a note similarly drawn and indorsed with the present, was given by the bank, about three years before the date of the note on which this suit was brought; and was given with the knowledge of the indorsers thereon, and in consequence of their solicitation. For the purpose of showing an agreement between the bank and the maker of the note, that the note to be discounted, and those thereafter to be made for its renewal, should be payable at the Bank of the Metropolis, and there

demanded, the bank proved by parol testimony, that the said G. A. Carroll did not reside in the district, after the winter of 1817, in which W. Carroll lived in Washington, but resided at Port Tobacco, in Maryland, about twenty miles from the city, which he occasionally visited; that many of the notes, taken for the continuance of the accommodation, were expressed to be payable at the said bank; and that all the notes, previous to that on which this suit was brought, were there demanded, which demand was acquiesced in, as sufficient, and subsequent notes given in renewal of those so demanded. The bank also proved, that it was its custom, in all cases where the maker was a non-resident, to require an agreement to pay such notes at the bank, and that they never would have agreed to discount the said notes, but on this condition. The counsel for the defendants below objected to this testimony, but the court permitted it to go to the jury. The counsel for the defendants below then prayed the court to instruct the jury, that to enable the plaintiffs to sustain their action, it was necessary to prove that a personal demand had been made on the maker of the note. The court refused to give this instruction; but did instruct the jury, that if they
*92] *should be satisfied, from the evidence, that it was agreed by all the parties whose names appear on the notes, that the payment should be demanded at the Bank of the Metropolis, and that it was so demanded, then a personal demand on the maker, was not necessary. An exception was taken to these opinions of the court, and their correctness is now to be examined.

The plaintiffs in error contend, that the testimony ought not to have been admitted, because it is an attempt, by parol proof, to vary a written instrument. But this is not an attempt to vary a written instrument. The place of demand is not expressed on the face of the note, and the necessity of a demand on the person, when the parties are silent, is an inference of law, which is drawn only when they are silent. A parol agreement puts an end to this inference, and dispenses with a personal demand. The parties consent to a demand, at a stipulated place, instead of a demand on the person of the maker; and this does not alter the instrument, so far as it goes, but supplies extrinsic circumstances, which the parties are at liberty to supply. No demand is necessary to sustain a suit against the maker; his undertaking is unconditional; but the indorser undertakes conditionally to pay, if the maker does not; and this imposes on the holder the necessity of taking the proper steps to obtain payment from the maker. This contract is not written, but is implied. It is, that due diligence to obtain payment from the maker shall be used. When the parties agree what this due diligence shall be, they do not alter the written contract, but agree upon an extrinsic circumstance, and substitute that agreement for an act which the law prescribes, only where they are silent. We think, then, that there was no error in admitting the parol evidence which was offered to sustain the action.

If the testimony was admissible, there is no error in the instruction given by the court. It was, that if the jury believed, from the evidence, that it was agreed by all the parties, that the demand should be made at the Bank of the Metropolis, and that it was so made, then a demand of the maker was not necessary. This point is, we think, involved in the question respecting the admissibility of parol testimony to establish the agreement. Had the note purported on its face to be payable at the Bank of the Metropolis, that

express agreement would undoubtedly have dispensed with a personal demand. If that agreement can be made by parol (and unless it can, the testimony was inadmissible), the effect of the parol contract is the same, on this point, as if it had been in writing. The only *inquiry, therefore, is, whether the testimony was sufficient to be submitted to the jury for the purpose of proving the agreement? We think it was. [*93

The circumstances, that the indorsers were themselves active in procuring the accommodation for the maker of the note; that the accommodation had been continued for years, without a demand on the person of the maker; that it was the invariable usage of the bank, when the maker of an accommodation note resided out of the city, to require, as the condition of the loan, a stipulation that a demand at the bank should be sufficient; that this accommodation would not have been continued, after the removal of the maker out the city, but on this condition; that the note purports, on its face, to be negotiable at the Bank of the Metropolis; are facts, from which the jury might justifiably infer the agreement of the parties to dispense with a demand on the person of the maker.

A verdict having been rendered for the bank, the defendants in the court below filed reasons in arrest of judgment. The error alleged, is, that the first count in the declaration neither charges a personal demand on the maker of the note, nor excuses the omission to make such a demand. The declaration certainly does not charge a demand on the person of the maker; but this was not necessary, if the parties had agreed that a demand at the bank should be substituted for a demand on the maker. The plaintiffs in error contend, that the agreement is not alleged in the declaration, and we admit, that the omission to make this averment would be fatal. In that event, the plaintiff below would have shown no cause of action. But the declaration avers a demand of the note, "at the Bank of the Metropolis," where the said note was payable. The note is set out in the declaration, and does not purport, on its face, to be made payable at the bank. But the averment in the declaration, that it was payable there, cannot be true, unless there was an agreement of the parties to that effect. It is an averment which must have been proved at the trial, or the plaintiff below could not have obtained a verdict and judgment. After a verdict, it is, we think, sufficient to sustain the judgment. There is no error, and the judgment is affirmed, with costs.

Judgment affirmed.

*Philip Hickie and others, heirs and legal representatives of James Mather, deceased, Appellants, *v.* Alexander B. Starke and others, heirs and legal representatives of Robert Starke, deceased, Appellees.

Error to state court.—Land-law.

In the construction of the 25th section of the judiciary act, passed 24th of September 1789, this court has never required, that the treaty, or act of congress, under which the party claims, who brings the final judgment of a state court into review before this court, should have been spread upon the record. It has always deemed it essential to the exercise of jurisdiction, in such a case, that the record should show a complete title, under the treaty or act of congress, and that the judgment of the court is in violation of that treaty or act.[1] p. 98.

In order to bring himself within the protection of the act of cession by Georgia to the United States, for the land, the party must show that he was "actually settled" on the land, on the 27th of October 1795, the period mentioned in the said act of cession. p. 98.

It seems, that a settlement made on the land, by another person, who cultivated it for the proprietor, would be sufficient to constitute "an actual settlement," within the meaning of the law; though the proprietor should not reside, in person, on the estate, or within the territory. p. 98.

Error to the Supreme Court of Mississippi. In the supreme court of the county of Adams, in the state of Mississippi, the appellees filed a bill in chancery against the appellants; which, according to the laws of the state, was transferred to the supreme court, where judgment was given for the complainants.

The purpose of the bill was, to obtain a conveyance of a tract of land, containing 2000 acres, for which Robert Starke, in 1791, under whom the complainants claimed, obtained an order of survey from the governor-general of Louisiana, which order was executed by the deputy-surveyor, and of which land he afterwards took possession, and cultivated for years. Subsequently, Robert Starke being willing to exchange this body of lands for another, proposed the same to the governor of Louisiana. The bill alleged that, from some personal hostility towards him, an offer of the land so held by him was made to James Mather, the ancestor of the appellants, the defendants in the bill; and a grant of the land was made in 1794, to James Mather, by the governor of Louisiana, who thereupon entered, and cultivated part of the tract.

It was admitted, that all the forms required by the established laws and customs of Louisiana, while under the Spanish government, by which a full and complete title to land was acquired, had not been conformed to, by Robert Starke, or his heirs, the appellees; and that the title of James
*95] Mather was, *in all respects, full and complete, as a legal title, under those laws. The appellees, in their bill, claimed to have the land conveyed to them, as the title of the appellants had been acquired by collusion with the governor of Louisiana; and that Robert Starke had been forcibly, and against his will, dispossessed of the land. Under the authority of the supreme court of Mississippi, a feigned issue was tried, to determine "whether the ancestor of the complainants ever made a voluntary adandonment of his right to the premises in question, free from any undue influence on the part of the Spanish government or its officers." This issue was found, by the verdict of a jury, in favor of the complainants; and the

[1] S. P. Maney *v.* Porter, 4 How. 55.

same having been certified to the supreme court, a decree was made in favor of the complainants, the appellees. The appellants then filed their petition for a writ of error to the supreme court of the United States; suggesting, that the title of James Mather arose "under the articles of agreement and cession," between the United States and the state of Georgia, and that by the decree of the supreme court, that title has been overruled. The argument before the court, was principally confined to two questions; upon the determination of which, the jurisdiction of the court in the case, depended.

1. Whether the construction and effect of the articles of agreement and cession, between the United States and the state of Georgia, were presented for the consideration of the supreme court of Mississippi, in the investigation of this case; so that, by the decree of the court, the title claimed by the appellants, under the articles of agreement, was brought into question?

2. Whether the appellants' title, being a full and complete Spanish grant, was confirmed by "the articles of agreement and cession," and was in itself a valid and indefeasible grant of the land?

The only facts connected with the discussion of the case before this court, were those which related to the actual possession of the land by James Mather, and the period of the same. They are sufficiently noticed in the decision of the court.

Livingston, for the appellants.—The question of jurisdiction rests upon the fact, whether the construction of "the articles of agreement and cession," was before the court giving the decree for the appellees. The articles provide, that all complete grants, made by the Spanish or British governments, prior to the acquisition of Louisiana, by the United States; and all incomplete grants made by the state of Georgia, before "the articles," shall be confirmed by the United States. *The complainants' bill admits, that the appellants, the defendants in the supreme court [*96 of Mississippi, had a complete grant from the Spanish government of Louisiana, and thus the title of the appellants was brought before the court; and this title was made valid, by the "articles of agreement and cession." The evidence in the case also fully establishes the Spanish title of the appellants, and this is shown in every part of the record; the omission of the appellants to plead this title, thus acknowledged, or thus proved, ought not to defeat it. (7 Wheat. 164, 201.) The petition for a writ of error to the judge of the supreme court of Mississippi, states, that the title of the appellants, is claimed under the "articles of agreement and cession;" and as he signs the allowance of the writ, the fact of the title having been before him, is sufficiently shown.

As to the non-compliance, by the appellants, with the provisions of the act of congress of 3d March 1810, which provide for the registering of claims, under the Spanish and British government, it was said—1. Congress cannot pass a law to affect the title, which have been declared complete by the "articles of agreement and cession." 2. If that law is valid, the fact of forfeiture by non-registration, must be ascertained by some proceeding, before the title can be considered as lost. 3. The provisions of the law refer to British grants, which were of a particular nature and which were required to be exhibited to, and registered with the commissioners; and not to Spanish grants.

Both parties to the case, claim under a law of the United States; and, by the 25th section of the judiciary law, the jurisdiction of this court extends to all such cases. As to jurisdiction, there was cited, 4 Cranch 482; 4 Wheat. 348; 5 Cranch 348.

McDuffie and *Coxe*, for the appellees.—The court will not entertain jurisdiction of this case, but to a limited extent, if it shall consent to assume any jurisdiction over it; as the whole of the facts, upon which the equitable title of the appellees rested, having been peculiarly within the jurisdiction of the supreme court of Mississippi, sitting in chancery, and the decision of that court having affirmed these facts; they will remain unaffected, by any proceedings here. 1 Wheat. 352; 2 Ibid. 363; 6 Ibid. 379, 390; 7 Ibid. 206.

In the chancery court of Mississippi, "the articles of agreement and cession" were not noticed; and the decree was exclusively upon the equitable title of the complainants in the bill. This being the fact, it cannot be alleged here, that the construction of these articles was brought into question. *In order to maintain the jurisdiction of this court, it must be shown, that the title under "the articles, &c.," was decided upon by the court.

*97]

2. "The articles of agreement and cession," look forward to the performance of certain acts, under the laws of the United States. The 5th section of the act of congress of 1803 requires, that titles claimed under Spanish grant, shall be exhibited to a board of commissioners, to be appointed for the purpose of examining and registering the same; and until it shall be shown, that the appellants have a grant under the Spanish government, and that the same was exhibited and registered according to the provisions of the law, they are precluded from claiming title under "the articles of agreement and cession." The articles of agreement were not intended to extend further than to adjust the claims of the United States, and the state of Georgia, to the lands; and not to settle those of individuals. *Henderson* v. *Poindexter*, 12 Wheat. 543. Congress had no power to legislate, so as to deprive any one of an equitable title, and consequently, the articles of agreement could not take away the appellee's title, existing before the cession.

3. The appellants are bound to show a good and perfect title, under the agreement with Georgia, and the laws of the United States; and that they were in possession of the property. The grant from Spain must have been legally executed, according to the Spanish laws; and, under these laws, the prior equitable title of the appellees, would have been regarded and enforced. 7 Partidas, 16th, 17th title. The operation of "the articles," cannot be such, as will give validity to a title originating in fraud or violence; nor will this court say, that a title originating thus shall be sustained; or that the decision of an inferior court, upon the facts of fraud and violence, was erroneous. 7 Wheat. 206; 6 Ibid. 379.

The supreme court of Mississippi did not decide, that the title held by the appellees, was invalid; but that it was a legal title, which could not, in conscience, be held by the appellants; and that they should convey the same to the complainants, the appellees. A court of chancery does not decide on the title to land, directly, but only operates on the same, collaterally.

Marshall, Ch. J., delivered the opinion of the court.—This is a writ of

error, to a decree pronounced in the court of the last resort in the state of Mississippi, directing the plaintiffs in error to convey to the defendants, a certain tract of land, in the said proceedings mentioned. The plaintiffs in error allege, that their title was secured by the compact entered into between the United States and Georgia, for the *cession of the country [*98
in which the land lies; and that this decree is in violation of that compact. The defendants insist, that the compact between the United States and Georgia was not called into question; and that the 25th section of the judiciary act, does not give this court jurisdiction of the case.

In the construction of that section, the court has never required that the treaty, or act of congress, under which the party claims, who brings the final judgment of a state court into review before this court, should have been pleaded specially, or spread on the record. But it has always been deemed essential to the exercise of jurisdiction in such a case, that the record should show a complete title under the treaty or act of congress, and that the judgment of the court is in violation of that treaty or act. The condition in the cession act, on which the plaintiffs in error rely, is in these words:—"That all persons, who, on the 27th day of October 1795, were actual settlers within the territory thus ceded, shall be confirmed in all the grants, legally and fully executed prior to that day, by the former British government of West Florida, or by the government of Spain." The plaintiffs produced a grant, legally and fully executed; but to bring the case under the treaty, they must also prove, that the ancestor or person, under whom they claim, was an actual settler, on the 27th of October 1795. The answer asserts, that the warrant of survey issued on the 7th day of February 1793, and the survey made on the 20th July, in the same year, when possession was taken; and that the patent issued on the 3d April 1794. James Williams deposes, that about the 3d December 1795, he took possession of the tract of land in dispute, as overseer for James Mather, the patentee, and understood from him, that he had gone to Natchez, some time before, to apply for land in the part of the country where the tract in controversy lies. This is the testimony furnished by the record, to prove that James Mather, the grantee, was an actual settler, according to the requisition of the cession act of Georgia.

In *Henderson* v. *Poindexter*, 12 Wheat. 530, the term "actual settler," seems to have been understood as synonymous with the resident of the country. That case, however, did not require that the precise meaning of the term should be fixed, and the court is disposed to think, that a settlement made on the land by another person, who cultivated it for the proprietor, would be sufficient; though the proprietor should not reside in person on the estate, or within the territory. Had the settlement proved by Williams, been made at the day required by the cession act, it would, we think, have satisfied the requisition of that act, and entitled the plaintiffs in error to the benefit of the condition. But it was not made until the 3d of *December 1795. We think, then, that the plaintiffs in error have failed to [*99
prove, that the person under whom they claim, was an actual settler on the 27th day of October 1795; and that the court has no jurisdiction of the cause.

Writ of error dismissed, it not appearing that this court has jurisdiction of the cause.

*United States, Appellants, *v.* The Saline Bank of Virginia, John Webster and others, Appellees.

Discovery.—Excuse from making discovery.

The plaintiffs, as creditors of an unincorporated bank, filed a bill against the cashier, and a number of persons, stockholders of the bank, for a discovery and relief; who, in reply to the bill, stated, that their answers to the bill would subject them to penalties, under the laws of Virginia, prohibiting unincorporated banks: *Held*, that the defendants were not bound to make any discovery, which would expose them to penalties.[1] p. 104.

Appeal from the Circuit Court of West Virginia. This case came before the court, on an appeal by the United States, from the decree of the district court of the United States for the western district of Virginia; in which court, the district-attorney of the United States, filed a bill against John Webster, cashier, and a number of others, as stockholders of the Virginia Saline Bank, to charge them, in their private capacities, for certain deposits of money made with them, and also to subject their joint funds, &c.

The bill charged, that about the year ——, a company was formed by a number of persons, citizens of Virginia, within that district, to carry on the usual and ordinary business of banking. That they established a banking-house; assumed the name and style of the "President, Directors and Company of the Saline Bank of Virginia;" that they issued notes or bills, purporting to be payable out of the joint funds; to make discounts and exchanges, whereby circulation and currency was given to their notes and bills; that in discharge of public dues, $10,120 of their notes were paid into the treasury of the United States, before the 21st of October 1819; and on that day, $5831, in said notes, were deposited by an agent of the treasury, with John Webster, cashier of the said association, who demanded payment therefor, after obtaining a certificate of deposit; which payment was refused by Webster, who said he had no funds. At the same time, the agent presented a draft drawn by the treasurer of the United States, for $4290, being also for their notes received in the treasury, which was the balance of the said sum of $10,120. This draft was refused also, for want of funds. The bill charged, that Webster possessed funds of the company in specie, and notes of solvent chartered banks, and combined with individuals of the company to refuse payment, by fraudulently secreting these funds. The bill prayed an account of the funds of the company, and also, to subject the cashier and stockholders to a personal decree.

*101] *There were filed, with the bill, the following documents mentioned therein:—

1. "Virginia Saline Bank, October 21st, 1812. William Wham has deposited in this bank, 5831 dollars, in notes of the same, for safe-keeping—to be returned to him, or his order."

J. Webster, Cashier.

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[1] S. P. Stewart *v.* Drasha, 4 McLean 563. And see Atwill *v.* Ferrett, 2 Bl. C. C. 40; Finch *v.* Rikeman, Id. 301. Although it be provided by statute, that the answer of a defendant to a bill in equity, shall not be received in evidence against him, on the trial of any indictment for the fraud charged in the bill, yet the defendants in such bill cannot be compelled to make discovery as to any charge which is indictable at common law, and involves moral turpitude. Union Bank *v.* Barker, 3 Barb. Ch. 358. See Rose *v.* Savings Fund, 6 Phila. 10; Philadelphia *v.* Kyser, 10 Id. 50.

2. "Virginia Saline Bank, 21st October 1819. I certify, that William Wham, cashier of the Bank of Columbia, acting as agent for the treasurer of the United States, this day demanded payment of my receipt of this date, in his favor, for 5831 dollars. That he presented a draft drawn by the treasurer of the United States, No. 9079, dated 18th March 1818, in favor of Jonathan Smith, for 4290 dollars, and demanded payment for the said deposit and the said draft; whereunto I answered, that I was not prepared with funds, and could not pay the said draft, or deposit, at this time."

J. WEBSTER, Cashier.

The above-mentioned draft, drawn by the treasurer, is in these words:—

No. 9079, Reg'd. March 18th, 1818,
for the Register, J. DAWSON.

No. 9079, Dr. 4290.

Treasury of the United States, Washington, March 18, 1818.

Sir:—At sight, pay to Jonathan Smith, Esq., cashier Bank United States, four thousand two hundred and ninety dollars, value received.

T. T. TUCKER,
Trea. U. States.

JOHN WEBSTER, ESQ.,
Cashier, Virginia Saline Bank.

To the bill of the United States, the defendants filed the following joint and several plea, with the usual affidavit:—These defendants, by protestation, not confessing or acknowledging all or any of the matters and things in the complainants' said bill of complaint contained, to be true, in such manner and form as the same are therein alleged and set forth, for plea thereunto say, that the company which assumed the name and style of the said "President, Directors and Company of the Saline Bank of Virginia," whereof mention is made in the bill of complaint, had not, at the time of the issuing, or of giving currency or circulation to the notes or bills in the said bill of complaint mentioned, or at any time hitherto, any charter incorporating the said company, with authority to deal or trade as a bank, or any charter whatsoever; and these defendants further say, that all the notes and bills issued by the said *company, and to which circulation and currency was given, as in and by the complainants' bill is supposed, were [*102 entitled and offered in payment by the said company, to wit, at the time of the issuing of the said notes and bills, as charged and supposed by the said bill of complaint, to wit, at the western judicial district of Virginia; and these defendants aver, that all the matters and transactions in the said bill of complaint stated, and whereof discovery is sought, relate to the emission of the said bills and notes by the said company, and to the offering the same in payment as aforesaid, all which matters and things these defendants are ready to aver, maintain and prove, as this honorable court may award: and these defendants are advised and insist, that they ought not to be compelled to discover or set forth any matters, whereby they may impeach or accuse themselves of any offence or crime, or be liable by the laws of the commonwealth of Virginia, to penalties and grievous fines; for which cause, these defendants humbly pray the judgment of this honorable court, whether they shall be compelled to make any other or further answer to said bill of complaint, and humbly pray to be hence dismissed, &c.

J. PINDALL, Defendants' Attorney.

The cause was set for argument, on this plea, by consent. The district court sustained the plea, and dismissed the bill. From which decree, the United States appealed to this court.

The record contained the articles of association called for by the bill, with a list of the subscribers, the 4th article whereof is in these words, viz: "No stockholder shall be answerable in his person, or individual property, for any contract or engagement of the said company, or for any losses, deficiencies or defalcations of the capital stock of the said company; but the whole of the said capital stock, together with all the rights and credits, and all the property, both real and personal, belonging to the said company, and nothing more, shall, at all times, be answerable for the legal and equitable demands against the said company." By the articles of association, it appeared, that the subscription of the stock of the company, began on the 14th of August 1814.

The legislature of Virginia had thrice enacted laws on the subject of unincorporated banking companies, in February and in November 1816; and in August 1817. Tate's Digest, 41, 42. The following are the provisions of the laws of Virginia upon this matter:—

1. It shall not be lawful for any association or company, not having a charter incorporating such association or company, with authority to deal or trade as a bank, now formed or in being, or which hereafter may be formed within the limits of *this commonwealth, for the purpose of discount-
*103] ing notes, bills or other securities for the payment of money or other valuable thing, and issuing notes, drafts or bills, whether payable to order or bearer, or any other securities for the payment of money or other valuable thing, in the name, or on account, or for the benefit of, any such association or company, or otherwise for the purpose of dealing, trading or carrying on business as a bank; to commence or continue the discounting of any notes or bills, or other securities, for the payment of money or any other valuable thing, or the issuing of any notes, drafts or bills, or other securities for the payment of money, or other valuable thing, or such dealing, trading or carrying on business as a bank; and every member, officer or agent of any such company or association, that may so commence or continue such discounting or issuing of notes, drafts, bills or other securities, or the dealing, trading or carrying on business as a bank, shall be held or taken to be guilty of a misdemeanor, and upon conviction thereof, on indictment, information or presentment, shall be liable to be fined at the discretion of a jury, in a sum not less than one hundred, nor exceeding five hundred dollars. And if any such company or association, or any president, manager, cashier, or other officer or agent of such company or association, shall pay out, deliver, put in circulation, or issue any note, draft, bill or other security for the payment of money or other valuable thing, purporting to promise, order, request or stipulate the payment of money or other valuable thing, or that money or other valuable thing is payable by, or on behalf of such company or association, or any person or persons, as agent or agents thereof; each member, officer and agent thereof shall be, in like manner, liable to the same penalty.

All contracts that hereafter may be made by individuals for the purpose of forming themselves into any association or company, for discounting and issuing notes and other securities, for the payment of money or other valua-

ble thing, as mentioned in the first section of this act, or dealing, trading or carrying on business as a bank ; shall be, and the same are hereby declared to be utterly null and void.

2. The capital stock of any association or company, trading, discounting paper, or issuing notes, in violation of this act, and all capital stock subscribed to such association or company, shall be held in trust for the benefit of the commonwealth, and it shall be the duty of the attorney-general, whenever he shall be informed of the existence of any such company or association, to institute a suit in the superior court of chancery for the district of Richmond, in behalf of the commonwealth, for the purpose of recovering the capital *stock aforesaid. In such suit, it shall be lawful to make all or any of the members of such company or association [*104 and any officer, agent or manager thereof, parties defendant ; and to call upon and compel them, or either of them, to exhibit all their books and papers, and an account of all such matters and things as may be necessary to enable the court to make a decree in pursuance of the provisions of this act. The members of any such association or company made defendants in such suit, shall be held severally liable to the commonwealth for their respective proportions of the capital stock held in such company or association, at the institution of such suit, or the time of the decree, or by any person or persons, for his, her or their benefit ; and the court shall decree against the defendants, respectively and severally, the amounts that they and each of them may respectively and severally hold as aforesaid, in the capital stock of such company or association, or by any person or persons for his, her or their use or benefit, to be levied of the proper goods and chattels, lands and tenements of such defendants : Provided, however, that no disclosure made by any party defendant to such suit in equity, and no books or papers exhibited by him in answer to the bill, or under the order of the court, shall be used as evidence against him in any motion and prosecution under this law ; and that a recovery in such suit shall be a bar to every motion or prosecution against any defendant to such suit, for the recovery of any penalty, or the infliction of any punishment prescribed by this act. See also, 1 Rand. 71 to 101 inclusive.

The case was submitted to the court without argument, by the *Attorney-General* of the United States ; and by *Webster* and *Doddridge*, for the appellees.

Marshall, Ch. J., delivered the opinion of the court.—This is a bill in equity for a discovery and relief. The defendants set up a plea in bar, alleging that the discovery would subject them to penalties, under the statute of Virginia. The court below decided in favor of the validity of the plea, and dismissed the bill. It is apparent, that in every step of the suit, the facts required to be discovered in support of this suit would expose the parties to danger. The rule clearly is, that a party is not bound to make any discovery which would expose him to penalties, and this case falls within it. The decree of the court below is, therefore, affirmed.

Decree affirmed.

*Daniel Rhea and others, Appellants, *v.* Daniel Rhenner, Appellee.

Married women.—Presumption of death.

The law seems to be settled, that when a wife left by her husband, without maintenance and support, has traded as a *feme sole*, and has obtained credit as such, she ought to be liable for her debts; and the law is the same, whether the husband is banished for his crimes, or has voluntarily abandoned the wife. p. 108.

By the laws of Maryland, a *feme covert*, who has been abandoned by her husband, is not permitted to marry a second time, until her husband shall have been absent seven years; and shall not have been heard of during that time. p. 108.

By those laws, a married woman cannot dispose of real property, without the consent of her husband; nor can she execute a good and valid deed to pass real estate, unless he join in it; the separate examination and other solemnities required by law are indispensable, and must not be omitted. A deed, therefore, executed by a married woman, of real property, acquired by her whilst a *feme sole* trader, and whilst she was abandoned by her husband, is void.[1] p. 109.

Appeal from the Circuit Court for the District of Columbia. This was an appeal from the circuit court of the district of Columbia, and county of Washington; where a bill had been filed by Daniel Rhenner, the appellee, against Daniel Rhea and Elizabeth his wife, and William Erskine, an infant, the son of Elizabeth Rhea, by a former husband, Robert Erskine.

Coxe, for the appellants.—1. This case stood before the circuit court, as to Elizabeth Rhea, upon the bill and answer; although there may have been a replication, yet no proof having been taken, the hearing was upon the bill and answer only. The proceeding is altogether irregular as to William Erskine the infant; the rule being, that when redress is sought against an infant, all the averments must be made out by proof.

2. Two contracts are set out in the bill, one of which is a parol contract, and which is denied on the answer; no proof was given, that such a contract had been made, and yet the decree proceeds upon it, as if it had been proved.

3. The deed executed by Daniel Rhea and wife, to the appellee, states the consideration to be a debt due by Daniel Rhea, to the grantee; and the bill alleges the debt to have been one of Elizabeth Rhea. The parties to a deed are not allowed to contradict it. 1 Ves. 128; 2 P. Wms. 204.

4. Elizabeth Rhea, being at the time the debt arose, the wife of Erskine, could make no contract. A married woman may act as a *feme sole* trader, *106] but it does *not follow, that she can execute a deed. The deed of a married woman is absolutely void; and to constitute a deed an estoppel, it should be a valid deed.

5. It was not a sufficient consideration, for the wife of Daniel Rhea to pass property away from her own son, for the payment of a debt which, by this deed of conveyance, is stated to be due by Daniel Rhea, to the appellee.

Key, for the appellee.—The court below have not given a decree upon the alleged parol agreement. The decree allows the property to be sold for the payment of the plaintiffs' claims, the proceeds to be brought into court, where the amount of these claims must be proved. Elizabeth

[1] See Ayetsky *v.* Goery, 2 Brewst. 302.

Rhea was left by her former husband, Erskine, in 1814, carried on business as a *feme sole* trader, in Georgetown, and as such acquired the lot of ground conveyed to the appellee; she having contracted the debt to the appellee, in the course of her trading. The husband having allowed her to contract debts and to purchase property, thereby consented that the property should be liable for her debts. This is a proceeding in a court of equity, to sustain a claim, the justice of which cannot be denied; and it is easier to do so in such a proceeding, than it would be in a court of law. 2 Vern. 614, 104; Prec. Ch. 328. The absence of the husband, Erskine, is equivalent to abjuration of the realm, or banishment; in either of which cases, the contracts of a married woman are valid by the law of England. 1 Bos. & Pul. 357; 2 Esp. 554; 4 Ibid. 27.

The deed acknowledged by a privy examination is an estoppel. Comb. 232; 7 Mass. 14, 19.

Duvall, Justice, delivered the opinion of the court.—This case is brought up, by appeal, from the circuit court for the district of Columbia and county of Washington, sitting in equity. The appellee, who was complainant in the court below, filed his bill in equity, in the year 1822, in the circuit court, against Daniel Rhea, and Elizabeth his wife, and William Erskine, an infant son of said Elizabeth. The bill alleges, that Elizabeth Rhea, formerly Erskine, was indebted to the complainant in the sum of $300, for goods sold and delivered; that being pressed for payment, she, with the defendant, Rhea, with whom she then lived, agreed, that if allowed further time, they would secure the debt, by conveying to Rhenner a lot of ground, No. 165, in Beatty & Hawkins's addition to Georgetown; which was the property of said Elizabeth, and which had been conveyed to her, by the name of Elizabeth Erskine. That Rhea, together with the said Elizabeth, by their deed, *bearing date May 13th, 1818, conveyed to the complainant the lot of ground before mentioned, for the purpose of [*107
securing the debt, with interest; and stipulated, that if the debt was not paid in two years, it should be held in trust, with power to sell the same, and apply the proceeds, &c.

The bill further states, that the said Daniel and Elizabeth, a few days before the date of the deed to the complainant, viz., on the 10th of May 1819, but after the agreement to convey to the complainant, fraudulently conveyed the same premises to the defendant, Erskine, an infant son of said Elizabeth, in fee, in consideration of natural love and affection; that he, the said Rhenner, had, at a considerable expense, at the request, and with the knowledge and approbation of the defendants, erected improvements on the lot, and put a tenant in possession of the same; but that the defendant, by collusion, soon after obtained possession of the same, and still keeps it, claiming to hold it under the deed to the infant. The bill concludes with praying, that the deed to William Erskine may be declared void, and that the property may be sold to pay his claim, &c.

The defendant, Daniel Rhea, in his answer, admits, that his wife, before his intermarriage with her, viz., in May 1819, was the wife of one Robert Erskine, and was engaged in carrying on business for herself; that he did agree to join, and did join her, in the conveyance to the complainant, and in that to her son; that he had no title or interest in the premises; that the

property belonged, in May 1819, to Elizabeth Erskine, who was a married woman; and he denies all the other allegations in the bill.

Elizabeth Rhea, in her answer, avers, that she was married to Robert Erskine, in January 1812; that after her marriage, in the absence of her husband, one Adam Mayne conveyed to her the premises mentioned in the bill of complaint; the deed bears date on the 7th of April 1817; that her husband, Erskine, left her in the year 1814, and she believed he was alive in May 1819; and that she was not, at that time, the wife of Daniel Rhea; that in July 1821, Erskine having then been beyond seas more than seven years, she married Daniel Rhea; having received no support from her former husband, since he left her.

The answer of the infant is put in by his guardian, in the usual form, submitting to the protection of the court; without admitting or denying any of the facts alleged in the bill.

In this state of the proceedings, the court decreed a sale of the lot before mentioned, for payment of the claim of the complainant; and appointed a trustee to make the sale, under the terms prescribed in the decree; reserving the claim of the complainant for proof on it, and further order. From this
*108] decree, *there was an appeal, and the cause is now before this court for their decision. The question submitted by the arguments of the counsel is, whether the contracts and engagements of Elizabeth Rhea, made in the absence of her first husband, and prior to her marriage with the defendant, Rhea, are obligatory; and to what extent, a woman who has been abandoned by her husband, may contract debts, for which she is personally liable.

The law seems to be settled, that, when the wife is left without maintenance or support by the husband, has traded as a *feme sole*, and has obtained credit as such, she ought to be liable for her debts. And the law is the same, whether the husband is banished for his crimes, or has voluntarily abandoned the wife. It is for the benefit of the *feme covert*, that she should be answerable for her debts, and liable to an action in such a case; otherwise, she could not obtain credit, and would have no means of gaining a livelihood. A decision to this effect, by the court of common pleas, in England, is reported in 1 Bos. & Pul. 359. In delivering the opinions of the court, Mr. Justice BULLER refers to the case of *Lady Belknap*, whose husband was exiled. She was permitted to sue in her own name. The husband of Lady Sandys was banished by act of parliament, during life; and it was decreed, in her case, that she might, in all things, act as a *feme sole*, and as if her husband was dead; and that the necessity of the case required she should have such power. 1 Vern. 104. And the same reason applying where the husband had abjured the realm, the wife, in that case, was allowed to sue, as a widow, for her dower. In such case, she has been permitted to alien her land, without her husband, and is exempted from the disabilities of coverture. It has been uniformly considered, that banishment or abjuration is a civil death of the husband. In the case of *Deborah Gregory* v. *Paul, executor of Warburton*, reported in the 15th volume of Mass. reports, all these cases are reviewed by the supreme judicial court of Massachusetts; and the law recognised.

In the case under consideration, there was a voluntary abandonment of the wife, by the husband, without having furnished her with the means

of support. In his absence, she traded and dealt as a *feme sole*, and is liable for her debts. When the deed for the lot afore-mentioned was executed, her husband had been absent five years only; she continued under coverture, and was the wife of Robert Erskine, her first husband. There is no evidence, that she was, at that time, married to Daniel Rhea; and if the marriage had been proved, it would have been illegal and unavailing. A *feme covert*, who has been abandoned by her husband, is not permitted to marry a second time, with impunity, until her husband shall have been absent seven *years, and shall not have been heard of, during that time. But by the laws of Maryland, which must govern in this case, [*109 a married woman cannot dispose of real property, without the consent of her husband; nor can she execute a good and valid deed, to pass real estate, unless he shall join her in the deed. The separate examination, and other solemnities, required by law, are indispensable, and must not be omitted. The deeds executed by her and Daniel Rhea, in May 1819, are, therefore, inoperative and void.

The circuit court decreed, in this case, upon the bill annexed and exhibits, without further testimony. They do not, in themselves, contain sufficient matter for a decree. It does not appear, than any evidence was taken on commission, or otherwise, to establish, or disprove, the material allegations in their bill. The record being thus defective, this court cannot make a final decision. The decree of the circuit is reversed, and the record remanded for further proceedings.

Decree reversed.

*Sundry African Slaves, The Governor of Georgia, claimant, Appellant, *v.* Juan Madrazo.

The Governor of Georgia, Appellant, *v.* Sundry African Slaves, Juan Madrazo, Claimant.

Jurisdiction.

In the district court of the United States for the district of Georgia, a libel was filed, claiming certain Africans, as the property of the libellant, which had been brought into the state of Georgia, and were seized by the authority of the governor of the state, for an alleged illegal importation; process was issued against the slaves, but was not served, the case was taken by appeal to the circuit court, and the governor of Georgia, filed a paper, in the nature of a stipulation, importing to hold the Africans subject to the decree of the circuit court, &c.: *Held*, that such a stipulation could not give jurisdiction in the case to the circuit court, as process could not issue legally from the circuit court against the Africans; because it would be the exercise of original jurisdiction in admiralty, which the circuit court does not possess.[1] p. 121.

"It may be laid down as a rule, which admits of no exception, that in all cases where jurisdiction depends on the party, it is the party named in the record."[2] p. 122.

The libel and claim exhibited a demand for money actually in the treasury of the state of Georgia, mixed up with the general funds of the state, and for slaves in the possession of the government; the possession of both of which was acquired by means which it was lawful in the state to exercise: *Held*, that the courts of the United States had no jurisdiction; the same being taken away by the 11th article of the amendment to the constitution of the United States. p. 123.

In a case where the chief magistrate of a state in sued, not by his name, but by his style of office, and the claim made upon him is entirely in his official character, the state itself may be considered a party in the record.[3] p. 124.

Appeal from the Circuit Court of Georgia. These cases were brought before this court, from the circuit court of the United States for the district of Georgia, under the following circumstances:

The schooner Isabelita, a Spanish vessel, owned by Juan Madrazo, a native Spanish subject, domiciled at Havana, was dispatched by him, with a cargo, his own property, in the year 1817, on a voyage to the coast of Africa, where she took in a cargo of slaves. On her return-voyage, she was captured by a cruiser called the Successor, under the piratical flag of Commodore Aury—the said cruiser being then commanded by one Moore, an American citizen—and having been fitted out in the port of Baltimore, and manned and armed in the river Severn, within the waters and jurisdiction of the United States. The Isabelita, and the slaves on board, were carried to Fernandina, in Amelia Island, and there condemned by a pretended court *111] *of admiralty, exercising jurisdiction under Commodore Aury; and sold, under its authority, by the prize-agent, Louis Segallis, to one William Bowen. The negroes so purchased by Bowen, were conveyed into the Creek nation, in consequence, as it was alleged, of the disturbed state of East Florida, the insecurity of property there, and with a view to their settlement in West Florida, then a province of the Spanish monarchy. Being found within the limits of the state of Georgia, they were seized by an officer of the customs of the United States, and delivered to an agent appointed by the governor of Georgia, under the authority of the act of the legislature of that state, passed in conformity to the provisions of the act of

[1] The Hollen, 1 Mason 431; The Creole, 1 Phila. 190.

[2] Gill *v.* Stebbins, 2 Paine 417.

[3] Kentucky *v.* Ohio, 24 How. 66.

congress of March 1807, prohibiting the importation of slaves into the United States; the negroes having been so brought into the United States in violation of that act. Some of the negroes were sold by an order of the governor, without any process of law, and the proceeds paid over to the treasurer of Georgia. The residue of the negroes were in possession of an agent, appointed by the governor of Georgia.

The Isabelita was fitted out as a cruiser, at Fernandina; taken by Moore to Georgetown, South Carolina; seized there by the United States, sent round to Charleston; libelled in the district court of South Carolina; and by a decree of that court, restored to Madrazo, the claimant.

The governor of Georgia filed an information in the district court of the United States for the district of Georgia, praying that a part of these Africans, which remained specifically in his hands, might be declared forfeited, and might be sold. A claim was given in, in this case, by William Bowen; Juan Madrazo, the libellant in the other case, did not claim. The decree of the district court dismissed the claim of William Bowen, and adjudged the negroes to be delivered to the governor of Georgia, to be disposed of according to law. William Bowen appealed to the circuit court, by which court, his claim was dismissed; and from the decree of that court, dismissing his claim, he did not appeal.

Juan Madrazo filed his libel in the district court of Georgia, alleging, that a Spanish vessel called the Isabelita, having on board a cargo of negroes, was piratically captured on the high seas, carried into the port of Fernandina, there condemned by some pretended tribunal, and sold; that the negroes were conveyed, by the purchaser, into the Creek nation, where they were seized by an officer of the United States, and by him delivered to the government of the state of Georgia; pursuant to an act of the general assembly of the state of Georgia, carrying into effect an act of congress of the United States; *that a part of the said slaves were sold, as permitted by said act of congress, and as directed by said act of the [*112
general assembly of the said state, and the proceeds thereof deposited in the treasury of the said state; that part of the said slaves remain undisposed of, under the control of the governor of the said state, or his agents; and prayed restitution of said slaves and proceeds. Claims were given in by the governor of Georgia, and by William Bowen. The district court dismissed the libel, and the claim of William Bowen. From this appeal, Juan Madrazo appealed to the circuit court. The circuit court dismissed the libel and claim of the governor of Georgia, and directed restitution to the libellant; and from this decree, appeals were taken by the state of Georgia, and by William Bowen. A warrant of arrest was issued by the district court, but was never served; a monition also isssued, and was served on the governor and treasurer of the state of Georgia.

In the circuit court, the following proceedings took place:—"On motion of the proctors of the libellant, Madrazo, ordered, that he have leave to renew his warrant for the property libelled; but it shall be held a sufficient execution of such warrant, if the governor, who appears as claimant, in behalf of the state, will sign an acknowledgment, that he holds the same subject to the jurisdiction of this court." Whereupon, the following instrument was filed, December 24th, 1823:—

Executive Department, Milledgeville, May 15th, 1823.

The executive having been furnished by the deputy-marshal with the copy of an order, passed by the circuit court of the United States, in relation to certain Africans, the title to which is a matter of controversy in the said circuit court, and also in the superior court of the county of Baldwin, makes the following statement and acknowledgment, in satisfaction of said order and notice:

Juan Madrazo
v.
Sundry Africans.
} Libel in admiralty, against sundry African negroes.

The governor of the state of Georgia acknowledges to hold sundry African negroes, now levied on, by virtue of sundry executions, by the sheriff of Baldwin county, subject to the order of the circuit court of the United States, for the district of Georgia, after the claim of said sheriff, or prior thereto, if the claim in the said circuit court shall be adjudged to have priority of the proceeding in the state court.

JOHN CLARK, Governor.

*113] *Documentary evidence was introduced in the court below, and witnesses were examined, which proved the interest of Madrazo in the Isabelita; the illegality of the capture and condemnation; and which were intended to prove the identity of the negroes, the subject of the proceedings, with those who had been on board the Isabelita.

On the part of Juan Madrazo, it was contended: 1. That his proprietary interest in the slaves, and the illegality of the capture, and condemnation of the Isabelita and cargo, were fully proved, and that he is entitled to restitution of the property libelled. 2. That the court below had jurisdiction. 3. That the possession of the property libelled, the service of the monition, and the order of the circuit court, and agreement of the governor of Georgia, filed in that court, fixed the parties in possession of the property for it; and that the process of the court would operate on them individually, and not on the state of Georgia.

On the part of the state of Georgia, it was contended: 1. That the court below had no jurisdiction. 2. That there was no sufficient proof of proprietary interest, to entitle Juan Madrazo to restitution of the property libelled.

William Bowen was not represented by counsel, before the court.

As the decision of the court was exclusively on the question of jurisdiction, no other than the arguments of counsel on that question are given.

Berrien, on the part of the state of Georgia.—1. The circuit court of the United States had no jurisdiction in the case, it involving jurisdiction over the state of Georgia. Jurisdiction cannot be claimed on the ground of consent; it cannot be obtained by the voluntary appearance of the governor of Georgia to the libel of Madrazo, and he had no right to give jurisdiction. The exemption of a state from the jurisdiction of the courts of the United States, is for the preservation of its sovereignty; it is an attribute of sovereignty, and it is no objection to the exception being taken, that the appearance was voluntary. The governor of Georgia could not yield up this attribute of the sovereignty of the state; his agency being limited by the constitution. A party may object to the jurisdiction of the court below, to

try a cause which he himself instituted, *Capron* v. *Van Noorden*, 2 Cranch 126. This question, is, therefore, to be considered as unaffected by the appearance of the governor of Georgia.

The 11th article of the amendments to the constitution of the United States takes away the jurisdiction of the courts of the Union, in all cases in law and equity, in which claims are *preferred against the separate states; and the amendment was intended to leave to the several [*114 states the adjustment of the claims of individuals upon them. *Cohens* v. *State of Virginia*, 6 Wheat. 264. The judicial power of the courts of the United States, by the amendment, prevented from extending to any suit, commenced or prosecuted, &c., and against a state. 6 Wheat. 264, 407, 408. The alteration in the constitution was not made by revoking a power which the courts possessed; but the amendment declares, that, "the judicial power shall not be construed to extend to suits, &c.;" and denies that such a power ever existed.

Why is not a suit in the admiralty a suit at law? It proceeds according to the law of the country, and in the courts of the country. The laws which govern and regulate the decisions of the admiralty courts, are the laws of the Union. It is agreed, that, according to the doctrine in *Fowler* v. *Lindsey*, 3 Dall. 411, the state must be either nominally, or substantially, a party to the suit. It is not enough, that the suit may, in its result, consequently affect its interests. The state of Georgia is a party in the proceedings of Madrazo; a citation is prayed to the state; and the property which the libellant seeks to obtain, by the decree of the district court, is in the possession of the governor of Georgia, under the authority of a law of the state; another part is in the treasury of Georgia, and has become mingled with the general and public funds of the state. The process of the court was served on the governor and treasurer of the state; and they are required to show cause, why restitution shall not be decreed. The law of the United States of 1807, prohibits the importation of slaves; and directs, that if slaves are brought in, they shall be seized, and delivered to the governor of the state in which the seizure is made. The governor of Georgia appointed an agent to receive them; and the libel states the slaves claimed, were delivered to the agent of the state. The right of the state of Georgia, acquired under that act, is spread on the record by the libellant; and it is this right, so acquired, which he seeks to divest. The state of Georgia is, therefore, a party to this suit, because the *res* is in her possession; and the monition issued below, was served upon the governor and the treasurer of the state. The jurisdiction is also denied, because a judgment of the court would operate directly on the state of Georgia. Madrazo should look to the legislature of Georgia for redress; and the appeal to her justice, is not to be made through the courts of the United States.

The terms of the amendment to the constitution—its spirit, *and the views heretofore taken of it, by this court, are all opposed to [*115 the construction now claimed, which will except from the operation of the amendment cases of admiralty jurisdiction. Proceedings in the admiralty, are suits at law. Does the admiralty proceed without law, according to the will of the judge? The forms of its proceedings are according to the civil law; the rights of the parties are decided according to the law of nations, and the law-merchant; and both on its prize and instance side, according to

the municipal laws of the country where it sits. The objections made by the states to their liability, before the amendment to the constitution, was not to the mode by which the suit was instituted; but to the fact of their being made answerable to the courts of the Union. To restrict the amendment to cases of common law and equity, would not, therefore, have afforded an adequate remedy to the alleged grievance. Nor was the restriction established with a reservation as to claims by foreigners; neither was it intended to leave uninfluenced by it, cases which might arise out of a state of war. Many of the suits which had been brought, and which might have been brought, before the amendments, were instituted by foreigners; or were of a nature to be prosecuted in the admiralty. The construction claimed by the opposite counsel, would exhibit the extraordinary fact, that while the amendment took away the jurisdiction of the supreme court in suits against states, it left it in the lowest court under the constitution.

Nor does the exemption of the states from suits in the admiralty, authorize apprehensions of internal difficulties. In cases of captures at war, on the high seas, by whatever ship of war or armed vessel, acting under the authority of the United States, the capture may be made, no right could be acquired by capture, to the property, by a state; the right to the property, is that of the sovereign who makes the war; and, but for the prize act, by which the property captured is condemned and distributed, it would remain the property of the sovereign. *Osborn* v. *Bank of the United States*, 9 Wheat. 730; likewise *Cohens* v. *Virginia*, 6 Ibid. 264. But if the amendment to the constitution does not extend to cases of admiralty jurisdiction; the jurisdiction of this case would be in the supreme court, and therefore, there is error in these proceedings.

2. The court below never had possession of the *res*, or anything pertaining to it. The warrant of arrest issued in the district court, was never served; the court relying on the service of the monition, which was
*116] erroneous. *The *res* remained in the possession of the governor of Georgia, without any agreement for its production. The proceedings in the district court, not having been founded upon the *res;* and the service of the monition not having been legal; the circuit court could not have jurisdiction on the appeal. As an appellate court, it could, by no proceeding, get possession of the *res;* and the case should have been remitted by the circuit to the district court.

The provisions of the act of congress of 1807, which apply to this case, were not repealed by the law of 1818. The repeal applied to importations by sea, and these slaves were brought into Georgia by land.

Wilde, for Juan Madrazo, made these points.—1. That the court below had jurisdiction. 2. That the proprietary interest of Madrazo in the Isabelita and slaves, and the illegal outfit of the Successor, are sufficiently proved; and he is, consequently, entitled to restitution.

The original grant of jurisdiction, in such cases, to the courts of the United States, is ample. (2d sect., 3d art. Const. U. S.) The admiralty jurisdiction is, "of all cases of admiralty and maritime jurisdiction," generally, without restriction; whether they arise under the constitution, laws and treaties of the United States, or the law of nations. The grant of common-law and

equity jurisdiction, is confined to cases arising under the constitutional laws and treaties of the Union. Before the amendment to the constitution, the courts of the United States must have taken cognisance of admiralty cases; although a state were directly interested, or even a party on the record. Even since the amendment, there are cases in which it is presumed these courts may take jurisdiction, although a state be a party. The second clause of the tenth section of the second article of the constitution, prohibits the states from keeping troops, or ships of war, only in time of peace. In time of war, they may; during actual hostilities, there is nothing to prevent a state from fitting out a ship of war, or even a fleet, for defence or annoyance, and the lawful prizes made by such a fleet, it is presumed, would be the property of the state—a state may exercise this power. Congress have the right to make rules concerning captures; such rules are the supreme law. But if all captures, made by state cruisers, are to be tried in state tribunals, how long could the rules of congress concerning captures be enforced, or the belligerent rights of the Union be exerted, without the violation of justice to neutral nations? To the great powers of war and peace, must be attached *those of making war efficient, and peace secure. Unjust judgments, unredressed, are among the causes of war. But if the state tribunals are to decide in the last resort, upon captures made by their own vessels, where neutral claimants are concerned; the whole may be involved in war, by the misconduct of a part. This court will not adopt such a construction of the amendment, unless it is forced upon them, by its terms. The language must be clear, strong and peremptory, which coerces its adoption. [*117

The grant distinguishes between common-law and equity jurisdiction, and admiralty jurisdiction. They are given by distinct clauses, and to a different extent; and are treated as separate powers. If they are so considered—if the three are separately granted, distinguishing each from the other, and two only are taken away; does not the third remain?

If the district court were proceeding without jurisdiction, how has it happened, that a prohibition was not moved for? It would lie, in such a case; *United States* v. *Peters*, 3 Dall. 121; and an appeal might be taken on the decision. *Cohens* v. *Virginia*, 6 Wheat. 397. The counsel referred to Publicus, No. 80, and to the debates of the conventions, on adopting the constitution. But supposing the amendment extends to, and excludes, admiralty, as well as equity and common-law jurisdiction; is this a case, where the state is a party defendant on the record, or in which her rights are directly implicated; and the process of this court must go against her? In form, the state is not a party—the information and claim are by John Clark, governor, in behalf, &c. The proceeding, if state interests are implicated, is not against a state, but by a state; the state, if a party at all, is the actor. In substance, it is a judicial proceeding, at the instance of a state; in which she seeks the aid of the United States courts, to give effect to a tittle claimed in her behalf, under the United States laws. In effect, the sentence and process of the court will operate not upon the state, but on individuals. *Osborn* v. *Bank of the United States*, 9 Wheat. 738; and *United States* v. *Bright*, 3 Hall's Law Journ. 216.

Has the state of Georgia really any interest in these Africans? The claim set up is under the act of congress of 1807, prohibiting the slave-

trade; which places Africans illegally imported, at the disposition of the state into which they are brought; and the act of Georgia, of November 1817, ordering them to be sold, unless taken by the colonization society, and all expenses since capture and condemnation paid. Before any decree upon this information—before it was even filed—all that part of the act of 1807, under which Georgia could derive any title, was repealed. Act of 1818. (3 U. S. Stat. 450.) *The title to property forfeited, or liable to forfeiture, is not divested, till it is libelled and condemned; and if there be an appeal, not until sentence of condemnation is rendered in the appellate tribunal. *Yeaton* v. *United States*, 5 Cranch 281–3. If the statute creating the forfeiture be repealed, before final sentence, without reserving the right to punish cases arising under it, condemnation cannot take place. *The Rachel* v. *United States*, 7 Cranch 329; *The Irresistible*, 7 Wheat. 551. Until the condemnation, the state has no right to the Africans. After condemnation, indeed, the importer's title is divested, by relation, back to the act of forfeiture. But until condemnation, his title is not divested. The right of the state, depends upon the result of a judicial investigation; which, when a forfeiture is ascertained by final sentence, gives it relation back to the time of the act committed, and from that period, divests the importer, and invests the state, with his title. But if, pending the proceedings, the act is repealed, the judicial proceeding necessary to give effect to the claim of the state, can have but one result—that claim must be rejected.

*118]

The proposition, that the courts of the United States have not jurisdiction in such a case, then, comes to this—an alleged right, in a state, though depending upon the result of a judicial inquiry, may be set up, to preclude that inquiry, upon the result of which it depends. And that, even though the court could look into the question, must determine that no right, in fact, exists. Under this act, there was no authority to sell the Africans, before condemnation; and the money, if in the treasury, is there by the unauthorized act of an individual, and in violation of the law.

Marshall, Ch. J., delivered the opinion of the court.—Some time in the year 1817, Juan Madrazo, a Spaniard, residing in the island of Cuba, engaged in the slave-trade, fitted out a vessel for the coast of Africa, which procured a cargo of Africans; and on its return, in the autumn of 1817, was captured by a privateer sailing under the flag of one of the governments of Spanish America, and carried into Amelia Island; where the vessel and cargo were condemned by a tribunal, established by Aury, the authority of which has not been acknowledged in this country. The Africans were purchased by William Bowen, and were conducted into the Creek nation; *within the limits of the state of Georgia, where they were seized by McQueen McIntosh, a revenue-officer, at Darien, in Georgia, early in January 1818, under the act of 1807; which prohibits the importation or bringing into the United States, of any negro, mulatto or person of color. This act annuls the title of the importer, or any person claiming under him, to such negro, mulatto or person of color, and declares that such persons "shall remain subject to any regulation, not contravening the provisions of this act, which the legislatures of the several states or territories, at any time hereafter, may make for disposing of such negro, mulatto or person of color."

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In December 1817, the legislature of Georgia passed an act, which empowered the governor to appoint some fit and proper person to proceed to all such ports and places within this state, as have, or may hereafter hold any negroes, mulattoes or persons of color, as have been, or may hereafter be seized or condemned under the above recited act of congress, and who may be subject to the control of this state; and the person so appointed shall have full power and authority to receive all such negroes, mulattoes or persons of color, and to convey the same to Milledgeville, and place them under the immediate control of the executive of this state. The second section authorizes the governor to sell such negroes, mulattoes or persons of color, in such manner as he may think most advantageous to the state. The third directs, that they may be delivered up to the colonization society, on certain conditions therein expressed; provided, the application be made before the sale.

Under this act, the Africans brought in by William Bowen, were delivered up to the governor of Georgia, who sold the greater number of them, and paid the proceeds, amounting to $38,000, into the treasury of the state. The colonization society applied for those remaining unsold, amounting to rather more than twenty, and offered to comply with the conditions prescribed in the act of December 1817. In May 1820, the governor of Georgia filed an information in the district court of Georgia, stating the violation of the act of congress, that the Africans were placed under the immediate control of the executive of the state, where they awaited the decree of the court. He states the application made on the part of the colonization society, with which he is desirous of complying, as soon as he shall be authorized to do so by the decree of the court.

In November 1820, William Bowen filed his claim to the said Africans, alleging that they were his property—that they *had not been brought into the United States in violation of the act of congress; but were [*120 seized while passing through the Creek nation, on their way to West Florida.

In February 1821, Juan Madrazo filed his libel, alleging that the Africans were his property—that on the return-voyage from Africa, they were captured by the privateer Successor, commanded by an American, and fitted out in an American port; that the vessel and cargo were carried into Amelia Island, and condemned by an unauthorized tribunal; after which they were brought by the purchaser into the Creek nation, where they were seized by an officer of the United States, brought into the limits of the district of Georgia, and delivered over to the government of that state, in pursuance of an act of the general assembly, carrying into effect an act of congress, in that case made and provided. That a part of the slaves were sold, and the proceeds, amounting to $38,000, or more, paid into the treasury of the state; and that the residue, amounting to twenty-seven or thirty, remain under the control of the governor. The libel denies that the laws of the United States have been violated, and prays that admiralty process may issue to take possession of the slaves remaining under the control of the governor of Georgia; and that the governor, and all others concerned, should be cited to show cause why the said slaves should not be restored to Juan Madrazo, and the proceeds of those which had been sold, paid over to him.

Upon this libel, a monition was issued to the governor of Georgia, who appeared and filed a claim on behalf of the state; in which he says, that the

slaves were brought into the state, in violation of the act of congress, and that they were taken into the possession of the executive of the state, in pursuance of the act of the state legislature, enacted to carry the act of congress into effect. That a number of the said slaves have been sold, and the proceeds paid into the treasury, where they have become a part of the funds of the state, not subject to his control, nor to the control of the treasurer. That the residue of the said slaves, who remain unsold, have been demanded under the law, by the colonization society. Process was also issued against the Africans, but was not executed. The two causes came on together, and the district court dismissed the claim of Bowen, and also dismissed the libel of Madrazo, and directed that the slaves remaining unsold should be delivered by the marshal, to the governor of the state, and that the proceeds of those sold, should remain in the treasury.

Both Bowen and Madrazo appealed to the circuit court. At the hearing in the circuit court, the sentence, dismissing *the claim of Bowen, *121] was affirmed. That dismissing the libel of Madrazo was reversed, and a decree was made, that the slaves remaining unsold, should be delivered to him, on his giving security to transport them out of the United States—and further, that the proceeds of those which were sold, should be paid to him. From this decree, the governor of Georgia and William Bowen have appealed to this court.

A question, preliminary to the examination of the title of the Africans, which were the subject of these suits, and to the proceeds of those which were sold, has been made by the counsel for the state of Georgia. He contends, that this is essentially, and in form, a suit against the state of Georgia; and therefore, was not cognisable in the district court of the United States. The process which issued from the court of admiralty not having been executed, the *res* was never in possession of that court. The libel of Madrazo, therefore, was not a proceeding against the thing, but a proceeding against the person, for the thing. This appeal carried the cause into the circuit court, as it existed in the district court, when the decree was pronounced. It was a libel, demanding, personally, from the governor of Georgia, the Africans remaining unsold, and the proceeds of those that were sold, which proceeds had been paid into the treasury. Pending this appeal, the governor filed a paper, in the nature of a stipulation, consenting to hold the Africans claimed by the libel of Madrazo, subject to the decree of the circuit court; if it should be determined that the claim in the circuit court had priority to sundry executions, levied on them by the sheriff of Baldwin county. Had this paper been filed in the district court, it would have been a substitute for the Africans themselves, and would, according to the course of the admiralty, have enabled that court to proceed in like manner, as if its process had been served upon them. The libel would then have been *in rem*. Could this paper, when filed in the circuit court, produce the same effect on the cause? We think, it could not. The paper in the nature of a stipulation, is a mere substitute for the process of the court; and cannot, we think, be resorted to, where the process itself could not be issued according to law. The process could not issue legally in this case, because it would be the exercise of original jurisdiction in admiralty; which the circuit court does not possess. This cause, therefore, remained, in its character, a libel against the person of the governor of Georgia, for the Africans

in his possession as governor, and for the proceeds in the treasury, of *those which had been sold. Could the district court exercise jurisdiction in such a cause? [*122

Previous to the adoption of the 11th amendment of the constitution, it was determined, that the judicial power of the United States extended to a case in which a state was a party defendant. This principle was settled in the case of *Chisholm* v. *Georgia*, 2 Dall. 419. In that case, the state appears to have been nominally a party on the record. In the case of *Hollingsworth* v. *Virginia*, also in 3 Dall. 378, the state was nominally a party on the record. In the case of *Georgia* v. *Brailsford*, 2 Dall. 402, the bill was filed by his excellency Edward Telfair, Esq., governor and commander in chief, in and over the state of Georgia, in behalf of the said estate. No objection was made to the jurisdiction of the court, and the case was considered as one in which the supreme court had original jurisdiction, because a state was a party. In the case of *New York* v. *Connecticut*, 4 Dall. 3, both the states were nominally parties on the record. No question was raised in any of the cases, respecting the style in which a state should sue or be sued; and the presumption is, that the actions were admitted to be properly brought. In the case of *Georgia* v. *Brailsford*, the action is not in the name of the state, but it is brought by its chief magistrate, in behalf of the state. The bill itself avows, that the state is the actor, by its governor. There is, however, no case in which a state has been sued, without making it nominally a defendant. *Fowler* v. *Lindsey*, 3 Dall. 411, was a case in which an attempt was made to restrain proceedings in a cause depending in a circuit court, on the allegation, that a controversy respecting soil and jurisdiction of two states, had occurred in it. The court determined, that a state not being a party on the record, nor directly interested, the circuit court ought to proceed in it. In the *United States* v. *Peters*, the court laid down the principle, that although the claims of a state may be ultimately affected by the decision of a cause, yet if the state be not necessarily a defendant, the courts of the United States are bound to exercise jurisdiction. In the case of *Osborn* v. *Bank of the United States*, 9 Wheat. 738, this question was brought more directly before the court. It was argued with equal zeal and talent, and decided on great deliberation. In that case, the auditor and treasurer of the state were defendants, and the title of the state itself to the subject in contest was asserted. In that case, the court said, "it may, we think, be laid down as a rule, which admits of no exception, that in all cases where jurisdiction depends on the party, it is the party named in the record." The court added, *"the state not being a party on the record, and the court having jurisdiction over [*123 those who are parties on the record, the true question is not one of jurisdiction, but whether, in the exercise of its jurisdiction, the court ought to make a decree against the defendants; whether they are to be considered as having a real interest, or as being only nominal parties."

The information of the governor of Georgia professes to be filed on behalf of the state, and is in the language of the bill, filed by the governor of Georgia on behalf of the state, against Brailsford. If, therefore, the state was properly considered as a party in that case, it may be considered as a party in this. The libel of Madrazo alleges, that the slaves which he claims, "were delivered over to the government of the state of Georgia,

pursuant to an act of the general assembly of the said state, carrying into effect an act of congress of the United States, in that case made and provided; a part of the said slaves, sold as permitted by said act of congress, and as directed by an act of the general assembly of the said state; and the proceeds paid into the treasury of the said state, amounting to $38,000, or more." The governor appears and files a claim on behalf of the state, to the slaves remaining unsold, and to the proceeds of those which are sold. He states the slaves to be in possession of the executive, under the act of the legislature of Georgia, made to give effect to the act of congress on the subject of negroes, mulattoes or people of color, brought illegally into the United States; and the proceeds of those unsold to have been paid in the treasury, and to be no longer under his control. The case made, in both the libel and claim, exhibits a demand for money actually in the treasury of the state, mixed up with its general funds, and for slaves in possession of the government. It is not alleged, nor is it the fact, that this money had been brought into the treasury, or these Africans into the possession of the executive, by any violation of an act of congress. The possession has been acquired, by means which it was lawful to employ. The claim upon the governor, is as a governor; he is sued, not by his name, but by his title. The demand made upon him, is not made personally, but officially. The decree is pronounced, not against the person, but the officer, and appears to have been pronounced against the successor of the original defendant; as the appeal-bond was executed by a different governor from him who filed the information. In such a case, where the chief magistrate of a state is sued, not by his name, but by his style of office, and the claim made upon him is entirely in his official character, we think, the *state itself may be considered as a party on the record. If the state is not a party, there is no party against whom a decree can be made. No person in his natural capacity is brought before the court as defendant. This not being a proceeding against the thing, but against the person, a person capable of appearing as defendant, against whom a decree can be pronounced, must be a party to the cause, before a decree can be regularly pronounced.

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But were it to be admitted, that the governor could be considered as a defendant, in his personal character, no case is made which justifies a decree against him personally. He has acted in obedience to a law of the state, made for the purpose of giving effect to an act of congress; and has done nothing in violation of any law of the United States. The decree is not to be considered as made in a case in which the governor was defendant, in his personal character; nor could a decree against him, in that character, be supported.

The decree cannot be sustained as against the state, because, if the 11th amendment to the constitution does not extend to proceedings in admiralty, it was a case for the original jurisdiction of the supreme court. It cannot be sustained in a suit, prosecuted not against the state, but against the thing; because the thing was not in possession of the district court.

We are, therefore, of opinion, that there is error in so much of the decree of the circuit court, as directs that the slaves libelled by Juan Madrazo, and the issue of the females now in the custody of the government of the state of Georgia, or the agent or agents of the said state, be restored to the said Madrazo, as the legal proprietor thereof, and that the proceeds of those

slaves, who were sold by order of the governor of the said state, be paid to the said Juan Madrazo; and that the same ought to be reversed; but that there is no error in so much of the said decree as dismisses the information of the governor of Georgia, and the claim of William Bowen.

JOHNSON, Justice. (*Dissenting.*)—By the new and unexpected aspect which this cause has assumed in this court, I feel myself called upon to accompany the report of this decision with a brief explanation. Such an explanation appears necessary, not less in vindication of the course pursued by the state of Georgia, than of the judicial course of the circuit court, over which I have the honor to preside.

By the state of facts, as now exhibited, it would appear as if the court of the sixth circuit of the district of Georgia, had been taking very undue liberties, both with the executive and treasury departments of that state; and that two of the *governors of that state, acting in behalf of the state, had first come voluntarily into the courts of the United States, [*125 and then, only because the decision of that court was against the rights they asserted, repudiated their own act, and denied the jurisdiction of the very court which they had voluntarily called to decide on their rights. Yet nothing can be further from the truth of the case. The real exposition of the incidents to the cause, lies in this—that the actual *promovent contestatio litis*, was the colonizing society; that Georgia, at least, in its inception, had no interest in it; that the governor only regarded himself as a stake-holder to the three disputants who claimed the property. The slaves, as well as the proceeds of those which were sold, it is notorious, have, in fact, been delivered up by the state to one of these claimants. It is true, that in this point, the legislature of the state has differed in opinion on the question of right, from the court that tried the cause, and surrendered them to Bowen, instead of Madrazo; but this fact proves that she was not contending for herself.

There is no necessity, however, for speaking out of the record on this subject. The information, as well as the claim filed to Madrazo's libel, both explicitly avow, that, as to the slaves remaining unsold, the governor was acting in behalf of the colonization society; and had not the decision below been against their claim, and on grounds which cannot be shaken, it is fair to conjecture, that the exception here taken to the jurisdiction, would never have been suggested; nor, had that society possessed a legal existence, so as to prosecute a suit, in its own name, is there the least reason to believe, that the governor of Georgia would ever have presented himself in the courts of the United States, upon this subject. What could he do? This property had come legally into the hands of his predecessor, a part had been sold, and the rest transmitted to him, specifically. Two parties presented themselves, claiming it in their respective rights; and having been constituted by law, the guardian of the rights of one; he presents himself to the only court that could take cognisance of the cause, in order to have the question of right decided, before he would surrender the slaves, in his possession, to either claimant. The money raised from the sales, he disavows having any control over.

But in the progress of the cause, incidents occur which produce a total change in the views and interests of parties. A third party arises, and on

the clearest proofs and best-established principles, has made out the proprietary interest to be in himself. An appeal is taken to the court; and pend-
*126] ing the *appeal, the party who failed in every court below, and must fail, wherever the rights are subjected to judicial cognisance, succeeds in prevailing on the legislature to abandon the property to him. Thus, then, the colonization society have lost all hopes from a suit at law; Bowen has obtained the property; the legislature that gave it to him, can, at least, feel no desire to have Madrazo's right confirmed in this court; and all became interested in overturning their own work, and crushing Madrazo's interest under the ruins. It is certainly a purpose which cannot be willingly favored in a court of justice; and I meet it with the most thorough conviction that the law is not with the appellants, on the objections to the jurisdiction of the court below, which have now, here, for the first time, been moved and argued.

There are two exceptions taken to the exercise of jurisdiction, in the court below:—1. That a state was a party, &c. 2. That the jurisdiction of the district court never attached, because the *res subjecta* was never actually in possession of that court.

The facts were these: the negroes were certainly brought into the United States, in contravention of the act of congress of 1807. That act creates a forfeiture, inasmuch as it divests the owner of all property in the slaves so brought in; and by another provision, it is left to the states to dispose of such persons of color, in any manner they may think proper, not contravening the provisions of that act. The state of Georgia, by law, authorized their governor to appoint an agent to receive such persons of color, and deliver them to the executive, to be sold, unless applied for, by the colonization society; and if so applied for, then to be delivered into their possession. These slaves were seized by a revenue-officer of the United States, and voluntarily delivered to Governor Rabun, then governor of Georgia; who had sold all except about thirty, before the society applied to him, agreeable to the provisions of the act. The Georgia law contains no express instructions to the governor, how to dispose of the proceeds of the sales. It authorizes him to sell, after sixty days' notice, "in such manner as he may think best calculated for the interest of the state;" but whether for cash, or credit, or to remain in, or be shipped from, the state, be meant by this provision, there are no means of determining. The money was, in this instance, paid into the treasury; or, at least, so the governor alleges, in his
*127] claim *to the Madrazo libel; and so we are bound to consider the facts.

Here, then, was a case of forfeiture, under a law of congress; and the governor of the state legally authorized to sue for, and recover, the thing forfeited, and "when seized and condemned," as the Georgia law expresses it, to sell it, on one state of facts; on another, to deliver it to the colonization society. Who was to sue for this forfeiture; if not the state, or the governor, as its representative? The society could not, for it had no existence in law.

The governor accordingly sold the greater part; and his successor filed an information in the district court of the United States, to have the residue condemned, that he might deliver them to that society. To this libel and information, Bowen filed his claim and answer; and while that suit was

pending, Madrazo filed his libel in the district court, praying process against the Africans remaining in the governor's hands, and the proceeds of those which were sold. On this libel, a warrant of arrest was issued against the slaves, and a monition to the governor and all concerned, in relation to the whole subject of Madrazo's claim. The warrant of arrest was not served in the district court; but Governor Clark, successor of Governor Rabun, appeared to the monition, without protest, and filed a claim to the Africans, in behalf of the society; as to the proceeds of those which had been sold, he simply answers, that they had been paid into the treasury, where they remained, mixed up with the treasure of the state, and beyond his control.

The pleadings were in this state, when the district judge entered upon a plenary hearing of the case, taking into view the information of the governor, with Bowen's claim, and the libel of Madrazo, with the governor's claim and answer; and thereupon, sustained the information, and dismissed Bowen's claim and Madrazo's libel. Bowen and Madrazo appealed; and on the hearing in the circuit court, where a body of new evidence was introduced, the decree of the district was reversed, and the information and Bowen's claim dismissed.

But having proceeded so far, the circuit court found itself thus situated. As the district court had sustained the information, it would have been nugatory to enforce its warrant of arrest upon the slaves, since they were already in possession of the state. Madrazo's libel being dismissed in that court, no further steps were taken, to render the *res subjecta* into actual possession. But when the information was dismissed, and Madrazo's *libel sustained in the circuit court, it followed, that it was error in the district court, not to have enforced the service of the warrant of [*128 arrest on the slaves, or done some equivalent act. Thus situated, the circuit court could not send back the cause; because, by the 24th section of the judiciary act of 1789, the circuit court is required to go on and make such decree, as the district court ought to have made. That court thought that the obligation to perform this duty, carried with it all the incidents necessary to perform it, and ordered process accordingly. To this, the governor again, without protest, responded, by voluntarily entering into a stipulation to hold the slaves, subject to the order of that court; and then the court, considering itself legally in possession of the *res*, made the decree in favor of Madrazo, which is here brought up for revision.

On the question of right, upon the evidence before the circuit court, there can scarcely be two opinions. The cargo was Madrazo's; it was captured by a privateer; fitted out in Baltimore; run into Fernandina; there sold to Bowen; carried across the country to the Creek agency, within the limits of the United States, and where its jurisdiction attached, notwithstanding the Indian title existed; and although Bowen, the tortious owner, committed an offence, by introducing them into the country; Madrazo was not privy to that offence, and was innocent of any act that could work a forfeiture of his interest.

But the question now to be considered, is exclusively that of jurisdiction; and it is insisted, first, that as the state was a party, and the party defendant in both cases, in the circuit court, that court could not maintain jurisdiction of the subject. That a state is not now suable by an individual, is a question on which the court below could not have paused a moment. The

11th amendment of the constitution put that question at rest for ever. But where is the provision of the constitution, which disables a state from suing in the courts of the Union? The second section of the third article, extends the judicial power of the United States, to all cases arising under the law of the United States, and to all cases of admiralty and maritime jurisdiction; to controversies between two or more states, between a state and citizens of another state; and between a state, or the citizens thereof, and foreign states, citizens or subjects. It is true, the next section provides, that, in all cases in which a state shall be a party, the supreme court shall have *original jurisdiction. But it is obvious, that original, does not mean exclusive; and in the 13th section of the judicial act of 1789, it is so treated; since the legislature there declares, in what instances the jurisdiction of the supreme court shall be exclusive, and in what concurrent, when a state is a party. The words of that section are: "the supreme court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also between a state, and citizens of other states and aliens; in which latter case, it shall have original, but not exclusive jurisdiction."

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Now, considering this section in connection with the constitution, it is obvious, that the word exclusive, there used, must be considered as applying solely to the courts of the United States; since it never could have been imagined, that the states were to be restricted from suing in their own courts, or those of their sister states; and thus construed, it must carry the implication, that the states may sue in any other courts of the United States, in cases comprised within the jurisdiction vested in those courts, by the judiciary act; provided, the cause of action, or the parties, be such as bring the suit within the cases to which the judicial power of the United States is extended, by the constitution. In a suit against an alien, then, there can be no question, that a state may sue in the circuit court; and must prosecute a suit there, if the alien chooses to assert the right of transfer secured to him, under the 12th section of that act. And so, with regard to suits against consuls and vice-consuls, it is perfectly clear, that the suit of a state must, if the defendant insists upon his right, be prosecuted in the district courts of the United States. The 9th section of the act, being that which prescribes the jurisdiction of the district courts, is explicit on this point. But that section embraces other cases, in which, without any strained construction, the states may assert the rights of a suitor, in the district court. The words of the section are, "the district court shall have exclusive original cognisance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation and trade of the United States, where seizures are made on waters, &c.; and shall also have exclusive original cognisance of all seizures of land, &c.; and of all suits for penalties and forfeitures, incurred under the laws of the United States."

Now, is is very clear, that wherever the district court is vested with "exclusive original cognisance," the supreme court can possess no original jurisdiction; and such is clearly the case, *with regard to seizures, and suits for forfeitures, under the laws of the United States, and suits in admiralty. And unless some reason can be shown, why a state should not prosecute a suit for forfeiture, under the laws of the United States; it follows, with regard to the information, that the jurisdiction was rightfully

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exercised by the district court, in the present instance. The admiralty suit shall be separately considered. But why may not a state prosecute for a forfeiture, under a law of the United States? Take the cases of a law of Congress passed to aid the states, in the collection of a tonnage-duty; or of a penalty, under their inspection laws. In the one case, there may be a seizure on the water, and in the other, on the land; in either, there may be a suit for a forfeiture; and in all, a penalty might, very rationally, be given to the state, or its prosecuting officer. The present, so far as it involves the question on the information, is precisely one of those cases. Here was a forfeiture, incurred under a law of the United States; and the benefit of it was consigned to the states, if they chose to accept it. Here, the state did accept it, and authorized their executive to assert the rights derived under the law of congress.

An examination of the exceptions in the 13th section of the act, which marks out the jurisdiction of the supreme court, will throw light upon this subject. The language of the section is, "that the supreme court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also, between a state and citizens of other states, or aliens; in which latter case, it shall have original, but not exclusive jurisdiction." Now, it may seem unaccountable, at first view, why these exceptions should have been extended to controversies between a state and its own citizens; since controversies between a state and its own citizens, is not one of the subjects of jurisdiction enumerated in the constitution. And the solution is to be found in this, that the grant of jurisdiction, as to cases arising under the constitution, laws, &c., of the United States, and of admiralty and maritime causes, is not restricted to, nor limited by, any relation or description of persons. Controversies, in these branches of jurisdiction, may, therefore, by possibility, arise between a state and its own citizens; certainly, between a state and the citizens of other states, or aliens, under the laws of the Union, or in admiralty and maritime cases.

As the law regards this information as a civil suit, *in rem*, on the exchequer side of the admiralty, and it was grounded on a law of congress—the citizenship of the claimants can have no influence on the question of jurisdiction. I think, *however, that it appears somewhere in this voluminous record, that Bowen was a citizen of Georgia; but whether of [*131
that state, a sister state, or a foreign state, the controversy, if it be regarded as one with individuals, is expressly excepted from the exclusive jurisdiction of the supreme court; and I must think, is within the original jurisdiction of the district court. And if so, it follows, that the state must, upon appeal from a decision there made in its favor, assume the attitude of a defendant in any court, into which the cause may be legally carried, by appeal or writ of error. In England, the king cannot be sued, yet he is daily brought before the appellate court, as a defendant in error. It has long since been decided, that is legal. And thus too, the United States continually appears upon the docket of this court, as a party defendant; and for the same reason, although not suable originally, yet upon a judgment obtained, injunctions have been granted against parties who could not otherwise have been made defendants; as, for example, the United States. The thing is unavoidable—it is incident to the right of appeal. Justice could

not be administered without it. There would be no reciprocity — the law would operate unequally, and to the prejudice of the citizen. There is no compulsory process used, to produce this reserved, I may say, normal, state of parties. The cause is removed by a citation, or other less offensive process, and the party appears in the superior court, if he will — if not, the cause is disposed of, without an appearance.

So much for the information, and the appeal from the district court upon it. We will now consider the rights of the state, in the relation in which it stood to Madrazo's libel. I am considering the state, and not the officers of the state, as the real party to the record. When Madrazo's libel was filed, the governor's information was pending; and as Madrazo's libel sets out the seizure and delivery of the slaves to the executive of Georgia, and the claims advanced to the proprietary interest therein; it was properly considered in the district court, in connection with the informatian, and in the double aspect of a claim and libel. In the case of *The Antelope*, the cross-libel of the Portuguese counsel was treated, reciprocally, as claim and libel. Considered in the relation of a claim to the information, it is impossible to deny, that if the state rightly preferred the information, it must have been bound by the decisions, both of the district court, and of the tribunal to which an appeal lay from the decision of the district court upon that information, as regarded the rights of the claimants.

*132] *And if we consider Madrazo's libel in the aspect of a suit in the admiralty, it appears to me impossible to assign a sufficient reason, why the state should not be equally bound. The property or possession of the state had been acquired under a capture at sea—a maritime tort. It was, therefore, clearly a case of admiralty jurisdiction. Where, then, is the limit to this branch of the jurisdiction of the district court? No personal relation, description or character, imposes any such limit. The grant of jurisdiction to the United States, and by the United States to the district court, is without restriction; and it would be singular, if a state should be precluded from the right of appearing to assert its rights before that tribunal. Suppose, the case of a capture of a library shipped to a state, and a re-capture and libel for salvage; surely, in some form or other, the state must have a hearing. There is nothing compulsory upon the state—the right may be abandoned, if it will; but after preferring a claim, will it be contended, that it may withdraw itself from the contest, under an assertion of state immunities, to the prejudice of individual right? This is not a new question in the admiralty—it is considered by Godolphin, who observes "that for the same party, in the same cause, to surmise and move for a prohibition against that jurisdiction, to which himself had formerly submitted, and in a cause, which, by the libel, appears not other than maritime, seems quite beside the rule and practice of the law" (Jurisdiction of the Adm. p. 116, 117); and the two adjudged cases of *Jennings* v. *Audley* (2 Brownl. 30), and *Baxter* v. *Hopes* (Ibid.), which he cites, do fully establish "that in all cases where the defendant admits the jurisdiction of the admiralty court, by pleading, then prohibition shall not be granted, if it do not appear, that the act was done out of the jurisdiction." Now, in this case, the state appeared, and claimed, to the monition, without protest. In the admiralty, a claimant is an actor; and had the decision of the district court been affirmed, the state would have had the full

benefit of this interposition, as a party. And again, at a subsequent period, the state voluntarily surrendered the *res* to the circuit court, and took it out again on stipulation, &c., and had not this exception now been taken, would have had all the benefit of a decree of restoration, if made by this court.

But it is insisted, that consent cannot give jurisdiction: that this is a sound rule, as applied to the common-law courts, cannot be controverted; but is it so in the admiralty? It must be recollected, that the common-law courts have themselves relaxed this rule, in relation to the admiralty. I allude to the controversy on the subject of the stipulation bonds, which was finally abandoned, on the ground of the assent *of the party [*133
stipulating to submit to the jurisdiction of that court. These decisions seem fully in point, to the present case. (2 Bro. Civ. & Adm. 97–8.) But in proceedings *in rem*, the admiralty wants no consent or concession to enlarge its jurisdiction. All the world are parties to such a suit, and bound by it, by the common consent of the world. The interest of a state, or the United States, in the *res subjecta*, must be affected by such a decision. The question will now be considered, whether the want of an actual reduction of the *res* into possession in the district court, deprived that court of jurisdiction; or whether if it did, that circumstance would affect the appellate jurisdiction of the circuit court. Also, whether on the reduction of the *res* into possession, there was any assumption of original jurisdiction in the circuit court.

On these points, I cannot bring myself to feel a doubt, since the very failure in the district court to grant process for reducing the *res* into possession, would be such a "*damnum irreparabile*" as would sustain an appeal to the circuit court. Otherwise, the very ground of appeal—that which gives jurisdiction, would take it away. And what, upon an appeal, would be the course of the circuit court, upon such a case? It has no power to remand the cause; for the 24th section requires, that "when a judgment or decree shall be reversed in a circuit court, such court shall proceed to render such judgment, or pass such decree, as the district court should have rendered or passed." This section, I must believe, necessarily, substitutes the circuit for the district court, upon a reversal; and vests it with power to do whatever that court could have done, or ought to have done, originally. It is very important here to notice, that not reducing the *res* into possession in the district court, was the necessary consequence of its first error, in sustaining the information, and dismissing Madrazo's libel. For if Madrazo's pretensions were to be considered as rejected, there could be no reason for pursuing the means of reducing the *res* into possession in the district court; and while the cause was in the circuit court, that necessity did not arise, for the same reason, until the decree was passed for reversing the decree of the district court, and dismissing the information. Thus circumstanced, the power given, and duty imposed, by the 24th section, could not have been exercised otherwise than it was. The circuit court alone could proceed to do justice between the parties, and become *quoad hoc*, vested with original powers.

The question, as it regards the proceeds of the Africans sold, is one of more nicety. For the proprietary interest in the negroes unsold, could well be disposed of, after the court *became actually possessed of them. [*134
The court was not at liberty to doubt, that the stipulators would

have returned the slaves, specifically, upon monition. But the proceeds of those sold, we must suppose had been paid into the treasury; and there is no doubt, that the court could not, and would not, have attempted, by compulsory process, to get at it. Yet, was this a sufficient reason for not proceeding to adjudicate upon the question of right? I think not.

It must be noticed here, that the head of the government had omitted no firm or legal means, to give authenticity to the submission of the state to the jurisdiction of the court. The letters of procuration, executed by both Governor Clark, and his successor, Governor Troup, in due form, are on the files; expressly authorizing, in the name of the state, all the acts of certain proctors of that court, in the name and behalf of the state. The governor's answer, then, was the answer of the state; and when the answer avows, that many of the slaves were sold, and the money paid into the treasury, what is it, but acknowledging that the property of Madrazo no longer remains in specific existence, but has been sold, and appropriated by the respondent, under such circumstances as convert Madrazo's rights into a pecuniary demand, a debt due by the state? Now, the state could stand in no other relation to Madrazo, in this behalf, than Bowen or the captor would have stood, had the sale been made by them; and can it be supposed, that a similar answer, from either Bowen or the captor, would have deprived the court below of its jurisdiction?

It is almost a work of supererogation, to resort to precedents on such a question; but if necessary, there is no want of precedents, to prove, that the district court was bound to go on, and render justice to the libellant, according to the forms of the admiralty, so far as it could proceed. The case of *Manro* v. *Almeida*, decided in this court in 1825, was just such a case. 10 Wheat. 473. There, it was fully considered, whether the court might go on, and how to proceed, and the cause was remanded to the circuit court for further proceedings. The libel charged a seizure and appropriation of a sum of money, on the ocean; and the respondent appeared, under protest, and, by demurring, admitted as true, what the answer here avows to be true. And strongly analogous is the case of *McKenzie* v. *Livingston & Welsh*, reported in a note to the 3 T. R. 333, in the case of *Stuart* v. *Wolf*; in which McKenzie preferred a libel in the vice-admiralty court, in Jamaica, to obtain condemnation of a sum of money, captured by him, and not paid into the registry of the court. Livingston and Welsh filed a claim, and that court decreed to them "the sum of 1300 pounds, *135] *in the possession of the captor." McKenzie appealed to the lords commissioners, who affirmed the decree below, and the cause was remitted for further proceedings. In that case, the *res* was avowedly out of possession of the court; and yet, upon the submission of the party who held it, the court entertained jurisdiction, and decreed upon the cause; as if the claimant had been libellant, and the libellant stood in his place.

When money is the thing in contest, or the thing captured has been converted into money, it becomes essentially a debt; and, of course, a metaphysical thing—not to be arrested specifically. Upon this view of the subject, the district court might have exercised jurisdiction over the whole capture; and did entertain jurisdiction, in the very act of dismissing the libel, upon the question of right. Then, when the whole cause was brought, by appeal, before the circuit court, I hold, that the circuit court was bound

to go as far as it could go, without intrenching upon the sovereign rights of the state; which, for the purposes of justice, had thus consented to enter into the litigation between these parties—that is, so far as a decree. Had not the progress of the court been arrested by this appeal, it could certainly have gone no further than to issue its monition. But it cannot be doubted, that upon Madrazo's petitioning the legislature on the subject, their officers would have been instructed to dispose of the property and money, according to the decree of the court. Subsequent events, however, have given a new aspect to things; and Madrazo, with abundant proofs of his rights, is left without remedy.

DECREE.—These causes came on, &c.: On consideration whereof, this court is of opinion, that there is error in so much of the decree of the said circuit court, as directs restitution of the slaves libelled by Juan Madrazo, and the issue of the females, in the custody of the government of the state of Georgia, or the agent or agents of the said state, and that the proceeds of those slaves, who were sold by order of the government of the said state, be paid to the said Juan Madrazo; the circuit court not having jurisdiction of a cause, in which the plaintiff asserts a claim upon the state; and that the same ought to be reversed and annulled; and the libel of the said Juan Madrazo is ordered to be dismissed. And this court is further of opinion, that there is no error in the residue of the said decree, and the same is hereby affirmed; and it is further considered and ordered, that the said cause be remanded to the said circuit court, with directions for further proceedings, to be had thereon, according to law and justice, in conformity to this opinion.

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*JOSEPH MANDEVILLE, one of the firm of RICHARD SLADE & Co., Plaintiff in error, *v.* GEORGE HOLEY and THOMAS SUCKLEY, joint merchants in trade, under the firm of HOLEY & SUCKLEY, Defendants in error. [*136

Confession of judgment.—Release of errors.

Under the law of Virginia, a confession of judgment by the defendant, is a release of errors.[1]

ERROR to the Circuit Court for the District of Columbia. An action was instituted in the circuit court for the county of Alexandria, by the defendants in error, against Richard Slade, James Anderson and the plaintiff in error, trading under the firm of Richard Slade & Co.; and the suit having abated as to Slade, by his death, and by return, as to Anderson, it was prosecuted against Joseph Mandeville only. The declaration contained the usual money counts, and the damages were laid at $10,500.

By consent of parties, an order was made by the court, referring the accounts to the auditor of the court, to state and report them to the court; this report to be subject to exceptions; and when the report should be settled, then the same to be substituted for a trial by jury, and a judgment to be entered for the whole sum, which should be finally ascertained by the court to be due. The auditor reported a balance of 2403*l.* 2*s.* 6*d.*, of which

[1] Catlett *v.* Cooke, 2 Cr. C. C. 9.

1860*l.* 6*s.* 7*d.* was principal, to be due to the plaintiff below ; which, with the exchange, amounted to $11,695.20, deducting the interest included in the balance reported by the auditor ; the principal of the debt found to be due, was less than the damages laid in the declaration. No exceptions having been filed, Mandeville, the plaintiff in error, at a term subsequent to the report, came in, and confessed a judgment for the sum reported, with interest, from the 7th of December 1824.

Swann, for the plaintiff in error ; *Taylor*, for defendants in error.

Swann.—The writ issued in a case is no part of the record, unless *oyer* of it is craved ; and the confession of judgment goes to the declaration, in which, the damages claimed are stated to be $10,500. Upon the confession of judgment for $11,695.20, the court gave a judgment which was erroneous, as to the sum, beyond the amount claimed in the declaration. The law of Virginia, which authorizes a jury to give damages, as the principal of the debt, to the amount laid in the declaration, and to allow interest from a *137] preceding *period, making the whole amount of the verdict greater than the damages in the declaration ; does not apply in this case, as the debt is a sterling debt. If this judgment be sustained, the plaintiff in error will be compelled to pay interest upon interest, as both principal and interest are included in the sum allowed by the auditor. The verdict of a jury, giving the principal and interest from a particular day, on the same, would have had a different effect.

Taylor, for defendants in error.—The court should allow the defendants damages upon the amount of the judgment, as the plaintiff in error was not justified in thus proceeding against his own confession of judgment, and its whole purpose was delay. The form of the confession of judgment is such as is usual ; and it is the same form of judgment, as upon the verdict of a jury. The law of Virginia authorizes a jury to give damages, which may, in the whole amount, exceed the damages laid in the declaration. The interest being stated to commence at a period anterior to the day of trial, a party may come in, and agree to enlarge damages. By the act of assembly of Virginia, of 1792, a judgment by confession is equivalent to a release of errors.

Marshall, Ch. J., delivered the opinion of the court.—The court are satisfied in this case, that under the law of Virginia, a confession of judgment, by the plaintiff in error, in the original suit, is a release of errors.

Judgment affirmed, with costs and damages, at the rate of six per centum per annum.

*James Greenleaf, Appellant, *v.* Nicholas L. Queen and Eleanor his wife, heirs, and Richard Wallack, administrator, of Washington Boyd, deceased, Appellees.

Assignment in trust for creditors.—Dower.—Decree in chancery.—Parties.

Where, by the terms of a deed, conveying real estate in trust, to be sold for the benefit of the creditors of the grantor, the trustee is directed to sell the property conveyed, by public auction, the trustee is bound to conform to this mode of sale. This is the test of value, which the grantor thought proper to require; and it is not competent to the trustee to establish any other; although, by doing so, he might, in reality, promote the interests of those for whom he acted.[1] p. 145.

Where property conveyed in trust, to be sold at public auction, had been sold by private contract, and the property was afterwards offered for sale, in the manner prescribed by the deed of trust, for the purpose of making a title to the private purchaser; at which time, more was bid for the same, than the amount for which it had been privately contracted to be sold; the purchaser, by private contract, to whom possession was delivered, at the price agreed on, cannot allege that the sale was void; since, whatever may be the liability of the trustee, to those interested in the proceeds of the sale, for the amount offered at the auction; it is not an objection, on the part of the purchaser, to release him from his contract. p. 146.

Where the vendee of real estate had purchased it, subject to the dower of the widow, of which dower he might have been informed, if he had used proper diligence, a court of equity will not interfere, to release the purchaser; but will leave him to such legal remedy as he may be entitled to, in case his title should, at any future time, be disturbed. p. 147.

Where a bill had been filed against a trustee of real estate, and after his death, administration had been granted to A.; who, on the petition of creditors, interested in the trust, was also appointed by the court, the substituted trustee, and the court went on to decree, that A., as trustee, should execute certain conveyances; the decree was held to be invalid; the course of proceeding, being rather to make the decree against A., in the character of administrator, because he claimed, as administrator, under a title derived from the original trustee, and was the person designated by law to represent him; or that a supplemental bill, in the nature of a bill of revivor, should have been filed against the substituted trustee; in which all the proceedings should have been stated, and he required to answer the charges contained in the original and supplemental bill. p. 148.

A decree of a court of chancery is erroneous, which, after ordering certain acts to be done, to enable a party to execute certain duties assigned to him, dismisses the bill; as it puts the cause out of court, and renders the decree ineffectual: and it is no answer to this objection, that it appears by the record in the case, that the acts ordered to be done, have been performed; since the error is in the decree itself, and not in its execution. p. 148.

A bill may be dismissed, where the plaintiff, when called upon to make proper parties, refuses, or is guilty of unreasonable delay, in doing so; but this must be done on demurrer, plea or answer, pointing out the person or persons who, the defendant insists, ought to be made parties. p. 149.

*Where a debtor had conveyed to a trustee, real estate, to be sold for the benefit of creditors, and the trustee dying before the conveyance of the property to a purchaser, another trustee was appointed by the court, upon the application of the creditors, to execute the trust; in a proceeding relative to the execution of the trust, and the conveyance of the estate, it is necessary that the heirs-at-law of the first trustee shall be parties to the same; as the legal title to the estate did not pass to the substituted trustee, by the appointment, but remained in the legal heirs. p. 149. [*139

Appeal from the Circuit Court of the District of Columbia, for the county of Washington; the appellant having been complainant, in a bill in

[1] S. P. Ellet *v.* Paxson, 2 W. & S. 436–7. If a power to sell, contained in a mortgage, be limited to a particular time, and the mortgagee fail to execute it, within such time, it is gone for ever. Lockett *v.* Hill, 1 Woods 552.

equity, filed 31st December 1819, in the court below, against Washington Boyd, trustee of Charles Minifie.

The objects of the bill were to make void a contract made by the appellant, for the purchase of certain lots of ground, in the city of Washington, being the estate held in trust for the creditors of Charles Minifie; that certain collateral securities delivered by the appellant, with his note for $3815, being for the purchase-money of the lots, of the trustee, should be returned; and that the note should be cancelled and surrendered; that a release should be executed, of the judgment at law obtained by the trustee, on the note, and for a perpetual injunction, and general relief, &c.

Upon filing this bill, an injunction was granted, until further order of the court; and, after various proceedings, the following decree was made:

Greenleaf
v.
Washington Boyd and others. } In Chancery, April Term, 1824.

It is ordered by the court, in this cause, that the trustee appointed by the order of January 21st, 1823, make and execute a good and sufficient deed to James Greenleaf, for the property sold to him, by the former trustee, Washington Boyd, according to the terms of that sale; to be approved by one of the judges of this court, and filed with the clerk, to be delivered to the said Greenleaf, upon the payment of the purchase-money; and that he also obtain and file with the clerk, a sufficient deed of release, from Zachariah Walker, to be approved of by one of the judges of this court, to the said James Greenleaf, releasing all title and claim to any and every part of the lots and property of the said Charles Minifie, sold by Washington Boyd, as trustee, or mentioned in the aforesaid deed of the trustee, Richard Wallack, to James Greenleaf; and that, upon the said deed, and the said deeds of release, being executed, signed, approved and filed as aforesaid, that then the injunction be dissolved, and the trustee authorized to proceed in levying and collecting the amount of the judgment *for the purchase-money, as mentioned in said bill. And the original bill, and bills of revivor, having been set down for hearing, upon the bills, answers and exhibits, and all the proceedings in the cause—it is, by the court, on this 15th of December 1824, decreed and ordered, that the said bill be dismissed, with costs. And it is hereby further ordered and decreed, that, before proceeding in collecting said purchase-money, a good and sufficient bond shall be executed, in the penalty of $500, by any one or more of the creditors, with security, to be approved of by one of the judges of this court, conditioned to indemnify the said Greenleaf, his heirs and assigns, from all claim and demand of Francis Jameson, his heirs and assigns, to any part of the lots or property mentioned in the deed of the said Wallack to said Greenleaf; which may have been purchased by the said Jameson, at the sale of the said Boyd, and filed with the clerk of the said court.

*140]

15th December 1824. By order, William Brent, Clerk.

From this decree, the complainant appealed. The opinion of the court, delivered by Mr. Justice Washington, fully states all the matter of the case.

The case was argued by *Jones*, for the appellant; and by *Key*, for the appellees.

Jones, for the appellant.—1. The title of Charles Minifie was never affected by the sale of Boyd to Mr. Greenleaf. The authority to sell, was a special one, and the terms not having been complied with—as the sale was private, and not public. Minifie, or his heirs, or his creditors, may proceed against the trustee—no time precluding the same. *Daniels* v. *Adams*, Ambl. 495; 1 Bridg. Index 41. A private sale was set aside, although more was obtained by the sale, than by a public sale; it being against the authority of the trustee. The court cannot vary the terms of a trust. 1 Anstr. 80; 4 Bro. C. C. 479.

2. Mr. Greenleaf had no notice of these objections to the title, until a few days before the filing of the bill; and it was then too late for this proceeding. 16 Ves. 272. The title could not be completed, without the consent of Minifie and his wife; and no steps were taken to obtain this; nor were the measures adopted, in reference to the titles acquired by Jameson, Prout and Walker, who purchased some of the lots at the public sale, effective. The purchaser would still be obliged to go into chancery, to complete his title to some of these lots so purchased. Nor has a title been made to him by the heir of Boyd; if Mr. Wallack, the substituted trustee, *could convey her title, it could not be by virtue of the decree stated in the case, as Mr. Greenleaf was not a party to the proceeding. [*141

The court will not permit an executory contract for land, to be carried into specific execution, until the seller can give a complete title. 4 Ves. 97; 2 Ves. jr. 100; 2 Coxe 294; 5 Ves. 147; 16 Ibid. 272. As to taking possession of property, being an acceptance of title: Sugden on Vendors 9.

The sale made to Greenleaf, was a fraud on the public; and no title to the purchase-money could be derived under it. A confirmation of the title held by Mr. Greenleaf, by the legal heir of Boyd, and by the creditors of Minifie, was necessary; and it was not the duty of the purchaser, to seek out the heir. He had called upon Boyd, who had the trust, to do what was proper.

There was no ground to dismiss the bill, for want of proper parties—this should have been pleaded; this is never done, unless in a case where no decree can be made, without affecting those who are not before the court.

Key, for the appellees.—This is a case, where a purchase was made, when property was high, which has since fallen; and the purchaser, therefore, desires to relieve himself from the bargain. The terms of the trust were complied with, by the trustee; a public sale was made of the property; Greenleaf took possession, knowing all the facts; and not until after judgment came against him for the purchase-money, did he ask for a specific performance, and an injunction. As to notice: 2 Johns. Ch. 197. The purchaser has not done what he ought to have done, to obtain a title. He should have filed his bill against all the persons interested—Minifie and the creditors; but the bill was against Boyd alone; and this authorized the conclusion, that the aid of Boyd only was wanting. The case is one of a *bonâ fide* and regular sale by the trustee; possession taken by the purchaser; execution of his contract, with full knowledge of all the circumstances, by the delivery of his promissory note for the purchase-money;

and afterwards, by proceedings without proper parties, and altogether irregular, an attempt by the purchaser to defeat the claims of the creditors of the *cestui que trust.*

Washington, Justice, delivered the opinion of the court.—This cause comes from the circuit court of the district of Columbia, for the county of Washington. The appellant filed *his bill in that court, against *142] Washington Boyd; setting forth, that on the 19th of March 1817, the said Boyd, as trustee under a deed of Charles Minifie to him, entered into a contract with the plaintiff, for the sale of sundry lots in the city of Washington, at the price of $3500, payable in six, twelve and eighteen months; for which, including the interest, and amounting in the whole to $3815, he then gave his note to Boyd, who acknowledged the receipt thereof, by an instrument under his hand; and thereby agreed, that on the payment of the note, he would convey to the plaintiff, the said lots, which had been previously sold at public auction, two of them to Elliot, as agent for the plaintiff, and the others to Francis Jameson, William Prout and Z. Walker. That, although the title to these lots which had been sold to Jameson, Prout and Walker, had not been released from their claims, the defendant, Boyd, had nevertheless recovered a verdict against the plaintiff for the amount of his note before mentioned, upon which he threatened to sue out an execution. The prayer of this bill was for an injunction, and a conveyance of the lots, with a clear title.

The plaintiff afterwards filed an amended bill, setting forth the original negotiations between the plaintiff and Boyd, in March 1816, for the purchase of the above lots, which resulted in a contract, by which the plaintiff was to be considered as the purchaser of them, at the price of $3500, payable with interest, in six, twelve and eighteen months. That the defendant had nevertheless thought proper to expose the said lots to sale, at public auction, some time in April 1816, and had caused Elliot, the plaintiff's agent, to be set down as the purchaser of two of the lots, at the price of $3500, although neither Elliot nor the plaintiff was present; and that the remaining seven lots were struck off, three of them to Jameson, at $159, one to Prout at $45.15, and the remaining three to Walker, at $264.90, making in the whole, the sum of $4019.05. That matters remained in this situation until the 19th of March 1817, when the written contract mentioned in the original bill was entered into. The bill then sets forth the judgment obtained by Boyd against the plaintiff, upon his note for the purchase-money of the lots, and the deposit by the latter, with the former, of certain securities, as collateral security for the debt, in consideration of a suspension of the execution until some time in December 1819. It further charges, that the plaintiff was ignorant of the title and authority of the defendant to dispose of the above property, until within a few days preceding the filing of this amended bill; when, upon examining the land records of the county, he found the deed of trust from Charles Minifie and one James Ewell and *Z. Farrell, to the said Boyd, conveying the above lots to *143] him, in trust to dispose of the same at public sale, on six, twelve and eighteen months credit, and to apply the proceeds to the payment of the debts of the said Minifie, and to hold what might remain, after such payments, subject to the decree of the circuit court of the said district and

county, in the suit brought by the wife of said Minifie for alimony; and the balance, if any, to be paid over to said Minifie. The bill then concludes, by charging that the contract made by the plaintiff with the defendant, for the purchase of the said lots, is void, because it was made in contravention of an injunction obtained by Mrs. Minifie, and because the purchase, by the plaintiff, was made at private, and not at public sale; that the title is likewise defective, for the same reasons, and because the property is subject to the claim of Mrs. Minifie for alimony and for dower, and is not released from the claims of Prout, Jameson and Walker, to the seven lots sold to them. The prayer of this bill is, that the contract may be declared void; that the judgment upon the plaintiff's note may be perpetually enjoined; and that the pledged securities may be restored to the plaintiff.

The injunction asked for, was granted, until further order. A petition was filed in the same court, by William Prout and others, creditors of Charles Minifie, setting forth the death of Washington Boyd, leaving Eleanor, the wife of Nicholas L. Queen, his heir-at-law; and praying that another trustee might be appointed to complete the execution of the trusts of the deed from Minifie to Boyd. To this petition, Queen and his wife appeared and filed an answer, admitting the truth of the allegation in the petition, that the said Eleanor is the heir-at-law of Boyd; and submitting to such decree as the court might think proper to make.

That cause being set for hearing on the petition and answer, the court, on the 21st January 1823, made a decree, by which Richard Wallack was appointed trustee in the place of Washington Boyd, deceased, upon his giving bond and security; with authority to complete the trusts left unexecuted by Boyd, according to the provisions of the trust deed, and to recover and collect the purchase-money for such of the trust property as had been sold by Boyd; and upon the payment thereof, to convey said property, by a good and sufficient deed, in fee, to the purchasers thereof, and to bring the said proceeds of sale into the court, to be distributed as the said court might direct, according to the deed of trust. A bond was accordingly executed by Wallack, approved by one of the judges of the court, and filed amongst the proceedings in that cause (a transcript of which proceedings was made an exhibit in this cause); on the same day the above decree was passed, the court decreed, in *this cause, that the plaintiff should, on or before a certain day, proceed in the same, by [*144 making the heirs of Washington Boyd defendants, as also such other persons as might be necessary to enable the court to decree therein; otherwise, that the bill of the plaintiff should be dismissed.

In May 1824, the plaintiff filed a bill of revivor against N. L. Queen and Eleanor his wife, heir-at-law of Washington Boyd, and Richard Wallack, administrator of the said Boyd; to which will Queen and wife appeared, and by consent of parties, the answer filed by them to the petition of Prout and others, was received as an answer to the bill of revivor, and the original suit was agreed to stand revived.

The cause was then set for hearing on the bills, answer and exhibits, and all the proceedings in this cause, and also on the petition of Prout and others before mentioned; whereupon, the court decreed, that Richard Wallack, the trustee appointed by the order of the 21st of January 1823, should execute

a good and sufficient deed to the plaintiff, for the property sold to him by Boyd, the former trustee, according to the terms of that sale, to be approved by one of the judges of the court; to be filed with the clerk; and to be delivered to the plaintiff, upon the payment of the purchase-money; that he should also obtain and file with the clerk, a sufficient deed of release by Zachariah Walker, to be approved as aforesaid, to the plaintiff, releasing all title and claim to any and every part of the property of Charles Minifie, sold by Boyd, as his trustee; and that upon the said deeds being executed, approved and filed as aforesaid, the injunction granted in this cause should be dissolved, and the trustee be authorized to proceed to levy and collect the amount of the judgment for the purchase-money, as mentioned in the bill. The decree then proceeds to dismiss the bill, with costs; and that before proceeding to collect the said purchase-money, a good and sufficient bond should be executed, in the penalty of $500, by any one or more of the creditors, with surety, to be approved by one of the judges of the court, with condition to indemnify the plaintiff, his heirs and assigns, from all claim and demand of Francis Jameson, his heirs and assigns, to any part of the lots or property, mentioned in the deed of the said Wallack to Greenleaf; which might have been purchased by the said Jameson, at the sale of Washington Boyd, and filed with the clerk of the court. From this decree, the plaintiff appealed to this court. A deed by Richard Wallack to James Greenleaf, bearing date the 2d of August 1825, a bond of indemnity executed by Jonathan and William Prout, and a deed of release by Z. Walker, as directed by the aforesaid decree, dated the 3d and 7th of February 1825, were executed, approved and filed by the clerk of the court, in *conformity with
*145] the decree, and form parts of the record brought up by this appeal.

The first objection made by the appellant's counsel to the decree of the court below, is, that the contract between the appellant and Washington Boyd, for the sale of the lots mentioned in the bill, was void, for want of authority in the latter, to dispose of the property in any other mode, than at public auction. Such, it must be acknowledged, is the mode prescribed by the deed of trust; nor can it be questioned, but that the trustee was bound to conform to this, as well as to the other requisitions of the deed, under which he professed to act. This was the test of value, which the grantor thought proper to require; and it was not competent to the trustee to establish any other, although by doing so, he might, in reality, promote the interest of those for whom he acted.

But what are the facts in the present case? The nine lots, which formed the subject of the correspondence between the appellant and the trustee, in March 1816, and of the written contract, on the 19th of March 1817, were actually advertised, as directed by the deed of trust; were set up for sale, as the amended bill alleges, at public auction, in April 1816, and were sold for the sum of $4019.05. Two of them were set down to S. Elliot, the agent of the appellant, at the price of $3500; and the other seven were struck off to Jameson, Prout and Walker, for the remaining sum of $519.05. It is not even charged in the bill, much less is there any proof in the cause, to warrant a suspicion that the sale was not fairly conducted; or that any person bid for the two lots set down to Elliot, more than the sum at which they were charged to him. In making the sale in that mode, no deception was practised upon the appellant; since he was informed, by Elliot's letter to

him, of the 16th of March 1816, that Mr. Boyd had further postponed the sale of Minifie's property, and would consider him, Greenleaf, as the purchaser for $3500. The writer adds, "I have stipulated, that the whole property shall be included; it is necessary to go through the forms prescribed by the decree;" meaning, no doubt, if the letter be truly transcribed into the record, the trust deed. But, on the 19th of March 1817, when the contract was finally reduced to writing, the appellant was distinctly apprised, that the whole of the lots had been sold at public sale, at six, twelve and eighteen months; and he was then satisfied to give his note for the stipulated sum agreed to be paid for the nine lots, upon the engagement of Boyd, to make a deed for the same to Samuel Elliot. Upon what plausible ground, then, can the appellant *now insist, that the lots were not sold at public auction, and on that ground, seek to be relieved against the [*146 payment of his note, given for the purchase-money, thus agreed to be paid for the property? The argument urged by his counsel, that the contract is void, because the lots were sold to the appellant for a less sum than that at which they were struck off to the purchasers at the public sale, cannot, for a moment, be maintained; since, whatever might be the liability of the trustee to the *cestuis que trust*, to pay the difference between those sums, it is surely not an objection, in the mouth of the appellant, sufficient to release him from his contract.

But were it to be admitted, that Boyd acted in derogation of his trust, in selling the property to the appellant for a less sum than he actually sold it for at public auction, and that on that account, the title of the appellant might be impeached; may not the objection be removed, by the agreement of the parties beneficially interested in the property under the deed of trust, to confirm the sale; or, by their acts, tending to produce the same result? Of this, we apprehend, there cannot exist a doubt. Now, who are the parties for whose benefit this trust was created? They are the creditors of Charles Minifie, in the first instance; and after they are satisfied, Mrs. Minifie, to the extent of the sum which might be decreed to her for alimony; and then Charles Minifie, as to any balance which might remain. But it appears from the exhibits filed in the cause, that the amount of the debt due by Minifie, and for which judgments were obtained against him, exceeded considerably the sum at which these lots sold at public auction, independent of the interest due upon those debts, and the costs of the different suits in which the judgments were entered. The only persons, then, who are beneficially interested in the property conveyed by the deed of trust, are the creditors of Charles Minifie, who have united in a suit against the heir-at-law of Boyd, for the purpose of having a new trustee appointed to carry into execution the sale made of the property, by the former trustee, under the deed of trust; and they are, as the bill charges, the active parties in enforcing the payment of the purchase-money; after these solemn acts, done in affirmance of the sale made to the plaintiff, the creditors would never be permitted, by a court of equity, to impeach it; nor can the alleged breach of trust be urged by the appellant, as a reason for annulling the contract, or excusing him from the payment of the purchase-money.

The next objection made by the appellant's counsel to the decree of the court below, is, that the title of the property, which it directs to be conveyed to the appellant, is defective; being incumbered with the claim of

Francis Jameson to three *of the lots, and with the right of dower of Mrs. Minifie in the whole of the property. It is very manifest, that the title of Jameson, if any he has, is merely nominal. The sale to him was made in 1816, upon six, twelve and eighteen months credit; and by the terms of the sale, he was required to give his note for the purchase-money, with an approved indorser, negotiable at one of the banks in this district. The bill does not charge, nor is it even alleged at the bar, that a note was given by Jameson for the purchase-money bid for these lots; not one cent of it had been paid by him, nor even demanded; or that, from the year 1816, when the sale was made, to the present moment, a claim to the property has been asserted or intimated, by this person. But it does appear, by the testimony of a witness examined in the cause, that the plaintiff, Greenleaf, has been in possession of the whole of the property, from the time that he purchased it; and that Jameson had, upon the application of Boyd to relinquish his claim to the property, consented to do so. Upon this state of facts, this court can feel no hesitation in saying, that Jameson had not such an equitable title to the lots purchased by him, as a court of equity would enforce against the trustee of Minifie, or against the plaintiff. Whether that court would require a title like this to be released, in a case where a trustee was a party plaintiff, asking for a specific execution of the contract, need not be decided in this case. But we are clearly of opinion, that the want of such a release cannot be urged by the vendee, as a cause for rescinding the contract.

The objection founded on the right of dower of Mrs. Minifie, is quite as untenable as the one that has just been disposed of. The plaintiff, when he made the purchase of this property, was apprised that he was dealing with a trustee; and knew, or might have known, from the land-records of the county in which the property was situated, whether Mrs. Minifie was a party to the deed of trust; and had, or had not, relinquished her right of dower. He required of the trustee no stipulation in relation to this right; and it may, therefore, be fairly presumed, that the value of it was taken into consideration, in fixing the amount of the purchase-money to be paid for the property. In such a case, as well as in that which we have just disposed of, a court of equity will not interpose to relieve the vendee, but will leave him to such legal remedy as he may be entitled to, in case his title should, at any future time, be disturbed by these claims.

The court is, upon the whole, of opinion, that the objections to the decree, which have been noticed, are insufficient to warrant a reversal of it.

*148] It is, however, exposed to other *objections, which must produce this result, and which now remain to be examined. The first is, that Richard Wallack, the substituted trustee, who is required by the decree to perform a number of acts, in order to entitle him to levy and to collect the amount of the judgments for the purchase-money, and upon the performance of which, the injunction is dissolved, was no party to the controversy in the court below. The suit, it is true, was revived against him, in his character of administrator of Washington Boyd, and also against the heir-at-law of Boyd; to which mode of proceeding, no objection could be taken, if the decree had been against him in his character of administrator, because, in that character, he claimed under a title derived from the party, by whose death the abatement of the suit was caused; and was the person designated

by law to represent him, in relation to his personal estates. But this was not the case in respect to Richard Wallack, as the substituted trustee and successor of Boyd. The power with which the latter was clothed, became vested in Wallack, not by operation of law, but by the appointment of the court, subsequent to the institution of the suit. The original suit, which abated by the death of Boyd, became also defective, by the termination of his powers, and the appointment of a new trustee, and could only be prosecuted against him, by way of a supplemental bill, in nature of a bill of revivor; in which it would be necessary to state, not only the original bill and the proceedings thereon, and the death of the former trustee, but the appointment of Wallack as his successor, and his acceptance of the trust; and to require him to appear and and answer the charges contained in the supplemental and original bills. For anything appearing upon the face of this record, Wallack is an entire stranger to the trust with which the decree connects him, and without any power whatever to make a valid conveyance. For there being no supplemental bill, nor allegation in any bill that Wallack had been appointed to complete the trust which Boyd had left unexecuted, and to collect the purchase-money for the property which that trustee had sold, and that he had accepted such appointment; these facts cannot be considered as having been established by the proceedings and decree in the suit of the creditors of Minifie, against the heir-at-law of Boyd. See Mitf. 33, 63, 70.

The next objection to the decree is, that after decreeing Wallack to perform a number of acts to entitle him to levy and collect the amount of the judgment against the appellant, as before mentioned, it proceeds to dismiss the bill, with costs; thereby putting the cause out of court, and rendering the other parts of the decree ineffectual. Should Wallack, for *example, refuse to execute a conveyance of the property to the plaintiff in the court below, pursuant to the decree, the non-existence [*149 of the suit on which that decree was made, would prevent any process of contempt from issuing against him, for the purpose of compelling him to execute the decree. It is no answer to this objection, that it appears by the record in this case, that Wallack has, in fact, executed the decree on his part; since the error complained of is in the decree itself, and not in its execution.

It was insisted by the counsel for the appellees, in anticipation of the above objection, that the court below would have been warranted in dismissing the bill absolutely, without requiring anything to be performed by the new trustee, in consequence of the omission of the plaintiff in that suit to make proper parties. That a bill may be dismissed, where the plaintiff, when called upon to make proper parties, refuses, or is guilty of unreasonable delay in doing so, need not be questioned; but to do so, without a demurrer, plea or answer, pointing out the person or persons who the defendants insist ought to be made parties, is unprecedented, and would, most unquestionably, be erroneous, although the decree should assign this as the ground of dismissal; which is not done in the present case.

The last objection to the decree, which it is thought necessary to notice, is, that the heir-at-law of Washington Boyd, deceased, is not required to release her title to the property in controversy to the appellant; a majority of this court being of opinion, that the legal estate in that property did not

pass to Richard Wallack, under the decree of the 21st of January 1823, before referred to, but is yet outstanding in the heir-at-law of Boyd.

The decree of the court below must, for these errors, be reversed, and the cause is to be remanded to that court for further proceedings to be had therein, in conformity with the principles before stated.

DECREE.—This cause came on, &c.: On consideration whereof, it is the opinion of this court, that there is error in the said decree, in requiring any act to be performed by Richard Wallack, before he was made a party to the said suit, by regular proceedings against him, according to the course and practice of a court of chancery, and had either answered the bill making him such a party, or the same had been taken for confessed against him; and that the said decree is also erroneous, in dismissing the bill of the plaintiff in the court below; and also, in not decreeing the said Nicholas L. Queen and Eleanor Queen his wife, the defendants in the said suit, to
*150] release to the *appellant, James Greenleaf, all their right and title to the property directed by the said decree to be conveyed to him by the said Richard Wallack; for which errors, it is now by this court decreed and ordered, that the said decree be reversed and annulled, and that the cause be remanded to the court below, to be there proceeded in according to law, and in conformity with the principles stated in this decree.

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*151] *BENJAMIN BUCK and THOMAS HEDRICH *v.* CHESAPEAKE INSURANCE COMPANY.

Marine insurance.—Policy.—Interest.

To affirm, that "in policies for whom it may concern," there can be no undue concealment as to the parties interested in the property to be insured, is obviously going much too far; since the underwriter has an unquestionable right to be informed, if he makes the inquiry. The assured may be silent, it is true, if he will; and let the premium be charged accordingly; but if the inquiry, when made, should be responded to by information, contrary to the verity of the case, this obviously gives a conventional signification to the terms of the policy, which may differ from the known and received signification in ordinary cases. p. 159.

A policy "for whom it may concern," will, in ordinary cases, cover belligerent property.[1] p. 160.

A knowledge of the state of the world, of the allegiance of particular countries, of the risks and embarassments affecting their commerce, of the the course and incidents of the trade on which they insure, and of the established import of the terms used in their contracts, must necessarily be imputed to underwriters.[2] p. 160.

The term *interest*, as used in an application for insurance, does not necessarily imply *property* in the subject of insurance.[3] p. 163.

The master of a vessel to whom property shipped on board the vessel under his command is to be consigned, in the absence of proof, that the owner of the property had not given authority to order insurance, has an insurable interest in the property on board his vessel; and this interest is sufficient to authorize the recovery of a loss, on the policy. p. 163.

As to the effect of certain instructions in a letter relative to insurance, and circumstances connected with the same, constituting a representation, to vitiate a policy, made under the authority and directions of the letter. p. 163.

This case came before the court, upon a division of opinion of the

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[1] Hodgson *v.* Marine Ins. Co., 5 Cranch 100; Straas *v.* Marine Ins. Co., 1 Cr. C. C. 343.

[2] Hazard *v.* New England Marine Ins. Co., 8 Pet. 557. And see Clarke *v.* Manufacturers' Ins. Co., 8 How. 249.

[3] See Hooper *v.* Robinson, 98 U. S. 538.

judges of the Circuit Court of the United States for the district of Maryland.

The action was brought upon two policies of insurance, upon a cargo of sugar, on board the brig Columbia, in the name of the plaintiffs, for the use of Daniel Fitch, who was an American citizen, a sea-captain, sailing out of the port of Baltimore, and the owner and commander of the Columbia; and of Gregorio Medina, of Ponce, in the island of Porto Rico. The plaintiffs were the agents of Daniel Fitch, and by two distinct orders, under different dates, had policies effected, upon their application, by the Chesapeake Insurance Company.

The amount of the separate interests of Captain Fitch and G. Medina, was shown by the following statement, which was admitted to be correct:

*The entire cargo embraced in the two policies, was	$8413 75 [*152
All marked F, in the bill of lading, belonging to Captain Fitch, viz., thirteen hogsheads, five tierces and ninety-two barrels of sugar, amounting to	2076 75
Add charges	198 50
Amount of the absolute and legal or equitable property of Captain Fitch,	2275 25
The residue belonging to G. Medina, the legal title to which, was in Captain Fitch, amounting to	5610 65
Add charges	527 85
	8413 75
Amount of the two policies	8000 00
Not covered	413 75

The Columbia, with her cargo, sailed from Porto Rico for Baltimore; the cargo consigned to Captain Fitch, and documented as such; G. Medina being on board of the vessel, on a visit to the United States. Both vessel and cargo were totally lost, near Norfolk, by the perils of the sea.

The circumstances attending the insurance, and the facts out of which the controversy arose, were as follows: On the 6th of May 1822, the plaintiff presented to the office the following order—

"Insurance is wanted against all risks, for account of whom it may concern; 3000 dollars on the brig Columbia, Daniel Fitch, master, and on cargo 6000 dollars, as interest may appear, at and from Ponce, Porto Rico, to Baltimore; by a letter from Captain Fitch, dated 19th April, he says, he expects to sail about 5th to 10th of May, that the brig is in good order, perfectly tight and seaworthy—what premium?"

1¼ per cent. (written on the order, by the office.)

"Accepted— Buck & Hedrick."

A policy was executed on the same day, on cargo, $6000, insuring Buck & Hedrick, "for whom it may concern." The perils insured against are, "of the seas, men of war, fire, enemies, pirates, rovers, thieves, letters of marque, arrests, taking at sea, restraints of princes; and all other perils, losses and misfortunes, for which assurers are legally accountable." No inquiry was made by the office for the letter of 19th April, alluded to in the

above order; nor was any warranty or representation of any kind made or asked for, in regard to said cargo, but the office executed the said policy on such order.

*153] *On the 24th May, Buck & Hedrick made application for further insurance on cargo; and the following letter from Captain Fitch, dated 27th April, was presented to the office, with an order written on the back of said letter; and a like policy was executed for "whom it may concern," without any inquiry for the said letter of 19th April, and for the same premium.

"Ponce, April 27th, 1822.

"Messrs. Buck & Hedrick:

"Gentlemen:—I wrote you a few days ago, by the brig Osprey, Captain Perkins, direct from Baltimore, requesting you to have insurance done for me, on the brig Columbia and her cargo, owned and commanded by me, to sail from this for Baltimore, about 5th to 10th May, with a cargo of sugar. When I wrote to you by the Osprey, I could not say what amount of cargo to have insured for me; I now think, I shall have on board about 130,000 lbs. valued at 8000 dollars, which amount I wish you to have insured for me, at as low a premium as you can. I wish you to understand, that the above sum of 8000 dollars, is not in addition to that mentioned in my last. The whole amount I want insured, is 8000 dollars on cargo, and 3000 dollars on the vessel and freight. She is in perfect good order, tight in every part, built in New Jersey, in 1814, and well found. Your attention to the above, will oblige your obedient servant, Daniel Fitch."

On the back of this letter was written the following: "What will 2000 dollars be insured at, agreeable to within letter, on cargo, of which you have 6000 dollars insured some time since? Buck & Hedrick.

"1¼ per cent." "Agreed—as interest may appear.

Buck & Hedrick."

Buck and Hedrick applied to the defendant for payment on said policies, and all the papers to prove the distinct interests of Medina and Fitch were shown; but the office declined to pay either, on the ground that said policy covered no one but Fitch, and that the letter of 27th April was a representation that the whole cargo was Captain Fitch's, and therefore, affected both policies.

The plaintiff, on the trial, prayed the court to charge the jury:

1. That as the policies of insurance in this case, purport to insure the plaintiff "for whom it might concern;" they are not bound to prove, that at the time of effecting said insurance, or any other time, they disclosed to

*154] the defendants, that Spanish *property was intended to be covered by said insurance; and that in policies of such description, there can be no undue concealment as to the parties interested in the property to be insured.

2. That if the jury believed the policy of 6th May 1822, was founded on the order of the same date, the said policy being "for whom it may concern," does cover belligerent as well as neutral property.

3. That if the jury believed that the policy, dated 24th May 1822, was founded on the letter of 27th April 1822, and the order written therein, the

policy being "for whom it may concern," does cover belligerent as well as neutral property.

4. That if the said Daniel Fitch, at the date of said policies, was legal and equitable owner of a part of the cargo insured, and the legal, though not equitable, owner of the residue; the policies "for whom it may concern," do cover the entire cargo; and said Daniel Fitch is competent in law to recover the whole, in his own name, though the belligerent character of a part of the said cargo was not disclosed, at the time of effecting said policies of insurance.

5. That the court instruct the jury, that the letter of 27th April 1822, with the order written thereon, do not in law amount to a representation, that the property to be insured, was the sole property of Daniel Fitch, or that the whole, or any part thereof, was not belligerent.

Upon these several prayers, numbered in the record, 1, 2, 3, 5 and 6, the judges of the circuit court differed in opinion, and certified the same to this court.

The cause was argued by *Hoffman* and *Mayer*, for the plaintiffs; and by *Wirt*, Attorney-General, and *Meredith*, for the defendants.

The *plaintiffs'* counsel contended: 1. A policy for whom it may concern, covers all possible persons and all possible interests, belligerent as well as neutral. *Hodgson* v. *Marine Insurance Company*, 5 Cranch 100. The doctrine has been so settled in France, England, New York, Massachusetts, &c. Phil. on Ins. 57–63, 107; 2 Magens 211; 2 Emerigon 460; Ord. Hanse Towns, tit. 1, § 4; 1 Emerigon, ch. 2, § 4, ch. 11, § 4; 2 Dane's Abr. 127; 1 Marsh. on Ins. 306, 215, in notes; Norris's Peake 246–8; Johns. Dig. 274, § 41, 43; 280, § 108; *Barnwell* v. *Church*, 1 Caines 217, 229, 237, 238, 243; *Murray* v. *United Ins. Co.*, 2 Johns. Cas. 168; *Skidmore* v. *Desdoity*, Ibid. 77; *Elting* v. *Scott*, 2 Johns. 157, 163; *Goix* v. *Knox*, 1 Johns. Cas. 337; 1 Marsh. on Ins. 306, 310; *Lawrence* v. *Sebor*, 2 Caines 203; *Hagedorn* v. *Oliverson*, 2 Maule & Selw. 485; *Steinback* v. *Rhinelander*, 3 Johns. Cas. 269; *Vandenheuvel* v. *United Ins. Co.*, 2 Caines *Cas. 217, 269, and 2 Johns. Cas. 127, 451; 5 Cranch 100, 109; *Seamans* v. *Loring*, 1 Mason 128, 125, 136. [*155

Was there a concealment of belligerent interest? Concealment can only have reference to the contract between the parties; non-disclosure is not concealment; and the party charging it must show fraudulent intention. As to the words, "lawful goods and merchandise," the parties refer to municipal sanctions only, and not to foreign circumstances. 1 Johns. Cas. 77, 120, 487.

Upon the doctrine of concealment, non-disclosure, or misrepresentation; the following positions were assumed, and claimed to be sustained by the authorities cited. 1. That no disclosure of anything within the essential nature of the policy, could be necessary—and consequently, that no undue concealment can be predicated, either as to the persons interested, or their country. 2. That there has been neither a representation, nor a misrepresentation, in regard to the cargo insured. 3. That the first policy stands upon nothing but the order of 6th May, in which order no one feature of a representation of neutrality is to be found, but the very reverse. 4. That the letter, on which the second policy, viz., for $2000, was effected, contains

no such representation, in regard to the cargo then to be insured—and if it did, it was strictly true, as Daniel Fitch's absolute interest amounted to $2275.25. 5. That this letter, if a representation at all, as to the neutrality of the cargo covered by this second policy, can in no way affect, by a retroactive energy, the antecedently executed policy. 6. That the office, having neglected to make those inquiries, which, under the circumstances of the case, the law imposed on it, cannot now transfer to the insured, the effect of an obligation to disclose, voluntarily, what would have been willingly communicated, had the office, at that time, deemed it of consequence to inquire after. 7. That Daniel Fitch, being the consignee and trustee of the whole of Medina's interest, with full authority to insure, and having the custody of the entire cargo, laden on board of his vessel, had an insurable interest in the whole; and might, had he seen fit so to do, have truly represented the whole as his own, for the purpose of effecting insurance. Phil. on Ins., and authorities, 64, 94; Ibid. 86, 89; Johns. Dig. 284, § 143, 144, 146, 147–53; Whart. Dig. 319, § 23, 30, 32; Phil. on Ins. 87; 7 Cranch 506; 1 Caines 75, 492; 2 Johns. Cas. 487; 1 Ibid. 1; 2 Ibid. 77, 120; 1 Caines Cas. xxv; 2 Johns. 130; *Anth. N. P. 83; Phil. 69, 90; 4 East *156] 590; *Dennis* v. *Ludlow*, 1 Caines 111, 217; *Long* v. *Bolton*, 2 Bos. & Pul. 209; *Boyd* v. *Dubois*, 3 Camp. 133, 312; 13 Co. 61, 267; 9 East 283, 292; 1 Camp. 116–18; 1 Maule & Selw. 35; *Long* v. *Duff*, 2 Bos. & Pul. 209; Phil. 101; Marsh. 473, note; *Brown* v. *Shaw*, 1 Caines 489; *Depeyster* v. *Gardiner*, Ibid. 492; *Fort* v. *Lee*, 3 Taunt. 381.

2. It was the duty of the insurers to inquire into the state of things, at the time of the contract, and there was no representation of a sole neutral interest. The insured asks to be insured against "all risks;" and it was, therefore, the duty of the office, to inquire what risks were intended to be covered.

Authorities cited as to the general nature of representation: Marsh. on Ins. 450–1; Phil. on Ins. 80; 6 Cranch 274–81; 7 Ibid. 507, 535, 536, 541; Phil. on Ins. 84; 14 Mass. 152; 1 Marsh. on Ins. 459; Phil. on Ins. 109–10; *Pawson* v. *Watson*, Cowp. 785, s. c. Marsh. on Ins. 459; *Bize* v. *Fletcher*, 1 Doug. 271; s. c. Marsh. on Ins. 459; Phil. on Ins. 106; *Alsop* v. *Coit*, 12 Mass. 40, s. c. Phil. on Ins. 110; *Ross* v. *Bradshaw*, 1 W. Bl. W. 312; s. c. Phil. on Ins. 110; Whart. Dig., p. 380, § 28, 30, 31, 32; *Hubbard* v. *Glover*, 3 Camp. 312; *Clapham* v. *Colozare*, Ibid. 382; *Dawson* v. *Atty*, 7 East 357; *Hodgson* v. *Maryland Insurance Co.*, 5 Cranch 100; *Livingston and Gilchrist* v. *Maryland Insurance Co.*, 6 Ibid. 274; 7 Ibid. 507; *Vandenhuevel* v. *United Insurance Co.*, 2 Caines Cas. 257, 267–82; 1 Doug. 305.

Authorities cited as to the duty of underwriters, to make inquiries: 1 Marsh. on Ins. 397, 474–5; Phil. on Ins. 84, 108–9; 2 Dall. 274; 2 Yeates 178; *Fort* v. *Lee*, 3 Taunt. 381; Phil. on Ins. 105; 14 East 479; Whart. Dig. 319, § 23; 1 Camp. 383; Phil. on Ins. 63; *Davis* v. *Boardman*, 12 Mass. 80; *Boyd* v. *Dubois*, 3 Camp. 133; *Duplanty* v. *Commercial Ins. Co.*, Anth. N. P. 157; *Livingston and Gilchrist* v. *Maryland Ins. Co.*, 7 Cranch 508, 536, 538, 547.

3. That even if the letter of 27th April had asserted, that Daniel Fitch owned the cargo, it was (so far as the doctrine of representation is concerned) substantially true; he being the legal owner, as trustee and

consignee of Medina's part, and as such, competent to sustain any action for that part of the cargo, and also to represent, though, perhaps, not to warrant it, as his. Phil. on Ins. 41, 42, 60; *Rind* v. *Wilkinson*, 2 Taunt. 237; *Joseph* v. *Knox*, 3 Camp. 320; 3 Wheat. Selw. 774–5, and note; *McAndrew* v. *Bell*, 5 Bos. & Pul. 373; *Lucena* v. *Crawford*, 1 Esp. 323; 3 Bos. & Pul. 75; Phil. on Ins. 58; Marsh. on Ins. 104–18; *Routh* v. *Thompson*, 11 East 428; *Ludlow* *v. *Browne*, 1 Johns. 15; *Caruthers* v. *Sheddon*, 6 Taunt. 14. [*157

4. That even admitting the letter of 27th April to be a gross misrepresentation, it can, in no way, effect either policy. Not the first policy, because that policy was founded solely on the order of 6th May, and was executed several weeks before the letter of 27th April was in the country. Not the second policy, because, as respects that portion of the cargo, covered by the $2000 policy, the letter was strictly true, Fitch's interest exceeding that amount. 1 Marsh. on Ins. 445–6; 2 Wheat. Selw. 750, note 41; Phil. on Ins. 80, 81, 84, 85; *Marsden* v. *Reid*, 3 East 572; *Dawson* v. *Atty*, 7 Ibid. 367; *Bell* v. *Carstairs*, 2 Camp. 543; *Forrester* v. *Pigou*, 1 Maule & Selw. 14; *Brine* v. *Featherstone*, 4 Taunt. 871; *Elting* v. *Scott*, 2 Johns. 157, 162.

On the part of the plaintiff, it was also urged, that the policy of the 6th of May was not to be connected with that of the 24th May; no representation was made whatever, when the first policy was entered into.

The insurance on the property on board the Columbia, was properly made under the authority and order of Daniel Fitch; who, as master of the brig, and in the relation which existed between him and Mr. Medina, had a right to order the same. Even gratuitous insurances are not *void*, but *voidable*. The tests of such insurances, are, was the premium secure, and had the party a right to abandon? The cases cited by the defendant's counsel, do not impugn these principles, but sustain them.

Meredith and *Wirt*, Attorney-General, for the defendants.—The letter of the 27th April was a representation of neutral property; and it is insisted, that the terms "for whom it may concern," may be limited by a representation, and the case before the court: the representation was not true. It is admitted, that the stipulations in a policy, may be enlarged by a representation, and if enlarged, why not restricted? *Urquhart* v. *Bernard*, 1 Taunt. 450. As to a representation and its effect, the following cases were cited; *Seamans* v. *Loring*, 1 Mason 136; 2 Johns. 157, 163; 2 Caines 203; 2 Johns. Cas. 451, 173.

The representation having been made a resident owner, was, in effect, a warranty of neutrality. Phil. on Ins. 82; 6 Mass. 220; 2 Johns. Cas. 451, 173. A representation must correspond with the facts represented, and must be as favorable to the insurers, as if it had been literally true. Phil. on Ins. 102; 2 Johns. Cas. 168; 6 Mass. 212. No case has been cited by the counsel for the plaintiffs, where the cover of property by fraud was protected. Here, *the cover was false, and intended to protect the property of Medina, a belligerent. [*158

Captain Fitch had not an insurable interest in the property of Medina, and as an agent, he was guilty of misrepresentation. *Lucena* v. *Crawford*, 5 Bos. & Pul. 323; 11 East 434. The first policy exhausted the whole of

Captain Fitch's interest in the property, and left nothing for the second policy; and the second could not operate, there being a clause against prior insurances in the policy. False lights were held out to the underwriters by the letter, and while they supposed they undertook a peace risk, they had assumed a war risk.

The insured are bound to show, that the property insured was intended to be insured by the policy; and there is no evidence of any authority given by Medina to Fitch, to cause the insurance to be made, or that the same was made for him. Phil. on Ins. 57–61; 3 Johns. Cas. 269. As to an adoption of policy, it must be done by the person for whom the insurance was intended. 2 Maule & Selw. 485; 1 Mason 136.

Johnson, Justice, delivered the opinion of the court.—This cause comes up from the circuit court for the Maryland District, on a difference of opinion.

The suit below was instituted on two policies of insurance, the one for $6000, the other for $2000, upon the brig Columbia, Daniel Fitch, master, at and from the Spanish island of Porto Rico, to Baltimore, for whom it may concern. Buck & Hedrick were the agents of Fitch, and the policies were made in their name. The first policy was executed on the 6th of May 1822, and stands unimpeached by any circumstances occuring at the time of its execution. But when application was made for the second policy, which was on the 24th of May, the agents laid before the underwriters a letter, dated Ponce, April 27th, 1822, to this effect:—

"Messrs. Buck & Hedrick:—I wrote you a few days ago, by the brig Osprey, Captain Perkins, direct for Baltimore, requesting you to have insurance done for me on the brig Columbia, and her cargo, owned and commanded by me, to sail from this for Baltimore, about 5th to 10th of May, with a cargo of sugar. When I wrote you by the Osprey, I could not say, what amount of cargo to have insured for me. I now think, I shall have on board about 130,000 pounds, valued at $8000, which amount I wish you to have insured for me," &c. The rest has no material bearing upon the cause. On the back of this letter was written the following inquiry: *"What will
*159] $2000 be insured at, agreeable to within letter, on cargo, of which you have $6000 insured some time since? Buck & Hedrick."

The vessel and cargo were totally lost by the perils of the sea; and the interest proved at the trial, consisted of above $2000, the property of Fitch, and above $6000, the property of G. Medina, a Spanish subject, of Porto Rico, at that time affected with the character of a belligerent. The whole cargo was consigned to Daniel Fitch, and documented as his—Medina himself being on board, on the voyage.

The order of insurance, on which the policy of 6th May was effected, was in the following words: "Insurance is wanted against all risks, for account of whom it may concern, $3000 on the brig Columbia, Daniel Fitch, master, and on cargo, $6000, as interest may appear, at and from Ponce, Porto Rico, to Baltimore; a letter from Captain Fitch, dated 19th April, says, he expects to sail about 5th to 10th of May; that the brig is in good order, perfectly tight and sea-worthy. What premium?" Both policies, it appears, were done at a premium of $1\frac{1}{4}$, and on neither occasion was the letter of the 19th April called for by the office, nor was any warranty or

representation of any kind made or asked for, respecting the cargo, beyond what was voluntarily made, and has been stated.

The first instruction on which the court below divided, was prayed for by the plaintiffs, in these words: "That as the policies of insurance in this case purport to insure the plaintiffs 'for whom it might concern,' they are not bound to prove, that at the time of effecting the insurance, or any other time, they disclosed to the defendants, that Spanish property was intended to be covered by the insurance; and that in policies of such description, there can be no undue concealment as to the parties interested in the property to be be insured." Dangerous as it always is, in a court of justice, to generalize in the propositions which it decides, it is peculiarly so, in questions arising on policies of insurance. The present proposition is obviously couched in terms too general to admit of an answer in the affirmative, without restriction or modification. And as courts of justice are not bound to modify or fashion the instructions moved for by counsel, so as to bring them within the rules of law, if this cause had come up on a writ of error to the judgment of the court below, for refusing the instruction as prayed; it would be difficult to say, that in the terms in which it is presented, the court was bound to give this instruction.

To affirm, "that in policies of such description, there can be no undue concealment as to the parties interested in the *property to be insured," is obviously going much too far; since the underwriter has [*160 an unquestionable right to be informed, if he makes inquiry; the assured may be silent, it is true, if he will, and let the premium be charged accordingly; but if the inquiry then made should be responded to, with information contrary to the verity of the case, this obviously gives a conventional signification to the terms of the policy; which may differ materially from the known and received signification in ordinary cases. He, for instance, who should insure "for whom it may concern," under an express assurance, that there is no belligerent interest in the cargo, could not, upon any principle, be held to have made assurance upon belligerent interest. This is no more than the application of the general principle, that insurance is a contract of good faith, and is void, whenever imposition is practised.

That a policy "for whom it may concern," will, in ordinary cases, cover belligerent property, has been fully conceded in argument. Nor is it contested, that previous representation will be sunk or absorbed, or put out of the contract, where the policy is executed in obvious inconsistency with those representations. But the ground here insisted on for defendants, is, that the letter of April 27th, was a representation that the whole cargo was Captain Fitch's, and that it thereby operated as an imposition upon the underwriters, and as such, avoids both policies; or that it affixes a conventional meaning to the phrase, in these policies, which limits its ordinary import.

Is there anything in the case, sufficient to except these policies from the ordinary import and effect of the phrase "for whom it may concern?" We are of opinion, there is not. Whatever turn of expression may be given to the question, or in whatever aspect it may be presented, it is obviously, at last, no more than the simple question, have these underwriters been entrapped, or imposed upon, or seduced into a contract, of the force, extent or incidents of which, a competent understanding cannot be imputed to

them? A knowledge of the state of the world, of the allegiance of particular countries, of the risks and embarrassments affecting their commerce, of the course and incidents of the trade on which they insure, and the established import of the terms used in their contract; must necessarily be imputed to underwriters. According to a distinguished English jurist, Lord MANSFIELD, in *Pelly* v. *Royal Exchange, &c.*, 1 Burr. 341, "the insurer, at the time of underwriting, has under his consideration the nature of the voyage, and the usual manner of conducting it. And what is usually done by *161] such a ship, with such a cargo, on such a voyage, is *understood to be referred to by every policy." Hence, when a neutral, carrying on a trade from a belligerent to a neutral country, asks for insurance '*for whom it may concern*,' it is an awakening circumstance. No underwriter can be ignorant of the practice of neutrals to cover belligerent property, under neutral names, or of the precautions ordinarily resorted to, that the cover may escape detection. The cloak must be thrown over the whole transaction, and in no part is it more necessary, than in the correspondence by other vessels, so often overhauled by an enemy, for the very purpose of detecting covers on other cargoes. Letters, thus intercepted, have often been the ground-work of condemnation in admiralty courts; and underwriters, to whom the extension of trade is always beneficial, must and do connive at the practice, in silence. They ask no questions, propose their premiums, and the contract is as well understood, as the most thorough explanation can make it.

There is nothing in the letter in evidence, calculated to mislead an insurer of ordinary vigilance, but what was fully explained away, by concomitant circumstances. It is true, that in the letter Fitch writes, to have insurance done for him, on "the brig Columbia and her cargo;" that he cannot say, what amount of cargo to have insured for him. Yet, when the offer was submitted, it was indorsed on the back of this letter, and expressly declared to be upon the same cargo, of "which you have $6000 insured, some time since." The insurance alluded to, was made "for whom it may concern," and this second policy is expressed in the same terms. Here, then, was a neutral, professing himself to be owner of a cargo, consisting of produce of the hostile island, on a voyage, having for its object, to find a market for that produce, most unnecessarily, if himself the real owner; or if there were no owners but neutrals; most unwisely subjecting himself, or them, to an increase of premium, which could not but result from such an offer. This was a circumstance calculated to produce inquiry. The defendants had a right to make what inquiries they pleased, as to the real character of the cargo; and if they did not make those inquiries, the law imputes to them the use of the phrase, "for whom it may concern," in its ordinary effect and signification. We are, therefore, of opinion, that this instruction, if so modified as to be confined to the case before the court, ought to have been given.

The second prayer, amounting only to an affirmative of the general proposition, as relates to the policy of the 6th May, we are of opinion, ought to have been given.

*162] The third prayer, having the same bearing upon the policy *of the 24th May, we are of opinion, for the reasons expressed in the first prayer, ought also to have been given.

By the fifth prayer, the plaintiffs ask of the court to instruct the jury, "that if the said Daniel Fitch, at the time of said policies, was legal and equitable owner of part of the cargo insured; and the legal, though not equitable owner of the residue, policies, 'for whom it may concern,' do cover the entire cargo; and said Fitch is competent, in law, to recover the whole, in his own name, though the belligerent character of a part of said cargo, was not disclosed, at the time of effecting said policies." The language in which this prayer is couched, obviously imports two propositions: 1st. That a policy, "for whom it may concern," will cover the whole cargo, though the assured had only the legal, without the equitable interest in part, and a legal and equitable interest in the residue; and 2d. That Daniel Fitch is competent, in law, to recover the whole, in his own name, though the belligerent character of part was not disclosed, when the policies were executed. It is a very great objection to this prayer, that the language used is too general and abstracted; and not adapted to the case, with that studied precision which the law requires; thereby rendering it scarcely possible for the court to meet it with a simple, positive or affirmative answer. To the first of the two propositions, it may be further objected, that it is difficult to perceive, how it came to be introduced into the cause. Abstracted from the effect of belligerent interest in the cargo, the defence admits, that the policy covers all other interests, whether legal or equitable. And with regard to the second, it is not easy to perceive, why the court should be called upon to charge the jury, that Daniel Fitch was competent, in law, to recover the whole, in his own name, when the suit is, in fact, prosecuted in the name of the agents; and they count upon the interests of both Medina and Fitch.

But the cause has been argued, upon the assumption, that this prayer brings up the question of insurable interest in Fitch, by whose instructions, Buck & Hedrick effected this insurance; and as it is better to follow out the concessions of counsel than to let the cause come up here again, upon this point, we will consider that question as being raised by this, in connection with the other prayers.

And here, we think, the facts make up a clear case of insurable interest. The only doubt, probably, arises from one of the most prolific grounds of uncertainty on many subjects, viz., the use of terms, originally unaptly selected, but now rendered legitimate, by use. It is only necessary to inspect a few cases *on this doctrine, to be satisfied, that the term [*163
interest, as used in an application for insurance, does not necessarily imply *property*, in the subject of insurance. In the case of *Craufurd* v. *Hunter*, 8 T. R. 13, the plaintiffs were commissioners appointed by the crown, under an act of parliament, to superintend the transportation, &c., of Dutch vessels, seized in time of peace, without any present designation for whom—whether to be held in trust, for the original owners, the crown, or the captor. The vessel had been carried into St. Helena; and the policy was effected, with a view to her safe transportation, from that island, to England; and after much consideration, it was adjudged, that this was a good insurable interest, and the plaintiffs recovered. The same point was afterwards decided, in *Lucena* v. *Crawford*, 3 Bos. & Pul. 75, on a writ of error, to the exchequer, after three arguments, and great deliberation; yet the seizures were made before declaration of war; and the interest of the

plaintiffs amounted to nothing but a power over the subject, with a claim by *quantum meruit*, for their services.

Putting down the present case, therefore, to its lowest grade of insurable interest, it is equal to that of the plaintiffs, in the two cases alluded to ; for Daniel Fitch was, at least, the agent or trustee of Medina, to transport his goods from Porto Rico, to a market, and to secure them from the chances of capture and loss. But this case is stronger than the English cases cited, for, by the act of Medina himself, Fitch was exhibited to the world, clothed with all the national documents, which evidence an absolute property ; and, for many purposes, the real owner would have been estopped to deny it. We will instance the payment of duties ; for which, either as owner or consignee, our laws held Fitch absolutely liable. We have, therefore, no doubt of the sufficiency of the insurable interest, in this case.

The last prayer, on which the court below divided, is in these terms : "That the court instruct the jury, that the letter of the 27th April 1822, with the order written thereon, do not, in law, amount to a representation, that the property to be insured, was the sole property of Daniel Fitch ; or that the whole, or any part thereof, was not belligerent." We have already expressed our opinion, on the proposition here presented. It is to be regretted, that this prayer also is so defective in precision. But it was obviously intended, and so argued, to be confined to a representation, which would vitiate the policy. With relation to the first policy, we are all of opinion, that it was unaffected by the letter specified ; and *with regard to
*164] the second policy, whatever might have been the effect of this letter, had it stood alone, yet, taken in connection with the concomitant circumstances, it was not fatal to the contract.

On this point, a majority of the court would be understood to express the opinion, that this letter, connected with the order indorsed upon it, the previous insurance referred to, and considered in relation to the state of the world, and the nature, character and ordinary conduct of the voyage insured, was not such a representation, as, *per se*, vitiated the policy. And this opinion will be certified to the court below.

This cause came on, &c. : On consideration whereof, this court is of opinion : 1. That as the policies of insurance in this cause, purport to insure the plaintiffs "for whom it may concern," they are not bound to prove, that at the time of effecting the said insurance, or any other time, they disclosed to the defendant that Spanish property was intended to be covered by the said insurance, unless inquiries on the subject were propounded by the insurer, prior to the insurance : 2. That if the jury believe the policy of the 6th of May 1822, was founded on the order of the same date, the said policy being "for whom it may concern," does cover belligerent, as well as neutral interest : 3. That if the jury believe, that the policy dated 24th of May 1822, was founded on the letter of the 27th of April 1822, and the order written thereon, the policy being "for whom it may concern," does cover neutral, as well as belligerent property : 4. That if the said Daniel Fitch, at the time of the date of the said policies, was legal and equitable owner of part of the cargo insured, and legal, though not equitable, owner of the residue ; the policies, being "for whom it may concern," do cover the entire cargo; and that the said Fitch had a good insurable interest in the whole cargo;

and the plaintiffs, as his agents, are competent to recover the whole sum insured thereon, on proof of such legal and equitable interest in the said Fitch: 5. That the letter of the 27th of April 1824, whatever might be its effect, if taken alone, yet, taken in connection with the indorsement thereon, with the previous policy to which it refers, the actual state of the world, &c., and the nature of such transactions, is not such a representation as vitiates the policy. All which is ordered and adjudged by this court, to be certified to the said circuit court.

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*Henry Wright, William Carothers, Robert Dennison, William Patton, Thomas Burman and James Robertson, Plaintiffs in error, *v.* The Lessee of Levi Hollingsworth and John Kaighn, Defendants in error. [*165

Practice in ejectment.

In an action of ejectment, in which, according to the provisions of the laws of Tennessee, the defendant was held to bail, the declaration stated two demises, one, by H. & K., citizens of Pennsylvania, and the other, the demise of B. & G., citizens of Massachusetts; the cause coming on for trial before a jury, the plaintiffs suffered a nonsuit, which was set aside; and the court, on motion of the plaintiffs, permitted the declaration to be amended, by adding a count on the demise of S., a citizen of Missouri; the parties went to trial, without any other pleading; and the jury found for the plaintiff, upon the third or new count, and a judgment was rendered in his favor.

The allowance and refusal of amendments in the pleadings, the granting and refusing of new trials, and most of the other incidental orders, made in the progress of a cause, before trial, are matters so peculiarly addressed to the sound discretion of the courts of original jurisdiction as to be fit for their decision only, under their own rules and modes of practice: this court has always declined interfering in such cases. p. 168.

After the filing of a new count to a declaration, the defendant, who, to the former counts, has pleaded the general issue, or any particular plea, may withdraw the same, and plead anew, either the general issue, or any further or other pleas, which his case may require; but he may if he pleases, abide by his plea already pleaded, and waive his right to pleading *de novo*, the failure to plead, and going to trial without objection, are held to be a waiver of his right to plead, and an election to abide by his plea; and if it, in terms, purports to go to the whole action, it is deemed sufficient to cover the whole declaration; and puts the plaintiff to the proof of his case, on the new, as well as on the old counts. p. 169.

Error to the Circuit Court of West Tennessee. This was an action of ejectment, commenced in the circuit court for the district of West Tennessee, in 1813, by the lessee of Levi Hollingsworth and John Kaighn, citizens of the state of Pennsylvania, against Henry Wright and others, the plaintiffs in error, and citizens of Tennessee.

The declaration set forth a demise from Hollingsworth and Kaighn to John Denn, the defendant in error. A notice was served on the tenants in possession, who, at June term 1813, appeared, and put in the plea of "not guilty." At June term 1817, after a jury had been sworn in the cause, the plaintiff suffered a nonsuit; which was afterwards set aside; and the plaintiff had leave to add a new count to his declaration, upon condition, that all the costs of the term should be paid by him, absolutely; and that he should pay all preceding costs, the same to be refunded, if he should ultimately succeed in the action. A new *count was then filed, in which was stated a lease from Benjamin Spencer, a citizen of Missouri. To this count [*166 no plea was filed; and at June term 1825, a trial was had, and a verdict and

judgment were rendered for the plaintiff, upon the last count in the declaration. This writ of error was brought to reverse the judgment.

White, for the plaintiff in error.—1. No plea was filed to the additional count in the declaration, upon which the trial was had, nor was there any other issue joined at the trial. 2. The amendment, authorizing a new lessor, ought not to have been allowed.

To the new count in the declaration, which introduced a new lessor, Benjamin Spencer, and stated a demise from him, the defendants were not called upon to plead. The case remained from 1817, when the additional count was filed, until June term 1825, when the trial took place; and the verdict of the jury was upon the new count, and nothing was said upon the former counts in the declaration. The verdict was therefore given, when no issue was joined; and the plea which had been put in originally, could not be applied, without consent or notice to the defendants, to the new count. A new party had been introduced, and the defendants should have been allowed an option, whether they would expose themselves to the expenses of a trial, upon the allegations in the additional count. The jury had not the count stating the demise from Benjamin Spencer, before them, and yet their verdict was upon it, exclusively. Adams on Eject. 200, 205; 1 Caines 153, 251. The terms on which the nonsuit was taken off, were, the payment of the costs of the term, absolutely; and of all antecedent costs, which were to be returned, if a verdict should be obtained by the plaintiff in the ejectment. These costs were to depend upon the issue between the then parties; but the verdict in favor of the plaintiff, upon the new count, condemned the defendants to pay the whole costs, upon an issue, not formed at the time the court took off the nonsuit; and upon the claim of a party. not at that time known to the court.

It does not appear from the record, that any ground was laid for the amendment, and the court ought to have been satisfied, before it was allowed; it would have been irregular to allow the amendment, without terms. On the institution of the suit, a *capias ad respondendum*, authorized by the act of assembly of Tennessee, was issued, against the tenant in possession, and bail given to secure the damages which might be recovered; and the case stood upon the claims of the then actual parties in the cause.

*167] *A new plaintiff could not be introduced, who could claim the benefit of the bail. 1 Scott's Revisal of the Laws of Tennessee.

Isaacks, for the defendants in error.—No objections were made to this count, or to the issue at the trial; no allegation of surprise, but the defendants produced and examined their testimony; and the verdict was given, without any exception to the pleadings.

1. It is not necessary that the record should show the grounds on which the court set aside the nonsuit, and afterwards allowed the amendment; they are stated to have been done, after motion, and a rule granted. The law of Tennessee authorizes the court to allow amendments, beyond the statutes of amendments and *jeofails* of England, "provided that the nature of the action shall not be changed; and all causes shall be tried, without being entangled in the nice formalities of pleading." (Act of Assembly of

Tennessee of 1809, ch. 49.) And the courts of Tennessee have given a most liberal construction to this law.

2. A plea of "not guilty" had been put in, and issue joined upon it. This plea traversed all the facts in the plaintiff's declaration, and made the traverse as broad as possible. The plea put in to the declaration, in its original form, was the proper plea to the new count.

3. It is not claimed, that the bail put in, when the suit was commenced, inured to the benefit of Benjamin Spencer.

TRIMBLE, Justice, delivered the opinion of the court.—This action of ejectment, was commenced in the circuit court, held in East Tennessee, by suing out a writ of *capias ad respondendum*, accompanied with the declaration, and the tenants in possession held to bail, to answer to the action, in the manner provided for by a statute of the state. The original declaration contained two counts; the first, on the demise of Hollingsworth and Kaighn, citizens of Pennsylvania; the second, on the demise of Joseph Blake and Daniel Green, citizens of Massachusetts. The tenants appeared and pleaded not guilty, upon which issue was joined. A trial was had, and a nonsuit suffered by the plaintiff, which was set aside, on the payment of costs. After these proceedings, the court, on the motion of the plaintiff, permitted the declaration to be amended, by adding a count, on the demise of Benjamin Spencer, a citizen of Missouri. The parties went to trial, without any other pleadings, and a verdict having been found for the plaintiff, upon the third or new count, judgment was thereon rendered in his favor; to reverse which, the defendants have prosecuted this writ of error.

They allege the judgment is erroneous and should be reversed.—*1. Because the count on which judgment was rendered against them does not show that Missouri is one of the United States. 2. Because [*168 the court permitted the declaration to be amended, by adding a new count, on the demise of Benjamin Spencer; and especially, as the amendment was permitted with payment of costs. 3. Because no plea was filed to the new count, nor any issue made up thereon.

The first objection was very properly not pressed, in argument. The count alleges Benjamin Spencer to be a citizen of the state of Missouri. This count was filed, after Missouri was admitted as a state into the Union; and there can be no question but that this, and every other court in the nation, are bound to take notice of the admission of a state, as one of the United States, without any express averment of the fact.

In support of the second objection, it is urged, that the admission of the new count, on the demise of a new lessor, made a material alteration in the suit; that the suit having been originally commenced, under the state practice, by writ of *capias ad respondendum*, to which the former lessors only were parties, the amendment was, in substance and effect, the institution of a new suit, or at least grafting a new one upon the old; and produced an incongruity upon the record; the first and second counts, and the proceedings on them, being proceedings under the statute, and the third or new count, a proceeding at common law; and that according to established principles of practice, it should have been allowed, if at all, only on payment of costs.

This argument would be entitled to great, and perhaps, decisive influence,

if addressed to a court having any discretion or power over the subject of amendments. But the allowance and refusal of amendments in the pleadings, the granting or refusing new trials, and indeed, most other incidental orders made in the progress of a cause, before trial, are matters so peculiarly addressed to the sound discussion of the courts of original jurisdiction, as to be fit for their decision only, under their rules and modes of practice, This, it is true, may, occasionally, lead to particular hardships; but on the other hand, the general inconvenience of this court attempting to revise and correct all the intermediate proceedings in suits, between their commencement and final judgment, would be intolerable. This court has always declined interfering in such cases; accordingly, it was held by the court, in *Wood* v. *Young*, 4 Cranch 237, that the refusal of the court below to continue a cause, after it is at issue, is not a matter upon which error can be assigned; that the refusal of *the court below to grant a new trial, is not a matter for which a writ of error lies, 5 Cranch 11, 187, and 4 Wheat. 220; and that the refusal of the court below, to allow a plea to be amended, or a new plea to be filed, or to grant a new trial, or to continue a cause, cannot be assigned as a cause of reversal on a writ of error. We can perceive no distinction in principle between these cases, and the one before the court. We must take the declaration, including the amendment, as we find it on the record. Nor can we interfere, because the court below did not, as it ought, require the costs formerly accrued, to be paid, as a condition of the amendment.

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The authorities cited by the learned counsel, do not, we think, support his last position, that the judgment is erroneous, because a plea was not filed to the new count. They prove, unquestionably, that upon the amendment being made to the declaration, by adding a count, the defendants had a right to plead *de novo;* they prove nothing more. They do not show that the defendants, in such cases, must necessarily plead *de novo;* or that judgment may be entered by default, for want of a plea to the new count, if, before the amendment, he has pleaded the general issue. We think the practice is well settled to the contrary. The defendant has a right, if he will, to withdraw his former plea, and plead anew, either the general issue, or any further or other pleas, which his case may require; but he may, if he will, abide by his plea already pleaded, and waive his right of pleading *de novo.* His failure to plead, and going to trial, without objection, are held to be a waiver of his right to plead, and an election to abide by his plea, and if it, in terms, purports to go to the whole action, as is the case in this instance, it is deemed sufficient to cover the whole declaration; and puts the plaintiff to the proof of his case, on the new as well as on the old counts. This is the general doctrine in other forms of action, such as trespass and *assumpsit;* and we see no reason to distinguish the action of ejectment, or take it out of the general rule.

Judgment affirmed, with costs.

*James J. McLanahan, Wilhelmus Bogart and John Joseph Coiron, Plaintiffs in error, *v.* The Universal Insurance Company, Defendants in error.

Marine insurance.—Seaworthiness.—Fraud.—Concealment.—Charge of the court.—Binding instruction.

It is, doubtless, within the province of a court, in the exercise of its discretion, to sum up the facts in the case to the jury, and submit them, with the inferences of law deducible therefrom, to the free judgment of the jury; but care must be taken, in all such cases, to separate the law from the facts, and to leave the latter, in unequivocal terms, to the jury, as their true and peculiar province. p. 182.

An application for a new trial, on motion, after verdict, addresses itself to the sound discretion of the court; and if, upon the whole case, the verdict is substantially right, no new trial will be granted, although there may have been some mistakes committed on the trial; the application is not a matter of absolute right, but rests in the judgment of the court, and is to be granted only in furtherance of justice. On a writ of error, bringing the proceedings on a trial, by bill of exceptions, to the cognisance of the appellate court, the directions of the court below, must then stand or fall, upon their own intrinsic propriety, as matters of law. p. 183.

Every ship must, at the commencement of the voyage insured, possess all the qualities of seaworthiness, and be navigated by a competent master and crew.[1] p. 183.

Seaworthiness in port, or lying in the offing, may be one thing; and seaworthiness for a whole voyage, quite another. p. 184.

A policy on a ship, "at and from a port," will attach, although, the ship be, at the time, undergoing extensive repairs, in port; so as, in a general sense, for the purposes of the whole voyage, to be utterly unseaworthy.[2] p. 184.

What is a competent crew for the voyage? at what time such crew should be on board? what is proper pilot ground? what is the course and usage of trade, in relation to the master and crew being on board, when a ship breaks ground for the voyage? are questions of fact dependent upon nautical testimony, and exclusively within the province of the jury. p. 184.

The contract of insurance is one of mutual good faith, and the principles which govern it, are those of an enlightened moral policy; the underwriter must be presumed to act upon the belief, that the party procuring insurance, is not, at the time, in possession of any fact material to the risk, which he does not disclose; and that no known loss had occurred, which, by reasonable diligence, might have been communicated to him. p. 185.

If a party, knowing that his agent is about to procure insurance for him, withholds information, for the purposes of misleading the underwriter, it is a fraud, and vitiates the insurance. p. 185.

Where a party orders insurance, and afterwards receives intelligence material to the risk, or has knowledge of a loss, he ought to communicate it to the agent, by due and reasonable diligence, to be judged under all the circumstances of each particular case, if it can be communicated; for the purpose of countermanding the order, or laying the circumstances before the underwriter.[3] p. 185.

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[1] There is an implied warranty, in every contract of insurance, that the vessel is seaworthy, and competent to perform the voyage. Warren *v.* United Ins. Co., 2 Johns. Cas. 231; Myers *v.* Girard Ins. Co., 26 Penn. St. 192. To render her seaworthy, she must be manned by a competent master and crew. The Vincennes, 3 Ware 171; The Ethel, 5 Ben. 154; Silou *v.* Low, 1 Johns. Cas. 184; Dow *v.* Smith, 1 Caines 32. If a vessel have, in fact, a competent sailing-master, she is not unseaworthy, though the registered master have no nautical skill, and act merely as supercargo. Draper *v.* Commercial Ins. Co., 21 N. Y. 378. Seaworthiness of the hull is such a state, as is competent to resist the ordinary action of the winds and waves, in the particular voyage insured. Bullard *v.* Roger Williams Ins. Co., 1 Curt. 148; Watson *v.* Ins. Co. of N. America, 2 W. C. C. 480.

[2] See Garrigues *v.* Coxe, 1 Binn. 592.

[3] S. P. Watson *v.* Delafield, 2 Caines 224; S. C. 1 Johns. 150; 2 Id. 526.

What constitutes due and reasonable diligence, is a question of fact for the jury. p. 186.

*171] *The accidental concealment of the time of the sailing of a vessel, would not prejudice the insurance, unless material to the risk; if fraudulently intended, it might not mislead; and whether fraudulent or not, is matter of fact for the jury. p. 188.

The material ingredients of a question of the importance of concealing the time of a vessel's sailing, are mixed up of nautical skill, information and experience; and are, in no sense, judicially cognisable, as matters of law. It seems, that this question does not cease to be a question of fact, when the vessel is to sail from a port abroad. p. 188.

Little stress ought to be laid upon general expressions falling from judges, in the course of trials; where the facts are not disputed, the judge often suggests, in a strong and pointed manner, his opinion as to their materiality and importance, and his leading opinion of the conclusion to which the facts ought to conduct the jury; this ought not to be deemed an intentional withdrawal of the facts, or the inferences deductible therefrom, from the cognisance of the jury, but rather as an expression of opinion, addressed to the discretion of counsel, whether it would be worth while to proceed further in the cause. And the like expression, in summing up any cause to the jury, must be understood by them, merely as a strong exposition of the facts, not designated to overrule their verdict, but to assist them in forming it. And there is the less objection to this course, in the English practice; because, if the summing up has had an undue influence, the mistake is put right by a new trial, upon an application to the discretion of the whole court; this is so familiarly known, that it needs only be stated, to be at once admitted. p. 190.

The question of materiality of the time of the sailing of the ship to the risk, is one for the jury, under the direction of the court, as in other cases. The court may aid their judgment by an exposition of the nature, bearing and pressure of the facts; but it has no right to supersede the exercise of that judgment, and to direct an absolute verdict as upon contested matter of fact, resolving itself into a mere point of law. p. 191.

ERROR to the Circuit Court of Maryland. The action, in the circuit court for the district of Maryland, was instituted by the plaintiffs in error, on a policy of insurance, in the usual form; and a verdict was rendered for the defendants, under the opinion of the court, upon the first of nine exceptions taken by the plaintiffs.

The material facts in the case were: Insurance was effected in Baltimore, in the name of Thomas Tenant, to the amount of $10,000, on the brig Creole, for a voyage from Havre de Grace to New Orleans, with liberty to touch and trade at Havana. The policy was dated upon the 22d day of December 1823. The insurance was made for the plaintiffs, the sole owners of the vessel, under the following circumstances: John Joseph Coiron, one of the plaintiffs, while at Havre de Grace, on the 19th of October 1823, addressed to Mr. John Stoney, of Charleston, the following letter:—

Havre, October 19th, 1823.

Mr. JOHN STONEY, Charleston:

*172] Dear Sir:—Please to have insured, for my account, for the *account and risk of whom it may concern, ten thousand dollars, on the brig Creole, of New Orleans, Captain Jacob Goodrich, for New Orleans, touching at the Havana. The brig and boats in the best order, having a round-house on deck, containing fourteen berths; the crew are seventeen in all. We intend sailing to-morrow. I have with me my family, consisting of two children and two nephews. The wind having shipped round suddenly, I write this in haste; my first will be more satisfactory to you, for particulars. The new Georgia upland cotton, twenty sous; rice, thirty francs. Your devoted servant and friend,

JOHN JOSEPH COIRON.

And also another letter, as follows :—

Duplicate.

Havre, October 20th, 1823.

Mr. John Stoney, Charleston :

Dear Sir :—I have yesterday requested you to have insured, on my account, for the account of whom it may concern, ten thousand dollars, on the brig Creole, of New Orleans, Captain Jacob Goodrich, from this port back to New Orleans, touching at the Havana, the vessel and boats in the best order, having a roof on deck, containing fourteen berths ; manned by seventeen hands. You know the vessel. I have only to add, that I have made a thousand dollars' worth more of repairs and improvement on her. She is now a very convenient packet. I will feel gratified to hear from you, at the Havana. I intend but making a very short stay there, having two children and two nephews with me, and being anxious to meet Mrs. C. I cannot give you any favorable information respecting business in this part of Europe. With the pleasing expectation of being soon near you, I remain, respectfully, dear Sir, your devoted servant and friend,

John Joseph Coiron.

This letter was inclosed in another, addressed by Quartier & Drogy, of Havre, to Mr. Stoney, dated 23d of October 1823, and stamped with the post-mark of Savannah, December 10th ; which, with the indorsements thereon, were as follows :—

P. Hesperus.

Havre, October 23d, 1823.

John Stoney, Esq., Charleston :

Sir:—We are indebted to our mutual friend, Mr. J. J. Coiron, from whom we beg leave to hand you the inclosed letter, for an introduction to your *173] respectable firm, and should feel *particularly happy, if it became the means of an active correspondence between us ; the produce of your country, and particularly cotton, being always of an easy and frequently advantageous sale in this part of France, on account of the vicinity of the metropolis, and the principal manufacturing towns, which gives Havre a decided preference over the other commercial ports of France. Georgia short staple, sells at 27 @ 29, and the stock on hand not considerable, few arrivals being expected, until the new crop, which can hardly reach our market before the month of December. It would, however, not be prudent, to speculate on the present prices, as they will be likely to give way, on arrival of the new crop, and occcasion considerable losses. Our opinion is, that purchases ought to be made at from 11 to 13*d.*, and not to exceed 14*d.*, to offer a benefit here.

Should you feel disposed to enter into a connection of business with us, and honor us with an answer, we could, if you are so inclined, commence with an adventure of a hundred bales of cotton, for mutual account, and successively enlarge the speculation, if the result prove satisfactory. As to the reimbursement for our share, we authorize you to draw on us, at Paris, at sixty or ninety days sight, if the exchange be advantageous; else we may either make you remittance, or open you a credit at New York. In case it

should suit you to speculate for your own account, we beg to offer you the facility of an anticipation of half the amount of the consignments you may please to instruct to our care, on receipt of the bills of lading and order for insurance. We are also ready to offer the same facilities on shipments which you may sway to us, for account of other houses, and to grant you a share in the commission on the same. Would oblige us, to render us the following service, viz: to procure acceptance of the inclosed bill of 420 dollars, sixty days sight, on Barbet & Esnard, of your city; and when accepted, to hand the same to Mr. Sam. Simon, at Augusta, &c. Believe us, with due regard, Sir, your most obedient servants,

A. Quartier & Drogy.

John Stoney, Esq., Charleston, S. C.

No. 9, 1823.—Quartier & Drogy, Havre, Oct. 23.—Received 13th December.

Hesperus.

The letter of the 19th October was dispatched, in a single form, from Havre, on the 20th, by a vessel sailing on that day, for Philadelphia; and was received by Mr. Stoney, on the 15th December; a duplicate of the letter of the 20th was dispatched on the 23d of October, by the Hesperus, *via* Savannah.

*174] *On the 12th of December 1823, Mr. Stoney applied to the Fire and Marine Insurance Company, and to the Union Insurance Company, in Charleston, for insurance on the Creole, and both offices refused the risk, upon the ground, that they ought to have received account of the arrival of the brig, before that time. The offers were withdrawn, and upon the 13th of December, he wrote to Thomas Tenant, Esq., at Baltimore, the following letter. The letter was post-marked at Charleston, on the day of its date; and was received in Baltimore, by Mr. Tenant, on Saturday, the 20th December, in due course of mail.

Charleston, 13th December 1823.

Thomas Tenant, Esq., Baltimore:

Dear Sir:—I received, the day before yesterday, a letter from John Joseph Coiron, *via* Savannah (extract annexed), in which he requests me to have insurance effected on the Creole, on his account, and others, valued at ten thousand dollars, $10,000. The two offices here are afraid of their own shadow, and will not underwrite her. I must, therefore, request the favor of your having the insurance done, agreeable to his order annexed, and I will be answerable to you for the premium, &c. Good upland cotton, 14 cents, and declining. I have only to confirm my respects of the 3d inst. which I hope you have received before this. If the insurance cannot be done with you, please write to New York, to have the same effected. Expecting the pleasure of hearing from you soon, I am, very respectfully, your most obedient servant, John Stoney.

Duplicate. (Inclosed.)

Havre, 20th of October 1823.

Mr. John Stoney, Charleston:

Dear Sir:—I have yesterday requested you to have insured, on my

account, for the account of whom it may concern, ten thousand dollars on the brig Creole, of New Orleans, Captain Jacob Goodrich, from this port, back to New Orleans, touching at the Havana. The vessel and boats in the best order, having a roof on deck, round-house containing 14 berths, manned by 17 hands. You know the vessel. I have only to add, that I have made one thousand dollars' worth more of repairs and improvements on her. She is, now, a very convenient packet.

Extract—Thomas Tenant, Esq., of Baltimore, Maryland.

No. 1. John Stoney, Charleston, 13th Dec. 1823, and 20th Dec. (mail), order for insurance.

*On the 22d of December 1823, Mr. Tenant applied to the defendants, the Universal Insurance Company, for insurance, by the following written order for the same; and upon the contract thus made, the policy was, on the same day, filled up and executed. "I want insurance, for account of whom it may concern, on the brig Creole, Jacob Goodrich, master, at and from Havre de Grace to New Orleans, with liberty to touch and trade at Havana, against all risks; and in case of loss, the same to be paid to me. The vessel valued, independent of freight, to this sum, 10,000 dollars. The Creole was completely rebuilt and coppered at Charleston, S. C., in last summer, at great expense, and is now considered a remarkably fine vessel. She was, and I presume still is, owned by McLanahan & Bogart, and J. J. Coiron. The latter gentleman was on board her, and I presume is returning in her to New Orleans. He writes from Havre, under date of 20th October, but does not say when the brig would sail. She sails under a certificate of ownership. What will be the premium on the above risk? [*175

Baltimore, 22d Dec'r 1823. THOMAS TENANT.
8 per cent. by Richard G. Cox.
Accepted.—T. Tenant.

On the day of insurance was so made, Mr. Tenant had made application, in the same terms, to the Maryland, Chesapeake and Baltimore Insurance Companies, all of which declined the risk. The Phœnix Insurance Company, upon application, declined, on the ground, that the time of sailing was not ascertained; and the Patapsco Company were willing to take $5000, at five per cent. premium. The insurance effected by Mr. Tenant, was the only one made upon the Creole. No information relative to the loss of the Creole was received in Charleston, nor was her loss known there, until the 15th of December; on which day, the brig Panther arrived at Charleston, and about 2 o'clock, Mr. Stoney was informed thereof.

On the 19th of October 1823, by entries in the log-book of the Creole, at Havre, it was shown, that "the brig was getting ready for sea on the 20th; at 9 A. M., the pilot came on board, and warped out into the basin, made sail, hove to in the offing, for the captain, owner, and passengers and crew." At 10 A. M., they came off, and the pilot left the vessel. Tuesday, the 21st October 1823, following entry was made in the log-book:

*Tuesday, October 21st, 1823.

H.	K.	COURSES.	WINDS.	
1	7			Commences with fine breezes and pleasant weather. This day contains 12 hours, ending at noon, at the commencement of the naval account. That at midnight, Cape De Here bore, per compass, S. S. E., distant five leagues. The detention of captain on shore, being in want of the national certificate of the owners of this brig, having been carried off by the former captain, Leonard Fash, who was dismissed. It was, therefore, necessary for the present captain to go through the requisite formalities, before the American consul, to prove the want of this important document.
2	7			
3	7			
4	7			
5	7			
6	7			
7	7			
8	7			
9	7			
10	7			
11	7			
12	7			

The protest of Captain Goodrich, master of the Creole, stated, that the Creole sailed from the port of Havre de Grace, on the 21st of October 1823, bound for Havana, in Cuba; that on the 29th of December, the brig was wrecked, and lost on Sugar Key, while on the voyage; and himself, the passengers and crew, were picked up, and some of them carried to New Orleans, by the ship Trumbull, which ship arrived on the 17th of December 1823. The second mate of the Creole, and five passengers, among whom were Mr. Coiron and his family, left the ship Trumbull, off the Havana, in the small boat of the Creole, and were landed there, upon the same day. It also appeared, from the evidence on the part of the defendants, that the schooner Chase, Captain Richard S. Pinckney, master, sailed from Havana, for Charleston, from the 1st to the 3d of December 1823, and arrived at Charleston, on the 12th of the same month. Captain Pinckney stated, that he did not hear, in Havana, any report of the loss of the Creole. The schooner Eliza and Polly sailed from Havana, for Charleston, three hours before the Chase, and Captain Pinckney left Havana, to go on board the Chase, three hours after the sailing of the Eliza and Polly.

The following letter from Lemuel Taylor to Mr. Tenant, was also admitted as evidence:

Havre, June 28th, 1824.

My dear Sir:—Your favor of the 5th instant was received yesterday; and in reply, I have only to say, that I left Havana on the 3d of December last, in the schooner Chase, *Captain Pinckney, for Charleston; and
*177] that, some days previous to my departure from Havana, I see a person land on the wharf, a crowd seemed to get round him, and I see several taking him by the hand; I asked who he was; his name was mentioned, but I do not now recollect it, and that he was passenger in the brig Creole, from Havre, for Havana, and lost on some of the Keys; and that he was an old trader to Havana, from France, and had a large adventure on board. His name, and time of landing, can be ascertained at Havana, if wanted. I never heard the case mentioned on the passage, or in Charleston; and I am sure, I never thought or heard of it, after leaving Havana, till one day, while in Baltimore, Mr. Parker, speaking of losses, mentioned the Creole; and I observed, I heard of her loss, while in Havana; he then observed, they

should have to refuse to pay the loss, and that it would be one of the most painful disputes he ever had, as president, on account of the great respectability of yourself and Mr. Stoney, and mentioned something about dates. From that time, until I received your letter yesterday, I never heard or thought of the case. And I again repeat, that I am sure I did not hear the loss mentioned on the passage, or in Charleston, and that I see the passenger land as mentioned; and that his name and date can be furnished from Havana, if wanted. I am, dear Sir, very sincerely, your friend and servant,

LEMUEL TAYLOR.

It was also proved, that the northern mail closed, in Charleston, at ten o'clock in the morning, and generally arrived in Baltimore, in seven days, exclusive of the day the letter was mailed, but never at an earlier day; though sometimes in eight or nine days; that it generally arrived from half past one to two o'clock, and the letters of Mr. Tenant were never delivered by the penny-post to him, until after three o'clock, on the day of the arrival of the mail. The hours of business of the insurance companies in Baltimore, terminated, daily, at two o'clock. The fullest testimony was given of the high character of Mr. Stoney and Col. Tenant, to negative the possibility of a presumption of intentional fraud or concealment, on the part of either of those gentlemen, relative to the loss of the Creole.

The plaintiff, on the trial, tendered nine exceptions to the opinions of the circuit court, all of which are stated on the record; but as, in the opinion of this court, no notice is taken any other than the first exception; and the court justified the refusal of the judges of the circuit court to sign the bill of exceptions to any other than the first, it is deemed necessary to insert the first exception only. That exception is as follows:—

"The defendants, by their counsel, prayed the court to *instruct the jury, that, upon the whole evidence in the case, the plaintiffs are [*178 not entitled to recover, and the verdict of the jury ought to be for the defendants; which instruction and opinion the court accordingly gave; and thereupon, the plaintiffs, by their counsel, prayed leave to except, and that the court would sign and seal this, their bill of exceptions, which is accordingly done, this 10th day of January 1826.

G. DUVALL, (Seal.)
ELIAS GLENN," (Seal.)

The cause was brought by writ of error to this court; and was argued by *Taney* and *Jonathan Meredith*, for the plaintiffs in error; and by the *Attorney-General* of the United States, and *Ogden*, for the defendants.

For the *plaintiffs*.—Two general grounds of defence were taken at the trial below.—1. A concealment of material circumstances in effecting the insurance. 2. Want of proper diligence, in not countermanding the order for insurance, after the loss had occurred.

As to concealment. Four instances of concealment were charged.—1. The time of the sailing of the brig from Havre. 2. An offer for insurance was made at Charleston, and its rejection. 3. The arrival of the two vessels from Havana at Charleston. 4. The description of the brig in Coiron's letter of 20th October, "she is now a very convenient packet."

As to negligence. The want of due diligence, in not countermanding the

insurance, was charged.—1. By Coiron, in not communicating the loss to Stoney, while off Havana. 2. By Stoney, in not revoking the order to Tenant, on hearing of the loss on the 15th of December.

The general principle as to the doctrine of concealment is, that the assured is bound to make a full disclosure. The exceptions are: 1. As to facts which the insurer ought to know: 2. What he takes on himself the knowledge of: 3. Which he waives being informed of: 4. Which are not material, as not varying the contract. *Carter* v. *Boehme*, 3 Burr. 1905.

1. As to the charge of concealment of the time of sailing; Coiron could only state his expectation on this subject. Coiron was not bound to state a mere expectation of the *time of sailing; because, if he had, it would *179] not have bound him as a representation. Phil. on Ins. 83, and cases cited. There is no general rule on the subject. It depends, like every other species of concealment, on its materiality to the risk, and it was not material here. *Foley* v. *Moline*, 5 Taunt. 430; 1 Camp. 116; *Fort* v. *Lee*, 3 Taunt. 381; 1 Marsh. 483, 484; *Mackay* v. *Rhinelander*, 1 Johns. Cas. 408; 1 Eng. C. L. 144. The usage in Baltimore, is, to calculate the sailing on the day of the last advices in port; which the order in this case stated to be 20th of October. The duty of disclosure is confined to facts, not to the conclusion of other men from the same facts. Phil. 100; *Bell* v. *Bell*, 2 Camp. 479; 1 Park (7th ed.) 292; 2 Dane's Abr. 121. The usage in Baltimore corresponds with the legal principle; and that usage may be applied to this case. But if the laws were otherwise, still the question would be, was the alleged concealment material, or was it not, in this case?

2. Concealment, as to arrival of vessels from Havana. The answers are: 1. There is no proof that Mr. Stoney knew of their arrival: 2. Immaterial, because when they left Havana, the Creole could not be considered missing. *Littledale* v. *Dixon*, 4 Bos. & Pul. 151.

3. Concealment, as to the Creole's being a packet: 1st. It is not necessary to describe the particular construction of the vessel offered for insurance. *Hayward* v. *Rogers*, 1 East 590. 2d. General ground—not countermanding the insurance. The rule of law is, that if, after an order for insurance, a loss happens, it is the duty of the assured to countermand the order, where there is probable ground to believe, that, by the exercise of reasonable diligence, it will arrive in time. See *Fitzherbert* v. *Mather*, 1 T. R. 12; *Watson* v. *Delafield*, 2 Caines 224. Coiron might fairly have presumed, that one of the three letters, ordering insurance, might have reached Mr. Stoney, long before the loss, particularly the one *via* Savannah.

The questions in this cause are all unmixed questions of fact, and they were improperly decided by the court below. The language of the instruction is peremptory, not by way of advice as to the facts, and was considered as binding on the jury. The question of materiality as to concealment, is always a question exclusively for the jury. 1 Park (7th ed.) 289, 301, 314, 317; *Hull* v. *Cooper*, 14 East 479; 1 Maule & Selw. 16; *Littledale* v. *Dixon*, 4 Bos. & Pal. 151; *Mackay* v. *Rhinelander*, 1 Johns. Cas. 408; *Williams* v. *Delafield*, 2 *Caines 329; *New York Firemen Insurance *180] Company* v. *Walden*, 12 Johns. 513, and the cases cited in the opinion of Ch. J. KENT. A question of due diligence is also a question of fact. 1 Stark. Ev. 412, &c.; and see notes in *Moore* v. *Mourgue*, Cowp.

479; *Wake* v. *Atty*, 4 Taunt. 493; *Bateman* v. *Joseph*, 2 Camp. 461; *Reece* v. *Rigby*, 4 Barn. & Ald. 202; *Watson* v. *Delafield*, 2 Caines 224.

In reply to the argument of the counsel of the defendants, it was said; the question of seaworthiness is one of fact, and should have been submitted to the jury. As to the casual absence of the captain: Phil. 118. The brief delay occasioned by the want of a paper, was not material; and was not a deviation to avoid the policy. Phil. on Ins. 191, and cases cited. The court have the right to decide upon the law of the case, but the facts are exclusively for the jury. Nor is it admitted, that the court may advise upon matters of fact, in this case. The court assumed to determine the facts, and took them entirely from the jury. The practice under the laws of Maryland, is in conformity to the principles, claimed by the plaintiffs, and the court are prohibited by law from advising upon the facts. This course of proceeding has not been found inconvenient, nor has it been disapproved of by the people; and it may, therefore, be considered judicious.

Wirt and *Ogden*, for the defendants.—The facts of the case justified the opinion of the court, which is the subject of the first exception: the whole of the case rests upon that exception. Was the vessel seaworthy, at the time of her departure from Havre? The log-book shows, that she got under weigh, before the master and crew were on board. At the time of the sailing of the vessel insured, she must be properly manned for the voyage; she must be seaworthy, when the voyage commences. Phil. on Ins. 117; 3 Burr. 1419; 7 T. R. 705; 1 Ibid. 343, 186. 2d. There was such a deviation as to discharge the underwriters. Delay for documents a deviation. 1 Phil. 181; 1 Marsh. 499.

Upon the first exception, two questions present themselves.—1. Did the court err in giving the instruction? 2. Did the court invade the privileges of the jury?

The time of the sailing of the Creole, was not communicated by Coiron, nor did he write, as he ought, and could have done, on his arrival at Havana, after the loss of the brig; and his omission to do this, avoided the policy. Phil. 96; 2 Caines 224; 1 Johns. 150; 2 Ibid. 526; 9 Ibid. 32. Mr. Stoney *should have inquired, at Charleston, of those who arrived from Havana, for information about the Creole. [*181

The courts of the United States are not bound by the recent law of Maryland, in reference to the power of courts to advise or instruct the jury upon facts; the law continues unaffected by the statute. What is concealment, is now become a question of law. Marsh. 467. In all cases, when a vessel insured is to sail from abroad, the time of sailing is material. Upon authority, this was a case in which the court had a right to say the insured could not recover. Phil. on Ins. 468; 4 Bos. & Pul. 4; Marsh. 470; *McAndrews* v. *Bell*, 1 Esp. 373, 407; Phil. 104.

It is objected, that the court took upon themselves to decide the materiality of the fact; and that this, by the law of insurance, is exclusively for the jury. This is to say, the court can give no opinion or instruction on the materiality of the facts. This authority is frequently exercised. 6 Cranch 274, 339; 13 Johns. 334; 8 Mass. 336. Questions of fact, on which the law was to be settled, have been taken from the jury. What is notice of nonpayment of a bill of exchange, is no longer a question of fact. So, questions

of abandonment. 6 Cranch 338. Breaking up of a voyage, has become a question of law, "or it may be considered in the chrysalis state, part grub and part butterfly." Ibid. 71.

The point now to be settled by this court, is a question of political jurisprudence; and the court is called upon, first, to decide and establish a rule for the proceedings of the courts of the United States; and to say how far these courts can interfere in questions of fact. Is the inquiry one which cannot be touched, because the barrier is established, "that the law is for the court, and the fact is for the jury?" In England, the same principles prevail, and yet the courts have broken down this barrier. It is expedient, that courts should thus interfere. While it is entirely conceded, that the preservation of the trial by jury, in criminal cases, is essential; in civil cases, what would be the trial by jury, without the interference of courts, and "if the law was left to the shifting sands of jury jurisprudence?" It would be "a world without a sun"—like chaos, before the command, "Let there be light!"

Story, Justice, delivered the opinion of the court.—This is a writ of error to the circuit court of the district of Maryland. The original action was brought by the plaintiffs in error, against the defendants, upon a policy of insurance, *underwritten by the defendants, whereby "they caused Thomas Tenant, for whom it may concern, to be insured, lost or not lost, at and from Havre de Grace to New Orleans, with liberty to touch and trade at Havana," ten thousand dollars, upon brig Creole and appurtenances. The declaration averred the interest in the plaintiffs, and a total loss by the perils of the seas. The defendants pleaded the general issue; and upon the trial, after the whole evidence on both sides had been given in, the court, upon the prayer of the defendants' counsel, instructed the jury, "that upon the whole evidence in the case," as stated, the plaintiffs are not entitled to recover, and the verdict of the jury, "ought to be for the defendants." Nine different instructions were then prayed for on behalf of the plaintiffs, which were all refused by the court, upon the ground, that the opinion already given, disposed of the whole cause, upon its merits. If that opinion was correct, this refusal was entirely justifiable; for the court was under no obligation to discuss or decide other points, when the plaintiffs' case was already shown to possess a fatal defect.

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The general question, then, before this court, is upon the propriety of the instruction so given to the jury. A suggestion has been thrown out at the bar, that this instruction was not intended to be positive and absolute, but merely advisory to the jury; that it was not meant to take away the right of the jury to decide freely on the facts; but merely to offer for their consideration those views which the court had arrived at, and which it might at all times properly suggest to the jury. It is, doubtless, within the province of a court, in the exercise of its discretion, to sum up the facts in the case to the jury, and submit them, with the inferences of law deducible therefrom, to the free judgment of the jury. But care should be taken, in all such cases, to separate the law from the facts, and to leave the latter, in unequivocal terms, to the jury, as their true and peculiar province. We do not, however, understand, that the present instruction was, in fact, or was intended to be, merely in the nature of advice to the jury. It is couched in

the most absolute terms, and imposed an obligation upon the jury to find a verdict for the defendants. It assumed, there were no disputable facts or inferences, proper for the consideration of the jury upon the merits; and that upon the unquestioned facts, the plaintiffs had no legal right of recovery. It is in this view, that is open for the consideration of this court; and in this view, it will now be discussed, so it was discussed in the argument at the bar.

Four grounds have been presented to justify the opinion of the circuit court, which, it is said, are apparent from the record itself, and each of them is decisive upon the case. The first is, *the unseaworthiness of the ship, at the time when she broke ground at Havre, and commenced [*183 the homeward voyage, by reason of the master and a sufficient crew not being then on board. The second is, the laying off and on, near the port of Havre, after departure on the voyage, for several hours, waiting for the master to come on board; which, it is said, was an improper detention, and amounted to a deviation. The third is, the omission of Coiron to communicate to his agent, or other persons in America, the knowledge of his loss, by way of Havana; so as to countermand the order of insurance, which, it is contended, was a fatal omission of duty. The fourth is, the omission to mention the time of the vessel's sailing from Havre, in the letter of the 20th October, ordering the insurance; which, whether fraudulent or not, was a material concealment, and misled the underwriters, in the same manner, as if there had been a representation that the time of the sailing was uncertain.

It is to be considered, that these points do not come before this court, upon a motion for a new trial, after verdict, addressing itself to the sound discretion of the court. In such cases, the whole evidence is examined with minute care, and the inferences which a jury might properly draw from it, are adopted by the court itself. If, therefore, upon the whole case, justice has been done between the parties, and the verdict is substantially right, no new trial will be granted, although there may have been some mistake committed at the trial. The reason is, that the application is not matter of absolute right in the party, but rests in the judgment of the court, and is to be granted only when it is in furtherance of substantial justice. The case is far different, upon a writ of error, bringing the proceedings at the trial, by a bill of exceptions, to the cognisance of the appellate court. The directions of the court must then stand or fall, upon their own intrinsic propriety, as matters of law.

The first and second points appear to us, in the present case, to resolve themselves into matters of fact; and the facts are too imperfect and too general, to enable the court to draw any legal conclusion from them, either as to the seaworthiness or deviation. There is no doubt, that every ship must, at the commencement of the voyage insured, possess all the qualities of seaworthiness, and be navigated by a competent master and crew. But how is this court to arrive at the conclusion, that the brig Creole was not in that predicament, at the commencement of the present voyage? The argument assumes, that the ship ought not to have got under weigh, or proceeded into the offing, until the master, and all the crew necessary, not for that act, but for the entire voyage, were on board. If the law were so, we have no means of ascertaining what crew was *actually on board at the time; [*184 nor whether the voyage was absolutely intended to be commenced

on that day ; nor whether the departure was merely contingent and dependent upon the master's procuring the proper ship's papers, and the breaking ground, and standing off and on in the offing, were preparatory steps only for this purpose ; nor whether, for such purposes, the pilot and crew on board were not amply sufficient. But we are far from being satisfied, that the law has interposed any such positive rule, as the argument supposes. Seaworthiness in port, or for temporary purposes, such as mere change of position in harbor, or proceeding out of port, or lying in the offing, may be one thing ; and seaworthiness for a whole voyage, quite another. A policy on a ship, at and from a port, will attach, although the ship be, at the time, undergoing extensive repairs in port, so as, in a general sense, for the purposes of the whole voyage, to be utterly unseaworthy. What is a competent crew for the voyage ? at what time such crew should be on board ? what is proper pilot ground ? what is the course and usage of trade in relation to the master and crew being on board, when the ship breaks ground for the voyage ? are questions of fact, dependent upon nautical testimony ; and are incapable of being solved by a court, without assuming to itself the province of a jury, and judicially relying on its own skill in maritime affairs. In this view of the point, it is not necessary to rely on the doctrine of Lord Chief Justice Abbott, in *Weir* v. *Aberdeen*, 2 Barn. & Ald. 320, which goes the length of asserting, that if there be unseaworthiness, at the commencement of the voyage, and the defect is cured, before loss, a subsequent loss is recoverable under the policy. This is an important doctrine, and well worthy of discussion, whenever it comes directly in judgment.

The like answer may be given to the point of deviation. This court cannot intend, that here there was any unnecessary delay in the commencement or course of the voyage. The delay, for the want of papers, may have been entirely justifiable ; and indeed, may have conduced to an earlier inception of the voyage, by putting the ship in a situation to depart at a moment's warning. The usage of trade may be, generally, or, at least, in that particular port, to get the ship under weigh, as in this case, and wait in the offing, until the master is ready to come on board ; and that usage may be not only convenient and beneficial to all parties, but absolutely necessary, in given cases, from the nature of the port, and the winds and seasons. How then can this court undertake to decide, as matter of law, apparent upon the record, that any delay, admitting of such explanations, amounts to a deviation ?

*185] The next point is the omission of Coiron to communicate *information of the loss, to his agent, so as to countermand the order for insurance. The contract of insurance has been said to be a contract *uberrimæ fidei*, and the principles which govern it, are those of an enlightened moral policy. The underwriter must be presumed to act upon the belief, that the party procuring insurance, is not, at the time, in possession of any facts, material to the risk, which he does not disclose ; and that no known loss had occurred, which, by reasonable diligence, might have been communicated to him. If a party, having secret information of a loss, procures insurance, without disclosing it, it is a manifest fraud, which avoids the policy. If, knowing that his agent is about to procure insurance, he withholds the same information, for the purpose of misleading the underwriter, it is no less a fraud ; for, under such circumstances, the maxim

applies, *qui facit per alium, facit per se.* His own knowledge, in such a case, infects the act of his agent, in the same manner, and to the same extent, which the knowledge of the agent himself would do. And even if there be no intentional fraud, still, the underwriter has a right to a disclosure of all material facts, which it was in the power of the party to communicate, by ordinary means; and the omission is fatal to the insurance. The true principle deducible from the authorities on this subject is, that where a party orders insurance, and afterwards receives intelligence material to the risk, or has knowledge of a loss; he ought to communicate it to the agent, as soon as, with due and reasonable diligence, it can be communicated, for the purpose of countermanding the order, or laying the circumstances before the underwriter. If he omits so to do, and by due and reasonable diligence, the information might have been communicated, so as to have countermanded the insurance, the policy is void. This doctrine is supported by the English as well as the American authorities, and particularly by *Watson* v. *Delafield* (1 Johns. 152; 2 Caines 224; 2 Johns. 526), where most of the early cases are collected, and commented upon, and it is well summed up by Mr. Phillips, in his treatise on insurance (p. 96). We do not go over the cases at large, because there is no controversy as to the general result. The only matter for observation is, whether the rule as to diligence, may not, in certain cases, be somewhat more strict, so as to require what, in *Andrew* v. *Marine Insurance Co.*, 9 Johns. 32, is called "extreme diligence;" or what, in *Watson* v. *Delafield*, is left open for discussion, as extreme diligence; the duty of communication, where the countermand may not only probably, but possibly, arrive in season. We think, however, that the principle of the rule requires only due and reasonable diligence, to be judged of under all the circumstances of *each particular case; and [*186
that the expressions thrown out in the cases above mentioned, were, not so much intended to point out a stricter rule, as to intimate, that there might be cases, in which a very prompt effort for communication might be fairly deemed not due and reasonable diligence, as where the loss takes place very near the port, at which the insurance is to be made, and the means of communication, by mail or otherwise, are regular or numerous; or where, from the lapse of time, and the date of the order for insurance, the party cannot but feel, that every moment's delay adds many chances in favor of the insurance being made before knowledge of the loss. Under such circumstances, in proportion as the delay would properly give rise to stronger suspicion of intentional concealment, the duty of prompt communication would naturally seem to press upon the party a more vigilant diligence. The case of *Wake* v. *Atty*, 4 Taunt. 494, lays down no new rule; but merely applies the old one to circumstances somewhat nice and peculiar in their presentation.

What constitutes due and reasonable diligence, in cases of this nature, is principally matter of fact for the consideration of a jury. When, indeed, all the facts are given, and the inference deducible therefrom, the question may resolve itself into a mere question of law. But it is, in general, impossible to lay down a fixed rule rule on the subject, from the almost infinite variety of circumstances which may affect its application; much must depend upon the means of communication, the situation of the parties, the knowledge of conveyances, the fair exercise of discretion, as to time, mode

and place of conveyance, the course of trade, and nature of the voyage, and the probable chances of the countermand being effectual. All these are matters of fit inquiry before the jury, and must, from their very nature, apply with very different force to different cases.

To bring these remarks home to the present case, there are certainly circumstances, which deserve the most careful consideration of a jury upon the point of due diligence. The loss occured at no great distance from the port of Havana; and if letters had been sent ashore at that port, there is strong reason to believe, that they could have reached Mr. Stoney, in time for a countermand, and at all events, if the loss had been made generally public at the Havana, the news might have reached Baltimore, before the insurance. But the record does not contain facts enough to establish a want of reasonable diligence on the part of Mr. Coiron. It is nowhere stated, that he was in a situation to make such a communication, or that he knew of the mate and crew being landed, or that vessels were about to depart for the United States from Havana. Nor is it shown, what were the means and facilities of communication, *in the course of trade and voyages, between that port and the United States, regular or irregular, from which we might deduce his knowledge of these means and facilities. Nor is it shown, that the parties contemplated a stoppage off the Havana, so as to put him upon diligence in writing; nor that this mode of conveyance of news was more certain, or quicker than others, which might have been resorted to, in the ordinary course of the voyage of the ship Trumbull to New Orleans. We may, indeed, conjecture, how these matters were, by general surmise or personal information; but judicially we can know nothing beyond what the record presents of the facts. Yet, all these circumstances must or may be material to the point of due diligence. In their very essence, they are matters of fact, and not conclusions of law.

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The opinion, therefore, to which the learned counsel wish to conduct us, that the policy is void, because there has been gross negligence, in not countermanding the order for insurance, is one, to which, upon this record, we cannot judicially arrive. It would be assuming the rights and exercising the functions of the jury, upon matters not proved, or wholly indeterminate in their own nature. This ground for maintaining the instruction of the circuit court, must then be abandoned.

The next point is the omission, in the letter of the 20th October, of any mention of the time of the vessel's sailing. This is put to the court in a double aspect; first, as the concealment of a material fact, and secondly, connecting the language of the letter with the accompanying circumstances, as a virtual representation that the vessel was not then ready or about to sail on the voyage. Whether this omission in the letter was merely accidental, or with design to mislead the underwriters, and whether, if so designed, it had the effect (which upon the testimony in the case, would be a matter of serious doubt), it is now necessary to inquire. If accidental, it would not prejudice the insurance, unless material to the risk; if fraudulently intended, it might not, in fact, mislead; and whether fraudulent or not, was matter of fact for the jury. That there was no virtual representation as to the time of sailing, seems to us conclusively established, by the language of the letter of Colonel Tenant, requesting insurance. He there says, "he (Coiron) writes from Havre, under date of the 20th October; but

does not say, when the brig would sail." Now, this letter, in direct terms, negatives any intention to represent any particular time of sailing. It leaves the question freely open to the underwriters, either for further inquiry, or for any presumptions most unfavorable to the assured. The natural result ought to be, that the underwriters should calculate the time of sailing as very *near the date of the letter, so as to ask a premium equal to the widest range of risk, from the intermediate lapse of time. [*188 The underwriters had no right to presume, that the ship would sail at some future indefinite period, and to bind the assured to that presumption. The letter told them, in effect, that the assured would bind themselves to no representation as to the time of sailing; but asked for insurance, whenever the ship might sail, be it on that day, or any future day. In this view, the point as to representation vanishes; and the like consideration would, in a great measure, dispose of that of concealment.

But the question, as to this latter point, has been argued at the bar, upon much more broad and comprehensive principles; upon which it seems proper for this court to express an opinion, especially, as this case may again undergo the consideration of a jury. It is admitted, that a concealment, to be fatal to the insurance, must be of facts material to the risk: and, certainly, of this doctrine, there cannot, at this time, be any legal doubt. It is further admitted (and so is the unequivocal language of the authorities), that generally, the materiality of the concealment is a question of fact for the jury. But it is said, that there are exceptions from the rule; and that concealment of the time of sailing belongs to the class of exceptions, and is a question of law for the exclusive decision of the court. It is necessary to maintain this position in its full extent, to extricate the present case from its pressing difficulties; and if this shall be successfully made out, it will still remain to be decided, whether the facts stated in the record, are sufficient to enable the court to pronounce the conclusion of law.

That the time of sailing is often very material to the risk, cannot be denied; that it is always so, is a proposition that will scarcely be asserted, and certainly, has never yet been successfully maintained. How far it is so, must essentially depend upon the nature and length of the voyage, the season of the year, the prevalence of the winds, the conformation of the coasts, the usages of trade, as to navigation, and touching and staying at port, the objects of the enterprise and other circumstances, political and otherwise, which may retard or advance the general progress of the voyage. The material ingredients of all such inquiries, are mixed up with nautical skill, information and experience; and are to be ascertained in part, upon the testimony of maritime persons, and are in no sense judicially cognisable as matter of law. The ultimate fact itself, which is the test of materiality, that is, whether the risk be increased, so as to enhance the premium, is, in many cases, an inquiry dependent upon the judgment of underwriters, and others who are conversant with the subject of insurance. In this very case, *the introduction of testimony was indispensable, to show the usual length of the voyage; and it was quite questionable, whether, in a [*189 just sense, the vessel could be deemed a missing vessel, at the time of the insurance. Upon such a point, it would not be a matter of surprise, if different underwriters should arrive at different results. In the nature of the inquiry, then, there is nothing to distinguish the time of sailing of the

ship from any other fact, the representation of concealment of which is supposed to be material to the risk. It must still be resolved into the same elements.

It has been said, that there is no case in which the materiality of the time of sailing has been doubted, where the ship was abroad at the time. Whether this be so or not, it is not important to ascertain, unless it could be universally affirmed (which we think it cannot), that the time of sailing abroad, must always be material to the risk. If it may not always be material, the question, whether it be so in the particular case, is to be decided upon its own circumstances. Indeed, we cannot perceive, how the place of sailing, whether from a home or foreign port, can make any difference in the principle. The time of sailing from a home port, may be material to the risk; and if so, the concealment of it will vitiate the policy; but whether material or not, opens the same inquisition into facts, as governs in cases of foreign ports. There may be less intricacy in conducting it, or less difficulty in arriving at a proper conclusion; but it is essentially the same process. The case of *Fort* v. *Lee*, 3 Taunt. 381, did not proceed upon the ground, that the time of sailing from a home port was never material to be communicated; but that, under the circumstances of that case, the underwriter, if he wished to know whether the ship had sailed, ought to have made inquiry. It was a mere application to the discretion of the court to grant a new trial, where the plaintiff had obtained a verdict, and there was no pretence of any misdirection at the trial. In *Foley* v. *Moline*, 5 Taunt. 430, the court said, that there was no pretence for the proposition, as a general rule, that it was necessary to communicate to the underwriters, whether the vessels on which an insurance was proposed, had sailed or not. There might be circumstances, that would render that fact highly material; as if the ship were a missing ship, or out of time. So that here, a denial of the proposition now asserted before us was, in the most explicit terms, avowed and acted on.

Two *nisi prius* cases before Lord Mansfield have been relied on, to establish the supposed exception to the general rule of cases, relative to the time of the sailing of the ship, in which it is argued, that his lordship undertook to decide the point of materiality, as matter of law, and to give it as a rule to the *jury. It is proper to remark, that little stress ought to be laid upon general expressions of this sort by judges, in the course of trials. Where the facts are not disputed, the judge often suggests, in a strong and pointed manner, his opinion as to the materiality of the concealment, and his leading opinion of the conclusion to which facts ought to conduct the jury. This ought not to be deemed an intentional withdrawal of the facts, or the inferences deducible therefrom, from the cognisance of the jury; but rather as an expression of opinion, addressed to the discretion of counsel, whether it would be worth while to proceed further in the cause. And the like expression, in summing up any cause to the jury, must be understood by them merely as a strong exposition of the facts, not designed to overrule their verdict, but to assist them in forming it. And there is the less objection to this course, in the English practice; because, if the summing up has had an undue influence, the mistake is put right, by a new trial, upon an application to the discretion of the whole court. This is so familiarly known, that it needs only to be stated, to be at once admitted. It

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is with reference to these considerations, that the cases above alluded to should be examined.

The first is *Ratcliffe* v. *Shoolbred*, cited from Marsh. on Ins. p. 349. It would certainly seem, at the first view, that Lord MANSFIELD did decide that concealment was material. But even by Mr. Marshall's report, brief as it is, it by no means appears that the materiality was in question at the trial, but only the effect of the concealment, in avoiding the policy. The same case is reported more fully and more accurately by Mr. Park, on Insurance, p. 290, where it is perfectly clear, that the point of materiality was left to the jury. "The question is (said his lordship), whether this be one of those cases which is affected by misrepresentation or concealment. If the plaintiffs concealed any material part of the information they received, it is a fraud, and the insurers are not liable;" and the jury found a verdict for the defendant, under this direction. So that the point was left fully open to them.

The next case is *Fillis* v. *Brutton*, cited in Marsh. on Ins. 348, and reported also in Park on Ins. 292. The insurance was on a ship from Plymouth to Bristol; and it appeared, that the broker's instructions stated, that the ship was ready to sail on the 24th of December, when, in fact, she had sailed on the 23d. Mr. Marshall states, that Lord MANSFIELD ruled, that this was material concealment and misrepresentation; but Mr. Park, from whose work the report is professedly taken, uses no such expression. His words are, Lord MANSFIELD said, this was a material concealment and misrepresentation; and the jury hesitating, he proceeded to expound to *them the general principles of law on the subject of misrepresentation and concealment; and he seems to have taken it for granted, [*191 that the misrepresentation was material (as from the short duration of such a voyage might naturally be inferred), and that the only point was, whether the ship had sailed or not. The same explanation disposes of the case of *McAndrews* v. *Bell*. (1 Esp. 373.) Indeed, in any other view, it would be impossible to reconcile these decisions with the judgment pronounced by Lord MANSFIELD, and other judges, upon more mature deliberation, when causes have been brought before them in bank. Take, for instance, what fell from the court upon the motion for a new trial, in *Macdowall* v. *Fraser*, 1 Doug. 247, 260; *Shirley* v. *Wilkinson*, Ibid. 293; *Hodgson* v. *Richardson*, 1 W. Bl. 289; *Littledale* v. *Dixon*, 4 Bos. & Pul. 151; and *Hull* v. *Cooper*, 14 East 479. In the case of the *Maryland Insurance Company* v. *Ruden's Administrators*, 6 Cranch 338, this court expressed the opinion, that "it was well established, that the operation of any concealment on the policy depends on its materiality to the risk, and that this materiality is a subject for the consideration of a jury." That opinion was acted upon by the court of errors of New York, in the case of the *New York Fireman Insurance Company* v. *Walden*, 12 Johns. 513, where Mr. Chancellor KENT, in a very elaborate judgment, reviewed the authorities, and laid down the doctrine in a manner that merits our entire approbation.

We think, then, that the exception insisted upon at the bar, cannot, upon principle or authority, be supported; and that the question of materiality of the time of the sailing of the ship to the risk, is a question for the jury, under the direction of the court, as in other cases. The court may aid the judgment of the jury, by an exposition of the nature, bearing and pressure

of the facts; but it has no right to supersede the exercise of that judgment, and to direct an absolute verdict, as upon a contested matter of fact, resolving itself into a mere point of law. If, indeed, the rule were otherwise, the facts in the record are not so full as to enable the court to reach the desired conclusion. There is not sufficient matter upon which we could positively say, that the time of sailing was, in this case, necessarily material to the risk.

For these reasons, the judgment of the circuit court must be reversed, and the cause remanded, with directions to award a *venire facias de novo.*

THIS case came on, &c.: On consideration whereof, it is considered by this court, that there is error in the opinion of the circuit court, given to the *192] jury upon the prayer of the *defendants' counsel—that upon the whole evidence in the case, as stated in the record, the plaintiffs are not entitled to recover, and that the verdict of the jury ought to be for the defendant; that opinion having withdrawn from the proper consideration of the jury, matters of fact in controversy between the parties. It is, therefore, further considered and adjudged, that the judgment of the said circuit court, in this case, be and the same is hereby reversed; and that the cause be remanded to the said circuit court, with directions to award a *venire facias de novo.*

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*193] *CORNELIUS COMEGYS and ANDREW PETTIT, Plaintiffs in error, *v.* AMBROSE VASSE, Defendant in error.

Spanish treaty.—Assignable claims.—Effect of abandonment to underwriters.

The object of the treaty with Spain, which ceded Florida to the United States, dated 22d May 1819, was to invest the commissioners with full power and authority to receive, examine and decide upon the amount and validity of asserted claims upon Spain for damages and injuries. Their decision, within the scope of this authority, is conclusive and final; and is not re-examinable; the parties must abide by it, as the decree of a competent tribunal of exclusive jurisdiction; a rejected claim cannot be brought again under review, in any judicial tribunal. But it does not naturally follow, that this authority extends to adjust all conflicting rights, of different citizens, to the the fund so awarded. The commissioners are to look to the original claim for damages and injuries against Spain itself; and it is wholly immaterial, who is the legal or equitable owner of the claim, provided he be an American citizen. p. 212.

After the validity and amount of the claim has been ascertained by the award of the commissioners, the rights of the claimant to the fund, which has passed into his hands, and those of others, are left to the ordinary course of judicial proceedings, in the established courts of justice. p. 212.

In general, it may be affirmed, that mere personal torts, which die with the party, and do not survive to his personal representatives, are incapable of passing by assignment; and that vested rights, *ad rem* and *in re*—possibilities, coupled with an interest and claim, growing out of, and adhering to property—may pass by assignment.[1] p. 213.

The law gives to the act of abandonment to underwriters, when accepted, all the effects which the most accurately drawn assignment would accomplish; the underwriter then stands in the place of the assured, and becomes legally entitled to all that can be recovered from destruction. p. 214.

It is clear, that the right to compensation for damages and injuries, to which citizens of the

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[1] Erwin *v.* United States, 97 U. S. 396. A right of action for a tort is not assignable, by operation of law, or otherwise. Ware *v.* Brown, 2 Bond 267.

United States were entitled, and which, under the treaty with Spain, were to be the subjects of compensation, passed, by abandonment, to the underwriters upon property, which had been seized or captured. p. 215.

The right to indemnity for an unjust capture, whether against the captors or the sovereign; whether remediable in his own courts, or by his own extraordinary interposition and grants upon private petition, or upon public negotiation; is a right attached to the ownership of the property itself, and passes, by cession, to the use of the ultimate sufferer; and is afterwards assignable by the person to whom it had been ceded.[1] p. 215.

It is not universally, though it may be ordinarily, the test of a right, that it may be enforced in a court of justice; claims and debts due by a sovereign, are not commonly capable of being so enforced; but it does not follow, that because an unjust sentence cannot be reversed, the party injured has lost all right to justice, or all claim, upon principles of public law, to remuneration. p. 216.

The treaty with Spain recognised an existing right in the aggrieved parties to compensation; and did not, in the most remote degree, turn upon the notion of donation or gratuity; it was demanded by our government as matter of right, and as such was granted by Spain. p. 217.

The right to compensation from Spain, held under abandonment made to *underwriters, and accepted by them, for damages and injuries, and which were to be satisfied under the treaty, by the United States, passed to the assignees of a bankrupt, who held such rights, by the provisions of the bankrupt law of the United States, of the 4th April 1800.[2] p. 219. [*194

Vasse *v.* Comegys, 4 W. C. C. 570, reversed.

ERROR to the Circuit Court of Pennsylvania. The defendant in error instituted his suit against the plaintiffs here, who were the surviving assignees, under a commission of bankruptcy, issued against him, under the act of congress of the United States, for establishing a uniform system of bankruptcy throughout the United States, passed April 4th, 1800.

In the circuit court, a judgment was entered in favor of the defendant in error, the parties having agreed upon a case, which, if required by either, might be turned into a special verdict, subject to the opinion of the circuit court.

The case was: that Ambrose Vasse, previously to the year 1802, was an underwriter on various vessels and cargoes, the property of citizens of the United States, which were captured and carried into ports of Spain and her dependencies; and abandonments were made thereof to the said Vasse, by the owners, and he paid the losses arising therefrom, prior to the year 1802. The said Ambrose Vasse became embarrassed in his affairs, and his creditors proceeded against him as a bankrupt, under the act of congress of the United States, for establishing an uniform system of bankruptcy throughout the United States. An assignment was made accordingly, to Jacob Shoemaker, since deceased, and the defendants, Cornelius Comegys and Andrew Pettit, who proceeded to take upon themselves the duties of assignees, and had continued to discharge the same. The certificate of discharge of the said Ambrose Vasse, bore date the 28th day of May 1802.

In the year 1824, the sum of $8846.14, was received by the defendants, from the treasury of the United States; being the sum awarded by the commissioners sitting at Washington, under the treaty of amity, settlement and limits, between the United States of America, and his Catholic Majesty,

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[1] S. P. Hunter *v.* United States, 5 Pet. 173. And see, The Potomac, 105 U. S. 624, and cases there cited.

[2] S. P. Phelps *v.* McDonald, 99 U. S. 298, in which the court declare the opinion of Judge STORY in Comegys *v.* Vasse, to be exhaustive and conclusive.

the King of Spain, dated the 22d day of February 1819, on account of the captures and losses aforesaid. On the 9th day of December 1823, the said Ambrose Vasse filed a bill in equity in the circuit court of the district of Columbia, claiming the sum awarded by the commissioners, and a settlement of the accounts of the assignees. This bill was intended to operate upon the funds which were expected to come into the hands of the agent of the assignees, prosecuting for them the claim before the commissioners; *195] but it was not *proceeded on; the said funds having been received by another person. The said Ambrose Vasse made a return of his effects to the commissioners of bankruptcy. The claim upon Spain for spoliations was not in the schedule; but claims upon France and Great Britain were.

The plaintiffs in error made the following points: 1. That the decree of the commissioners, under the Florida treaty, awarding the fund to the assignees of Ambrose Vasse, is conclusive in their favor, and against him. 2. That if the claim on the Spanish government was not legally the subject of assignment, and therefore, did not pass under the bankrupt proceedings, to the assignees, it could not pass under the abandonments made to Ambrose Vasse; who claims the fund, not as the original proprietor, but through cessions or assignments of the property made to him as an underwriter. 3. That this claim, as an incident to the property captured and carried into Spanish ports, did pass under the assignment of the bankrupt, and became vested in his assignees.

The case was argued by *J. R. Ingersoll* and *D. B. Ogden*, for the plaintiffs in error; and by *Lee* and *C. J. Ingersoll*, for the defendant.

For the *plaintiffs* in error, it was contended: I. That the commissioners under the Florida treaty had fixed the relative rights of the parties, by awarding the fund to the assignees, in the face of a claim presented by the bankrupt himself. In deciding thus, they decided, in effect, on the validity and operation of the assignment. The proceeding was not merely *ex parte*, but afforded to the bankrupt an opportunity to exhibit his pretensions; of which he had not failed to avail himself. His act of interposition was manifested by a bill in equity, filed in the circuit court of the district of Columbia, for the county of Washington, in December 1823; in which Ambrose Vasse, the complainant, states the facts now before this court, and attempts to reach the fund, not (as at present) from the assignees, but against the assignees; and to wrest it, not from the commissioners, but from the treasurer of the United States, who acted under their authority and decrees; and was, accordingly, made a party to the bill. If the commissioners have really decided the point, and, in so doing, they have not exceeded their jurisdiction, no appeal lies to this court. They acted under a treaty, which is the supreme law of the land; and no other tribunal, however exalted, can reverse or interfere with their decrees. The bill in equity admits, that Ambrose Vasse never filed the original claim. Hence, it appears, that all *196] the documents in support of it, *were in the possession of his assignees; and they enjoyed this evidence of ownership, at least. It is not, however, necessary, that the award of the commissioners should be conclusive; as the case of the plaintiffs in error is sufficiently strong upon the other points, which have been decided in the court below.

II. The argument of the defendant in error, is absolute and unqualified—that the claim which has yielded the fund in controversy, was of a description which could not be assigned. That the right to receive, did not exist in himself; and therefore, he could not transfer it to others; that he had nothing to assign; that his hopes rested on the will of an unaccountable, because sovereign power, who might, or might not, realize them; that no legal remedy could be pursued; and without some species of remedy, there can exist no right; that a claim, to be assignable, or even to have existence, means something not ideal, or merely precarious, but substantial, and susceptible of enforcement—not merely to be thought of, but pursued; and, by possibility, to be gained. Admitting, for a moment, both the position and the inference, the shadowy character of the claim, and the impossibility of transferring its ownership, and where does the defendant in error stand? His right to sue and recover, either from the commissioners, or his assignees, is derived through exactly the same sort of channel, as that of his antagonists. The only difference is, that he claims through a limited and partial assignment; and they through a general and all-comprehensive one. He was not the original owner. He was an underwriter, merely, on the property lost; and when he paid the losses, he received the assignments, without an idea, that at a distant day, this would be the shape in which they would develop themselves. He made his assignment, when everything was entirely unchanged. If all the representative interests are to be disregarded, and the political bounty is to inure to the first proprietor, then we are accountable, not to Ambrose Vasse, the underwriter, but to the original proprietors themselves. If the opposite argument be sound, neither of these parties is entitled to the money; and then, *potior est conditio defendentis.*

Nor does the defendant in error injudiciously concede anything, in the position which he assumes. He has no standing without it. Whatever he had, in the shape of property, passed by the bankruptcy. His only refuge is in the suggestion, that there was nothing, in the shape of property, to pass; and then, he is unhappily landed here—that being himself a claimant of it, as property, because under an assignment, the same argument applies with equal force to himself: and he is exactly as badly situated, as his opponents.

*The bankrupt thought the claim passed by the assignment, and intended that it should; for claims of a similar character, upon the [*197
French and British governments are stated among his effects, in the schedule laid before the commissioners. This, upon the government of Spain, was omitted; probably, because it was regarded as desperate, not being then included in any treaty.

III. There was a clear property to be assigned; and it was assigned by the original owners to the underwriter, and by the underwriter to his assignees.

1. Independently of all questions growing out of mere bankruptcy, this was, in its nature, peculiarly the subject of assignment. In matters of insurance, there was a time, when nearly every transfer consisted of a claim on a foreign government. No neutral vessel could, with safety, navigate the ocean. The attempt led, in instances innumerable, to capture and condemnation. Insurances were resorted to, at any rate of premium, however extravagant; and the little chance of hope of redress or indemnity, to which

the underwriters succeeded, was to be gathered from the sense of justice of these ruthless belligerents. Hence, transfers of these claims were of perpetual occurrence. Not only were the transfers made, and deemed worthy of acceptance; but our American courts of justice would permit no recovery from the insurers, until a cession had been actually made. *Brown* v. *Phœnix Ins. Co.*, 4 Binn. 45; *Rhinelander* v. *Penn. Ins. Co.*, 4 Cranch 42. Not only this; the time when abandonment cannot be made, is after restitution; when the opposite argument supposes the right only begins. *Adams* v. *Delaware Ins. Co.*, 3 Binn. 287; *Marshall* v. *Delaware Ins. Co.*, 4 Cranch 202. The claims on Denmark, France, England, Naples and Holland, comprise, agreeably to a sober estimate, $17,000,00 of American capital, locked up in the coffers of foreign potentates; and, long since, for the most part, reimbursed to the original proprietors, and resting on the insurance offices, to an immense extent. Why is it, that a policy always stipulates, that the insured shall sue, labor, &c., after capture, and even after condemnation; if the one party be requiring, and the other undertaking a wild, preposterous and despairing pursuit? It is the *spes recuperandi*—the incident to the property, or substitute for it, which is transferred, in whatever shape it may, at a distant day, present itself; although the transfer may be in form of the property itself. A thing need not be in possession, to be transferred. It may be on the other side of the globe. It need not even have actual existence, to be the subject of a legal contract of transfer or sale. A ship out of time—the hope or *chance of redemption, is sold in good faith. It appears, afterwards, that she was, at the time, consumed by fire, or at the bottom of the sea; yet the contract was good.

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2. As a matter of bankruptcy concern, and to be regulated by the principles of bankrupt laws. The treaty itself says not a word, as to person by whom the restored property, or its substitute, is to be received. It merely provides and awards the fund; but whether for the original owner, or underwriter, or assignee, is submitted to the general principles of established law. If it had provided, *eo nomine*, for the bankrupt, then it might, indeed, have been considered a solace for his general misfortunes, derived from a kind but ill-judged policy; and the political bounty (as it would then really be) would, perhaps, flow exactly where it was directed. But the argument, founded upon the idea of political bounty, is defective, when it attempts, on that ground, to give the fund to the bankrupt; since the treaty leaves that point, viz., the individual object of its kindness, entirely undefined. In the concatenation of inferences, one essential link is wanting; namely, that the particular individual is to be reimbursed. But why should the underwriter be preferred? He is not the original sufferer, whose feelings are to be assuaged; nor the final loser, whose pecuniary injuries are to be redressed. Had the violation of neutrality, which is remedied by the treaty never occurred, the property would have remained with the assured. As it is, the underwriter has paid the loss, but he has done it with the money of his creditors; and hence the *deficit* manifested in his bankruptcy. The real losers, then, on principle, have the fairest claim to redress.

As to the propriety of adopting bankrupt laws, there may be differences of opinion; but with respect to their object, policy and true application, when established, there can be none. They are not technical, but substantial. If they give relief from present difficulties, and hope and energy to

future exertions, it is in consequence of entire renunciation of all benefit from the past. If ingenuity could discover means by which debtors, notwithstanding their seeming surrender of all, could still retain a lurking interest, which deprives the creditor of his expected consolation ; it would not be surprising that bankrupt laws should be for ever discountenanced by legislative opposition, and that one general mercantile community should continue under the influence of a multitude of heterogeneous insolvent systems, feeble in their protection of the debtor, and worse than useless to the creditor.

It were extraordinary, indeed, if the effect of bankruptcy were to protect previously acquired property. But for his certificate, execution might be levied, attachment might reach the *fund, the wit of man could not elude the scrutiny of the law. Yet, the bankruptcy, which [*199 is designed to facilitate the assertion of these rights, if the present effort succeeds, would take them all away. The moment one becomes a bankrupt, a clear line is drawn between what is his, and what is his creditors'. The faculties which God and nature have given him, the disposition to labor, and the capacity for exertion of mind and body, are his own, inalienably, and nothing can deprive him of them. Even the personal claims to redress for bodily wrongs, which grow out of his person, and not out of his creditors' property, remain. But results arising from the investments of property, whether voluntarily or involuntarily made, however, or whenever, to arise, tracing their origin to previous possessions, are to return to those with whom they originated, and who did but advance them. Hence, all the limitations to the transfer by bankruptcy, are reducible to three classes : 1. Such as may never happen, being not merely future in their actual existence, but dependent for any, even a prospective, existence, upon events which, perhaps, never may occur. Of this description, are an heir apparent's pretensions. *Moth* v. *Frome*, Ambler 394. A pension to a soldier, who may die the moment after bankruptcy ; pay to an officer ; legacy to a bankrupt's wife, on the contingency of her surviving another person. *Krumbaar* v. *Burt*, 2 W. C. C. 406. 2. The lien of a tradesman, who has done work to a vessel. *Shoemaker* v. *Norris*, 3 Yeates 392. 3. Torts, which require an action in a personal form. *Shoemaker* v. *Keeley*, 1 Yeates 245 ; *Benson* v. *Flower*, W. Jones 215. This is confined to mere personal wrongs, not growing out of property, for there the assignees take, even though the injury be accompanied with violence. Eden's B. L. 235. Whatever does not come within one of these three exceptions, passes. Hence, almost every possible variety is to be found in the English cases, which are frequent, because of a continuance of bankrupt laws for a long series of years. 1 Cooke's B. L. 290, 365 ; 3 T. R. 88 ; 2 Vern. 432 ; 19 Ves. 432.

It was decided in England, nearly a century ago, that the insurer had the plainest equity in the world, to claim the proceeds of prizes taken under letters of reprisal, after they had paid the original owners. *Randal* v. *Cockran*, 1 Ves. sen. 98. The bankrupt law of the United States makes express provision for the transfer of equitable, as well as legal interests. Chief Justice KENT recognises our principle, in its largest extent, as to the substitute for the property, while he asserts that *there was no existing hope of recovery, as to the property itself. *Gracie* v. *New* [*200 *York Ins. Co.*, 8 Johns. 245.

The bankrupt law of the United States, in principle and policy, is the

same with the British statutes on the subject. In terms, so far as it applies to the present object, there is no difference. The deficiency is supposed to exist: 1. In the absence of the phrase of the statute (13 Eliz., c. 7), giving to the commissioners power "over all such interest in lands, as the bankrupt may lawfully depart withall." But this leaves the question exactly where it found it; as we are upon the very inquiry, whether this be such a thing as he may lawfully depart withall. And it is more than doubtful, whether the phrase would apply to the kind of interests now in contemplation. 2. In the supposed non-application of the 18th section, which contains the words, possibilities of profits. It is supposed, that this clause is introduced, not for the purpose of conveying the thing contemplated, but merely to discover anything which may fall in, prior to the certificate. It is apprehended, that there could be no object in a discovery, except to transfer; and it matters not, whether the transfer is made, while the object is remote, or is deferred, until beneficial possession can accompany the conveyance. And anything falling in, would become property; and under that name, must then and at all times be disclosed. 3. In the absence of the general expression in the statute, 6 Geo. IV., c. 16: "That this act shall be construed beneficially for creditors." That provision is not necessary for the present object, which is attained by a construction founded on the mere ordinary and inherent policy of a bankrupt system. The result is reached by Lord Chief Justice DALLAS, in an opinion delivered at Hilary term, 59 Geo. III., several years before the statute referred to, had any existence. *Clark* v. *Calvert*, 8 Taunt. 742.

Bankrupt laws are supposed to place the assignees in the room of the bankrupt, in the "same situation," without reserve. *Cassell* v. *Carroll*, 11 Wheat. 152. The interest in question, however, is plainly to be distinguished from a mere possibility; which is "an uncertain thing that may or may not happen." 2 Lill. Abr. 336. An heir presumptive or apparent, may have an expectation, but no right; for the ancestor may outlive him, or otherwise dispose of the inheritance. Hence, an heir apparent may be a witness, to prove the title to land, but a remainder-man cannot. *Smith* v. *Blackman*, 1 Salk. 283. A reversion absolute is thus a very different thing. Hence, we speak of the possibility of a *reverter*, which cannot be assigned, just as we do
*201] of *the possibility of a possession, which can. (Lord MANSFIELD, in the argument reported 11 Wheat. 168, on the Maryland charter.) A debt barred by the act of limitations, bankruptcy, or, perhaps, alienage; a debt of a foreign minister, infant or married woman, are not mere possibilities; although the remedies are, at least, as defective, and apparently inaccessible, as the one in question. The justice of a claim, and its assignable properties, are totally distinct, both from the question of its present or future character, and from the nature and even existence of a remedy. The assignable character of a thing depends on nothing technical, or *choses in action* would not pass. But upon the existence of right, abstracted from the consideration of present or future enforcement, or the susceptibility of enforcement at all, from the possible want of a precise remedy. Can there be a plainer proposition than this?—that he who unjustly takes my property from me, ought to restore it; in other words, that I ought to have it. And the union of my title to have, with his duty to restore, constitutes a rightful claim. The immediate wrongdoers are the individuals who committed the depredations on American commerce. The sovereign assumed the dis-

charge of these obligations ; and it is in pursuance of that assumption, that the money is paid.

The right might possibly be deficient, as regarded a specific remedy, and yet be a right still ; one, susceptible of being owned and transferred, though not advantageously used. But this right is perfect in itself, and is attended with a corresponding remedy. The error which lies at the root of the opposite suggestion, consists, in attaching a meaning too narrow and technical to the term "remedy." In a judicial court of justice, as our courts are organized, perhaps, there is none. The division, however, into executive, judiciary and legislative departments of government, is not universal. If, as it may be, the sovereign is the interpreter, as well as framer of the law ; that is, if instead of three branches, there be but one, or rather, instead of their being separate, they are united ; why is not an appeal as likely to succeed, when made to the supreme authority, as if made to what is usually a subordinate department ? At no very distant period of British history, the king himself actually attended in person in the courts of justice. He is still, in contemplation of law, present, *in aula regis*. But if the separation be entire, and judicial remedy be inaccessible, all being referred to the supreme power alone ; this merely reduces the difference between us, not to a question of remedy or no remedy, but the kind or quality of the remedy, whether judicial or executive. If this be the narrow line of separation, and so it is, at the worst, surely, you cannot pronounce the one everything, the other nothing—less than nothing ; that, a perfect, absolute, and *recoverable right ; this, a shadowy nonentity—a phantom—something "less even than a hope." [*202

On the contrary, it is a fundamental rule of presumption, that sovereigns will do justice voluntarily. It is the basis of international law. Hence, the broad line between barbarous and civilized states. What sovereign of a civilized community ever ventured to say, " he acknowledged no law but his own will, and set at defiance all remedy but that of force ?" There are laws among nations, just as well defined, and about as little liable to be broken, as those of particular municipalities. An American officer is understood to have applied for, and obtained, compensation, from the British government. An American citizen very recently made similar application, with similar success, to the sovereign of France. But it is more than presumption, that governments will do justice. It may be, and often is, enforced. They are compellable, by a code which is as effectual in its sanctions, as it is clear in its dictates. Municipal law is sometimes interfered with, by limitations, tenders and reliefs ; but contracts and rights are not, therefore, extinguished. There are places where there is no law. In China, strangers are altogether without the means of redress. Every one, with regard to them, is, whether native or sojourner, really irresponsible, and acknowledges not even the law of force. Yet bargains are made, and transfers are executed there, every day, which are respected and even enforced here. If one steal my property, and take refuge in the suburbs of Canton, does it cease to be my property ?—may I not retain or assign the ownership, notwithstanding the inaccessibility of the thing itself ? Principles are established by authority and precedent, which go the whole length of the case. The decision below assumes the broad ground, that there was no right, either in Ambrose Vasse or his assignees, or the original owners ; that "it is a mere expectancy, but without

hope, because without right, even a contingent one." Elementary writers on the law of nations, maintain very different principles. Grotius, lib. 3, c. 2, § 5; 2 Ruth. 568–70. Conformable to these principles, a decision was pronounced by the commissioners, under the 7th article of the British treaty, in the case of *The Betsey*, Furlong, master, Wheaton's Life of Pinkney, 193, &c. The newly-established Republic of Columbia, has set a noble example of deference for these doctrines, by reimbursing to the sufferers from depredation by their cruisers, the whole loss and interest, and fifty per cent. damages besides.

The best securities by which the hold on property is maintained, are claims on sovereign powers. Government stock, treasury-notes, exchequer bills, are all of this description. Yet, *where is the citizen that does not gladly exchange all the steadfast earth-bound property he has, and invest it in this more beneficial and productive possession? Trover and trespass may be maintained for it, contracts may be made with regard to it, transfers may take place of it; in short, there is no criterion of property or ownership, that may not be applied to what is regarded as having no substantial existence. A bond given by the King of Prussia, declaring himself and his successors bound to the holder, was held to pass as property by delivery. *Georgier* v. *Mieville*, 3 Barn. & Cr. 45. Yet where was the judicial remedy, if the crowned obligor had refused payment? Even criminal jurisprudence gives its sanction and assent to these principles. The forgery of a Prussian treasury-note, is within the statute, 43 Geo. III., c. 139, § 1; *Rex* v. *Manasseh Goldstein*, 3 Brod. & Bing. 201.

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The decrees of a foreign government are firm and irreversible, only with regard to the thing. A host of decisions, from *Hughes* v. *Cornelius*, 2 Show. 242, down to *Williams* v. *Armroyd*, 7 Cranch 423, and even *The Apollon*, Eden, claimant, 9 Wheat. 362, confirm this principle, but go no further. It required a constitutional provision to render adjudications and decrees conclusive throughout, even among sister states. Redress (if the thing itself be passed away) is substituted in some other shape, where wrong has been done by the decree; and it is the more necessary, in proportion to the efficacy and conclusiveness of the sentence by which the specific property has been irrevocably withdrawn. The cases provided for by treaty, were not necessarily, nor in point of fact, generally, of judicial condemnation and decree. They were of mere forcible abduction, and placing the ships and cargoes, tortiously, *infra præsidia*, for which indemnity is provided, not by restoring the thing, but substituting pecuniary compensation.

If the claim were originally nothing, yet when it became substantial, as it did at last, by the interposition of the government of the United States, it has relation back to the former time, and makes the whole available *ab initio*.

For the *defendant*.—The case states that the money was paid from the treasury, for losses provided for by the Florida treaty; but it does not state, to whom, or for whom, it was paid. The commissioners awarded nothing to Vasse's assignees, but, as is believed, to certain insurers, who claimed the funds. No doubt, their award is conclusive on its subject-matter, which is the amount and validity of the claims. By the 11th section, they were to receive, examine and decide upon such amount and validity.

By the second clause, they were to adjust claims; but they had no judicial function, process or power. They were a *board of inquest, to ascertain the sum of claims, and certify it to the treasury for payment. [*204 But parties could not litigate claims before the commission, which had no faculties of a judicial character. Neither of the parties to this suit were before that commission, which did not pretend to settle to whom, but only how much should be allowed to any ostensible claimant; leaving it to the ordinary tribunals to determine between disputants. It would be contrary to all principles, to extend, by construction, the powers of such an extraordinary court. In *Campbell* v. *Mullett*, 2 Swanst. 579, the three parties before the board did not each and all claim the same fund, but each his several share of it. There was no conflict of parties before the commissioners; but as the French partner was an alien enemy, his claim to part was rejected on that ground. In *Randal* v. *Cockran*, 1 Ves. sen. 98, Lord HARDWICKE rectified a judgment of commissioners appointed to distribute prize money; and the vice-chancellor, in the case in 2 Swanston, does not ascribe to the commissioners exclusive jurisdiction, except in their unquestionable province. Any person receiving money, by award of the commissioners, under the Florida treaty, holds it as money had and received to the use of all and any other persons capable of proving a right to it, or any part of it, by means of suit at law, or in equity.

The main question may be considered, first, by the light of the common law; secondly, by that of the English bankrupt acts and adjudications; thirdly, by our own. The commissioners' assignment to the assignees, is of estate and effects, claims and demands. The money in dispute was paid as indemnity for unlawful seizures; art. 9 of the treaty (8 U. S. Stat. 259). Vasse's certificate was signed in 1802. Of consequence, there was no indemnity, until twenty years afterwards. Whatever it may be, it is certain, that it was not specifically assigned, nor is it alluded to in the inventory of his property. If it passed, therefore, it must have been by mere operation of law, without intention of parties; for neither bankrupts, commissioners nor assignees appear to have adverted to it at all. Vasse's claims for English and French spoliations are mentioned, because they operated on his own property as a merchant. But whatever claims, if any he had, as an insurer, by virtue of losses made good by him to other merchants, are nowhere specified in the bankruptcy proceedings. From Vasse or from the commissioners, the assignees acquired no apparent title. Whatever their right is, to hold the fund they have got, must be shown independently of their title papers, which are altogether silent on the subject.

1. All the analogies from the common law are against it. By that, even a *chose in action* cannot be assigned, nor *any possibility or contingency, unless coupled with an interest, or in equity. 2 Bl. Com. 293; [*205 1 Com. Dig. 696–7, Assignment, C. 1, 2, 3; Shep. Touch. 239–40, 322; *Archer* v. *Bokenham*, 11 Mod. 152; *Wind* v. *Jekyl*, 1 P. Wms. 574; *Marks* v. *Marks*, 1 Str. 132. This, however, was not even a *chose in action*. It is questionable, whether Vasse could assign it himself. Yet the argument is, that the law assigned it, by constructive operation. But it is contended, that as it was assigned to him, it might be assigned by or from him. That argument confounds specific cession, with the constructive assignment, infer-

red from operation of law. The merchants whom Vasse indemnified for losses by captures, abandoned, and ceded to him specifically the *corpus* and the *spes recuperandi*. Indeed, neither abandonment nor cession is necessary; payment after total loss, acquires the title transferred, without either. *Gracie* v. *New York Insurance Company*, 8 Johns. 237. But the postulate here is, that by construction of the act of bankruptcy, this sovereign boon was transferred by Vasse to the commissioners, and by them to the assignees, without any specific or intended assignment of it, twenty years before it had existence; that such was the intention of the legislature in framing the bankrupt act. If so, certainly all the familiar doctrines of the common law were overlooked by them.

2d. It may be granted, that by the English statutes of Elizabeth, James and George, concerning bankruptcy, and their various adjudications, all property and interest passed by bankrupt assignment. I agree to the language of Ch. J. DALLAS, as quoted from 8 Taunt. 742—every beneficial interest. But then it must be what the law recognises as such, not every popular or vulgar notion of right or claim. In 2 Com. Dig. 112, title Bankruptcy, note *m*, the cases are collected, and the principles of exception will be found as well adjudged as those of general rule. After the extensive provisions of the statutes of Elizabeth and James, in 1732, came the Stat. 5 Geo. II., c. 32, enlarging and consolidating the system; and superadding the phrase, possibility of profits. The late consolidating act of 1825, 5 Geo. IV., c. 16, omits that phrase, but retains the legislative injunction, which pervades and characterizes the English system, to construe all the statutes largely and liberally for creditors. Thus enjoined, the courts have gone great lengths in administering the policy of the bankrupt laws. In exchange for personal liberation, they have required the surrender of all convertible property. But they have never taken anything which the bankrupt himself realizes after certificate, nor any mere damage demand, though suable before certificate. Now, the fund in question was
*206] a demand, if anything, for damages for *torts, and realized long after certificate. The English system goes no further than estate and effects, whether goods in possession, debts, contracts or *choses in action*, says Blackstone, 2 vol. 484. The act of Geo. IV., consolidating all its predecessors, is also limited to estate, goods, chattels, debts, and the like. Eden, app'x 25. Not a word of it applies to anything but tangible property, for which there is right of action, and right of action is nothing less than right of possession. *Dommett* v. *Bedford*, 6 T. R. 684. According to the latest and most eminent English authorities, mere possibilities are not devisable, nor do they pass to assignees under a commission of bankruptcy. Preston on Estates 75–6; Preston on Abstracts of Title 93–5, 254. The whole tenor of the argument of the master of the rolls, in the case of *Campbell* v. *Mullet*, 2 Swanst. 551, is to the same effect, in a case remarkably similar. The question there turned on partnership, it is true; but the reasons submitted in behalf of Vasse, are precisely those of the master of the rolls, whose decision is quoted as authority, in Gow on Part. 315–16. What possible construction of the English bankrupt law, can be drawn to a different result? The hope in question is not a thing at all, much less a *chose in action*. No right of action followed it; possession of it was impracticable; no remedy would reach it. The standard of remedy is the

true judicial test of right. To say, that this is but a question of the kind of remedy, is a mere argument of terms; for who can sue a sovereign? If the claim cannot be made in and through a court of justice, it is no claim. Even the political right, if it exist, to petition or complain to executive government, is not a right that can be classed with legal rights or claims. A mere possibility is an uncertain thing. 2 Lill. Abr. 343. But the hope of indemnity from a foreign sovereign, is the merest possibility imaginable. The English exceptions are: 1. Damages for torts or slander; *Benson* v. *Flower*, Sir W. Jones 215: 2. All unliquidated damages; *Goodtitle* v. *North*, 2 Doug. 562; *Banister* v. *Scott*, 6 T. R. 489; *Hammond* v. *Toulmin*, 7 Ibid. 612: 3. Any mere cause of action; *Ex parte Mare*, 8 Ves. 335; *Goddard* v. *Vanderheyden*, 3 Wils. 270. See also, *Overseers of St. Martins* v. *Warren*, 1 B. & Ald. 491; *Davies* v. *Arnott*, 3 Bing. 154. In *Watson* v. *Ins. Co. of N. A.*, 1 Binn. 47, it was left to a jury, to estimate a *spes recuperandi*; but in *Gracie* v. *New York Ins. Co.*, 8 Johns. 237, this proceeding is treated as preposterous. A fourth class of cases in England, concerns the pay of public officers, which never passes by bankrupt assignment, on principles of public policy. The doctrine of possibility of interest, it settled to mean a legal or practicable possibility; *Higden* v. *Williamson*, 3 P. Wms. 132; not any or every possibility; *Jacobson* v. *Williamson*, 1 Ibid. 385; **Moth* v. *Frome*, Ambl. 394; *Carleton* v. *Leighton*, 3 Meriv. 671; *Chandler* v. *Gardner*, cited in 17 Ves. 338; *Crutwell* v. *Lye*, Ibid. 343. It is not by the force of the phrase, that possibility of interest becomes so comprehensive a provision in the English bankrupt acts, but by their injunction on the courts to construe them largely. If Vasse, after assignment, and before certificate, had sued for slander or personal trespass, the assignees would have no right, according to the English law, to whatever he recovered after certificate. Now, the indemnity in question, which could not be sued for, was not awarded until after certificate, and then for torts *ex delicto*. Not a case from the English codes can be cited, nor a principle, which sanctions the assertion, that any mere possibility would pass, under such circumstances. All the cases referred to in the opposite argument, are of possibilities coupled with interest, and in some of them, the exception now contended for, is strongly put. *Jones* v. *Roe*, 3 T. R. 88. No English authority can be vouched by the assignees, while the case in 2 Swanston, the authority of Mr. Preston, and the analogies of all their established exceptions to the general rule, concur in the conclusion, that such a possibility as that in question, would not be taken by a commissioner's assignment, under the acts of bankruptcy in England. [*207

3d. But the American law differs materially from the English, on this subject. Bankruptcy, in England, is a long-established system, matured and formed by the legislature, and sustained by the judiciary. In this country, it had but a short-lived existence; has never been a public favorite, and the courts have no impulse from statutes to extend it by construction. The whole question is, what is the true interpretation of the act of congress of 1800. (2 U. S. Stat. 19.) The 5th, 6th, 13th and 14th sections are all that regulate assignments, and they each and all uniformly contemplate property that may be realized. By the 5th, the commissioners are to take possession of the property, and deliver the effects to the assignees. By the 6th, estate and effects are to be assigned; and the 13th provides for the

bankrupt's debts to be recovered. The 14th directs the assignees to recover his property, goods, chattels and debts. The 13th does, indeed, mention claims, but it characterizes them as such as are suable, attachable and recoverable by legal process. The only debatable section is the 18th. All the rest exclude every idea of possibility, contingency, damages or the like. They uniformly treat of tangible property, and nothing else. The 15th section, copied from the first section of the statute 5 Geo. II., provides for disclosure of every possibility of profit. But that provision is confined to the discovery of the bankrupt's interests. The same *section, when it comes to provide for their assignment, returns to the word estate. The intent was to eviscerate *ex seipso* an account of everything that may be realized; but not comprehending personal demands for torts and damages. This is clear from the 50th section, which provides for contingencies falling due before certificate; a superfluous provision, if the 18th section had already provided for them. These sections would be in conflict otherwise. But the meaning of this voluminous act is not to be taken from any detailed section. What may be called its code, is to be found in the whole taken together. The 26th section, allowing a premium for the discovery of estate; the 29th section, compelling assignees to exhibit accounts of estate and effects; the 32d section, directing them to keep books of receipts from estate; the 34th section, authorizing them to sell the estate at auction; the 53d section, making an allowance for support out of the estate; and the 54th section, directing a deposit of the money proceeding from the estate; all these sections are to be taken with the 5th, 6th, 13th and 14th sections, already analyzed, and altogether demonstrate, without doubt, that property, such as may be possessed, sued for and recovered, taken into possession and turned to account, was intended to pass by commissioners' assignment, but never any mere contingencies, with which no interest is coupled.

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By capture and *deductio infra præsidia*, the property insured and paid for by Vasse, was lost entirely. No lawful reclamation for it remained. The sufferer was the original owner, by whose session both *res* and *spes* were transferred to Vasse, when he paid for the losses. But this transfer conveyed to him no *chose in action*, because there can be none, without a right of action, for there is no such thing as right, without legal remedy. 3 Bl. Com. 123. No interest existed in Vasse, because he had no right; no claim, because a claim is a demand for a thing out of possession. Here was no *jus prosequendi*, or *standi in judicio;* no demand against the Spanish government, or our own; nothing of which any judicature could take cognisance. A right to damages begins, when an injury is inflicted. 3 Bl. Com. 116. But that is a suable right, of municipal cognisance. So, a captor has a defeasible and imperfect right, after capture, but only because the prize courts are open to him; whereas, Vasse could have sued or complained nowhere. The wrong he sustained was by a tort; the only redress was sovereign and international; the wrong was belligerent; the claim was by this nation against that; there was no arbiter, and war was the only remedy. The bounty which resulted, after twenty years' negotiation, was a sovereign boon, altogether contingent, gratuitous, unliquidated and fortuitous. Spain had declined in power; *this country had improved; her colonies, our neighbors, revolted, after our example; Florida, her province, happened to be convenient for our requital, and the very seizure

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of that province, which preceded its transfer, was not only accidental, but unauthorized. Grotius is quoted for the position, that an individual right exists to make reprisal for wrong suffered; but both Grotius and Rutherforth speak of national, not individual redress. Grotius does indeed refer to Homer, for the authority of Nestor, who is reported by that authority to have reprised on the cattle of the Eleans, for their stealing his horses; but this is not modern law, if it be even Grecian, in the times of the Iliad. Individual reprisals are unknown to the modern law of nations, especially, to the law of this country, which, by written constitution, requires a law enacted in form, to make war lawful. Vasse had no right to claim from Spain, or to act at all; he could do nothing but submit. Mr. Pinkney's argument, as referred to in the case of *The Betsey*, Furlong, does not contradict this position; and if it does, it was overruled by the majority of the commissioners, to whom it was addressed. *Brown* v. *Phœnix Ins. Co.*, 4 Binn. 445, and *Rhinelander* v. *Penn. Ins.* Co., 4 Cranch 45, do not affect the question of an assignment, by construction of the act of bankruptcy—and that is the only question. The sovereign grant was appropriated, by treaty between the two nations; it was distributable by the United States. Similar claims have been settled with the Republic of Colombia, and are pending against France, Naples and Denmark. The opposite argument has already transferred them in all cases of bankruptcy, by an unsuspected operation of law, constructively drawn from an expired act of congress; which argument, in like manner, has disposed of all the pensions or gatuities yet to be granted by our government to the officers of the revolution. They have all changed hands, unconsciously to the owners, who are petitioning, not for themselves, but the assignees of their creditors, in all instances of bankruptcy or insolvency. Can such an operation of law be possible or tolerable? Was such the intention of the framers of the act of congress, to establish an uniform system of bankruptcy throughout the United States? If so, and by dint of successful hostilities, a century hence, the claims on England, which have been relinquished by treaty, should be revived and acknowledged, their indemnity, if paid, will belong to assignees, not to sufferers. That the parties in this instance never thought of such result, has been shown. If congress, nevertheless, so enacted it, such enactment, it has also been shown, transcends the English bankrupt statutes, and contravenes all the established and familiar principles of the common law. It may be added, that *the French, it is believed also, the Dutch, and all other bankrupt systems, [*210 are the same. By the French, the things assigned are goods, money, furniture, effects, and *choses in action*. Code Civ. Commerce, liv. 3, t t. Prem., *de la Faillite*, § 2. Nowhere do possibilities, contingencies, mere rights of action for torts, or demands for unliquidated damages, pass from bankrupts or insolvents to their assignees. The American adjudications are uniform and strong in their current to that conclusion. *Shoemaker* v. *Keeley*, 2 Dall. 213; *Sommer* v. *Wilt*, 4 S. & R. 28; *North* v. *Turner*, 9 Ibid. 248–9; *O'Donnel* v. *Seybert*, 13 Ibid. 54; *Dusar* v. *Murgatroyd*, 1 W. C. C. 13; *Bird* v. *Clark*, 3 Day 272; *Krumbaar* v. *Burt*, 2 W. C. C. 406. The last case is in point; is a stronger case than the present; and has been acknowledged by the community as the settled law in Pennsylvania, for the last twenty years. To inquire whether the possibility of Vasse's recovery, would, in case of his death, have passed by will, or in course of administration, is but petitioning

the principle in contest. Even conceding the affirmative, does not affect the question, which depends on the construction of the act of congress; but it would be wrong to concede it against the authority of Preston, the case in 2 Swanston, and the case of *Krumbaar* v. *Burt*.

Story, Justice, delivered the opinion of the court.—This was an action of *assumpsit*, brought by Ambrose Vasse, in the circuit court for the district of Pennsylvania, to recover from the plaintiffs in error (who were defendants in the court below), a certain sum of money, received by them under the following circumstances:

Previous to the year 1802, Vasse was an underwriter on various vessels and cargoes, the property of citizens of the United States, which were captured, and carried into the ports of Spain and her dependencies, and abandonments were made thereof to Vasse, by the owners, and he paid the losses arising therefrom, prior to the year 1802. Vasse became embarrassed in his affairs, and his creditors proceeded against him as a bankrupt, under the act of congress of 4th April 1800, ch. 19. An assignment was made accordingly to Jacob Shoemaker (who is deceased), and the defendants, Comegys and Pettit, who proceeded to take upon themselves the duties of assignees, and have ever since continued to perform the same. Vasse was discharged under the commission; and his certificate of discharge bears date the 28th of May 1802. In the year 1824, the sum of $8846.14, was received by the defendants, from the treasury of the United States; being the sum awarded by
*211] the commissioners sitting at Washington, *under the treaty with Spain, which ceded Florida to the United States, dated 22d of February 1819, on account of the captures and losses aforesaid. On the 9th of December 1823, Vasse filed a bill in equity, in the circuit court of the district of Columbia, which is in the case; upon which, it seems, no final proceedings were had on the merits. Under the commission of bankruptcy, Vasse made a return of his effects to the commissioners; which is in the case. Upon these facts, a general verdict was found for the plaintiff, Vasse, for the sum of $8846.14, subject to the opinion of the court, with liberty for either party to turn the same into a special verdict; and the circuit court gave judgment upon the facts in favor of the original defendant. The present is a writ of error, brought for the purpose of ascertaining the correctness of that judgment.

Three questions have been argued at the bar: 1. Whether the award of the commissioners, under the treaty with Spain, directing the money to be paid to the defendants, as assignees of Vasse (which is assumed to be the true state of the fact), is conclusive upon the rights of Vasse; so as to prevent his recovery in the present action? 2. If not, whether the abandonment of the vessels and cargoes to him, as underwriter, by the owners, and his payment of the losses, entitled him to the compensation awarded, independent of his bankruptcy? 3. If so, then, whether his right and title to the compensation, passed by the assignment of the commissioners of bankruptcy, to the defendants, as his assignees, by the true intent and terms of the bankrupt act of 1800, ch. 19?

1. As to the first point.—The treaty with Spain, of the 22d of February 1819, was ratified on the 13th of February 1821, by the government of the United States. In the 9th article, it provides, that the high contracting parties

"reciprocally renounce all claims for damages or injuries, which they themselves, as well as their respective citizens and subjects may have suffered, until the time of signing this treaty;" and then proceeds to enumerate, in separate clauses, the injuries to which the renunciation extends. The 11th article provides, that the United States, exonerating Spain from all demands in future, on account of the claims of their citizens, to which the renunciations herein contained, extend, and considering them entirely cancelled; undertake to make satisfaction for the same, to an amount not exceeding $5,000,000. To ascertain the full amount and validity of these claims, a commission, to consist of three commissioners, &c., shall be appointed, &c., and within the space of three years from the time of their first meeting, shall "receive, examine and decide upon the amount and validity of all claims *included within the descriptions above [*212
mentioned." The remaining part of the article is not material to be mentioned.

It has been justly remarked, in the opinion of the learned judge, who decided this cause in the circuit court, that it does not appear from the statement of facts, who were the persons who presented or litigated the claim before the board of commissioners; nor whether Vasse himself was before the board; nor who were the parties to whom, or for whose benefit, the award was made. We do not think that the fact is material, upon the view which we take of the authority and duties of the commissioners. The object of the treaty was to invest the commissioners with full power and authority to receive, examine, and decide upon the amount and validity of the asserted claims upon Spain for damages and injuries. Their decision, within the scope of this authority, is conclusive and final. If they pronounce the claim valid or invalid, if they ascertain the amount, their award in the premises is not re-examinable. The parties must abide by it, as the decree of a competent tribunal of exclusive jurisdiction. A rejected claim cannot be brought again under review, in any judicial tribunal; an amount once fixed, is a final ascertainment of the damages or injury. This is the obvious purport of the language of the treaty. But it does not necessarily or naturally follow, that this authority, so delegated, includes the authority to adjust all conflicting rights of different citizens to the fund so awarded. The commissioners are to look to the original claim for damages and injuries against Spain itself, and it is wholly immaterial for this purpose, upon whom it may, in the intermediate time, have devolved; or who was the original legal, as contradistinguished from the equitable, owner, provided he was an American citizen. If the claim was to be allowed as against Spain, the present ownership of it, whether in assignees or personal representatives, or *bonâ fide* purchasers, was not necessary to be ascertained, in order to exercise their functions in the fullest manner. Nor could they be presumed to possess the means of exercising such a broader jurisdiction, with due justice and effect. They had no authority to compel parties, asserting conflicting interests, to appear and litigate before them, nor to summon witnesses to establish or repel such interests; and under such circumstances, it cannot be presumed, that it was the intention of either government to clothe them with an authority so summary and conclusive, with means so little adapted to the attainment of the ends of a substantial justice. The validity and amount of the claim being once ascertained by their award, the fund might well be permitted to pass

into the hands of any claimant; and his own rights, as well as those of all others, who asserted a title to the fund, be left to the ordinary course
*213] *of judicial proceedings in the established courts, where redress could be administered according to the nature and extent of the rights and equities of all the parties. We are, therefore, of opinion, that the award of the commissioners, in whatever form made, presents no bar to the action, if the plaintiff is entitled to the money awarded by the commissioners. The case of *Campbell* v. *Mullett*, 2 Swanst. 551, is distinguishable. The claim in that case had been laid before the commissioners, and rejected by them, on the ground, that the party was alien enemy; and if so, he certainly did not come into the purview of the treaty. It was not pretended, that the party had any title to the indemnity, unless it could be deemed partnership property, and as a partner, he was entitled to share in it. The court considered that it was not partnership property in which he had a title; that his claim to any portion of it had been rejected, upon the ground, that such claim was not within the treaty; and the indemnity had been granted to the other partners, for their shares only of the joint property, and they took no more than their own shares. The court then proceeded, upon the ground, that there neither was an original, nor a derivative title to the indemnity, in the party now seeking to set it up. If an assignment had been shown from them to him, of their own interest in the claim or award, before or after it was made, the case might have admitted of a very different consideration. Whatever, therefore, might be the authority of that case, upon general principles (upon which it is unnecessary to pass any opinion), it is inapplicable to the present.

2. The next question, which is not noticed in the opinion of the circuit court, turns upon the nature and effect of an abandonment for a total loss, to the underwriters. Much argument has been employed, and many authorities introduced, to prove what rights and interests, possibilities and expectancies, may or may not pass by assignment; we do not think it necessary to review these authorities, or the principles upon which they depend, upon the present occasion. In general, it may be affirmed, that mere personal torts, which die with the party, and do not survive to his personal representative, are not capable of passing by assignment; and that vested rights *ad rem* and *in re*, possibilities coupled with an interest, and claims growing out of, and adhering to property, may pass by assignment. But the material consideration here, is, whether upon the principles of the law-merchant, the right, title, interest or possibility (call it which you may), to the indemnity awarded in this case, did not pass by the abandonment to Vasse.

We do not think, that, upon an examination of the doctrines of insur-
*214] ance, there is any difficulty in this part of the case. It *does not appear on the record, whether there was, in this instance, any formal instrument of abandonment, or not, nor is it material, for the law gives to the act of abandonment, when accepted, all the effects, which the most accurately drawn assignment would accomplish. By the act of abandonment, the assured renounces and yields up to the underwriter, all his right, title and claim to what may be saved; and leaves it to him to make the most of it, for his own benefit. The underwriter then stands in the place of the assured, and becomes legally entitled to all that can be rescued from destruction. This is the language of the elementary writers, and is fully borne

out by Mr. Marshall and Mr. Park, in their treatises on insurance. Marsh. on Ins. b. 1, ch. 14; Park. on Ins. ch. 9, p. 228, 279. "Where (says Mr. Marshall), as in case of capture, the thing insured, and every part of it, is completely gone out of the power of the assured, it is just and proper, that he should recover at once, as for a total loss, and leave the *spes recuperandi* to the insurer; who will have the benefit of a re-capture, or of any other accident, by which the thing may be recovered." Mr. Park uses equally strong language, he says, "the assured has a right to call upon the underwriter for a total loss, and, of course, to abandon, as soon as he hears of such a calamity having happened; his claim to an indemnity not being at all suspended, by the chance of a future recovery of part of the property lost; because, by the abandonment, that chance devolves upon the underwriters." It is very clear, that neither of these learned writers meant to confine these remarks to cases, where the specific property itself, or its proceeds, were restored; for the whole current of their reasoning, in the context, goes to show, that whatever may be afterwards recovered or received, whether in the course of judicial proceedings or otherwise, as a compensation for the loss, belongs to the underwriters. And for this purpose, they refer to the case of *Randal* v. *Cockran*, 1 Ves. 98, before Lord HARDWICKE, where this very point was adjudged. In that case, the king had granted letters of reprisal against the Spaniards, for the benefit of his subjects, in consideration of the losses which they had sustained by unjust captures, and he appointed commissioners to distribute the produce of these reprisals among the sufferers; and the commissioners would not suffer the underwriters, but only the owners, to make claim for the losses; although the owners were already satisfied for their loss, by the underwriters. Lord HARDWICKE decreed, that the owner should account for the same to the underwriter; and said, "the person who originally sustained the loss, was the owner, but after satisfaction made to him, the insurer. No doubt, but from that time, as to the goods themselves, if restored in specie, or compensation made for them, the assured stood as a trustee for the insurer, in proportion to what he paid, although the commissioners did right to avoid being entangled in accounts, and in adjusting [*215 the proportion between them. Their commission was limited in time; they saw who was owner; nor was it material to whom he assigned his interest, as it was in effect after satisfaction made." This case reflects no inconsiderable light upon the point already discussed, as to the conclusiveness of the award of the commissioners. But it is decisive, that the assignment by abandonment, is competent not only to pass the property itself, or its proceeds, if restored, after an unjust capture, but also any compensation awarded by way of indemnity therefor. The case before Lord HARDWICKE was the stronger, because the indemnity was awarded to the party, by his own sovereign, and not by the sovereign of the captors. Mr. Marshall and Mr. Park manifestly contemplate the case as establishing the principle, that any indemnity, however arising, is a trust for the underwriters, after they have paid the loss. Park on Ins. ch. 8, p. 229; Marsh. on Ins. b. 1, ch. 14, § 4.

The case of *Gracie* v. *New York Ins. Co.*, 8 Johns. 237, recognises the same principle, in its full extent. That was a case of abandonment, after a capture, and where there had been a final condemnation, not only by the

courts in France, but an express confirmation of the condemnation by the sovereign himself. One question was whether the jury were at liberty to deduct from the total loss, the value of the *spes recuperandi*. The court held that they were not. Mr. Chief Justice KENT, in delivering the opinion of the court, said, "if France should, at any future period, agree to, and actually make compensation for the capture and condemnation in question, the government of the United States, to whom the compensation would, in the first instance, be payable, would become trustee for the party having the equitable title to the reimbursement; and this would clearly be the defendants (the underwriters), if they should pay the amount, &c." The case of *Watson* v. *Insurance Co. of North America*, 1 Binn. 47, proceeds upon the same principles. It admits, that the *spes recuperandi* passes by an abandonment to the underwriter; and the question there was, whether its value, when not abandoned, was to be deducted from the total loss. We consider it, then, clear, upon authority, that the right to the compensation in this case, was in its nature assignable, and passed, by abandonment, to Vasse; and upon principle, we should arrive at the same conclusion. The right to indemnity for an unjust capture, whether against the captors or the sovereign; whether remediable in his own courts, or by his own extraordinary interposition and grants, upon private petition, or upon public negotiation, is a right attached to the *ownership of the property itself, and passes by cession, to the use of the ultimate sufferer. If so assignable to Vasse, it was equally, in its own nature, capable of assignment to others; and the only remaining inquiry would be, whether it had so passed by assignment from him.

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The case of *Campbell* v. *Mullet*, 2 Swanst. 551, already adverted to, has been pressed upon the attention of the court as indicating, certainly not as deciding, a doctrine somewhat different. In that case, the compensation had been awarded by the commissioners, under the British treaty of 1794, to American citizens, for unjust captures made by British cruisers; and there had been condemnations by the highest appellate courts of prize. One argument was, that the compensation so granted, was not to be deemed a mere donation to the parties who received it for their own use, but an indemnity. The master of the rolls, in answer to this, said: "It is said, that the sums awarded by the commissioners are not matter of bounty or donation. Can they be a matter of right? What is right? That which may be enforced in a court of justice. Had the parties, whose property was condemned by irrevocable sentence, any right? What they obtain, after that condemnation, is not founded in right, but in policy between the nations, providing compensation to individuals, who have lost property by sentences, which are thought unjust. The grounds of relief before the commissioners are, the want of any redress in any municipal courts. Whatever the individual obtains, is not on the ground of right, or private property, but of hardship and injustice. Though this, therefore, is not a case of pure donation, as of a gift without anything in the nature of a consideration, yet for the purpose of being contrasted with property or right, it is a donation, not a restoration of a former right, but from a new fund, belonging to an independant authority, a grant to the sufferer for what he lost." Such is the language of the learned judge, and we cannot say, that the reasoning is at all satisfactory. It is not universally, though it may ordinarily be, one test of right, that it may be enforced in a

court of justice. Claims and debts due from a sovereign are not ordinarily capable of being so enforced. Neither the king of Great Britain, nor the government of the United States, is suable in the ordinary courts of justice, for debts due by either. Yet, who will doubt, that such debts are rights? It does not follow, because an unjust sentence is irreversible, that the party has lost all right to justice, or all claim, upon principles of public law, to remuneration. With reference to mere municipal law, he may be without remedy; but with reference to principles of international law, he has a right, both upon the justice of his own and the foreign sovereign. The *theory, too, that an indemnification for unjust captures is to be deemed, if not a mere donation, as in the nature of a donation, as contrasted with [*217 right, is not admissible. It is reasoning against the clear text of the treaty itself. What says the treaty of 1794, § 7? That where American citizens have sustained losses or damages, "by reason of irregular or illegal captures, or condemnations of their vessels, or other property, under color of authority or commissions from his Majesty, and adequate compensation cannot be obtained by the ordinary course of judicial tribunals, full and complete compensation for the same will be made by the British government to the said complainants." The very ground of the treaty is, that the municipal remedy is inadequate; and that the party has a right to compensation for illegal captures, by an appeal to the justice of the government. It was never understood, that the case was one to which the doctrine of donation applied. The right to compensation, in the eye of the treaty, was just as perfect, though the remedy was merely by petition, as the right to compensation for an illegal conversion of property, in a municipal court of justice. The case of *Randal* v. *Cockran*, 1 Ves. 98, stands upon the true gound. It considers the right of indemnity as travelling with the right of property. In that case, it might have been said, in answer to the claims of the underwriters, that they had no title, because it was a case of donation by the crown, out of funds provided by reprisals. So, perhaps, the commissioners thought; but Lord HARDWICKE decided otherwise. There cannot be a doubt, that if the party injured had died before or after the treaty was made; and compensation had been subsequently decreed, it would have been assets, and distributable as such, in the hands of his executors and administrators. The remarks which have been made upon this case, are equally applicable to the provisions for indemnity, under the treaty with Spain. It recognised an existing right to compensation, in the aggrieved parties, and did not, in the most remote degree, turn upon the notion of a donation or gratuity. It was demanded by our government as matter of right, and as such it was granted by Spain.

We may now come to the point, which indeed is the only one of any intrinsic difficulty in the cause—whether the right, so vested in Vasse, to compensation, passed, under the bankruptcy assignment, to his assignees? That this is a question free of doubt, will not be affirmed by any person who has thoroughly examined it, or read with care the elaborate opinion of the court below. The true solution of it must be found in a just exposition of the object, intent, and language of the statute of bankruptcy of 1800, ch. 19. The act begins by an enumeration of the persons who are liable to be declared *bankrupts, and among them are "underwriters or marine insurers." This plainly shows the sense of the legislature, that such [*218

persons might, by the ordinary course of their business, be reduced to insolvency, and be justly placed within the beneficial operation of such a law. It tends also to the presumption, that it might have been the intent of the legislature, that the rights devolved upon them, from the nature of the losses for which they were liable, so far as under any circumstances they might or could be valuable rights, should be available as a fund for the benefit of their creditors, in case of their bankruptcy. As the legislature meant to exonerate the underwriter from all future liability for his debts; it would seem natural, that the claims abandoned to him, which might constitute the whole of his effective estate, should be vested in his assignees, for the benefit of his creditors. If he possessed claims by abandonment, to the amount of $100,000, which might, by future events, be rendered more or less productive, and which might be (as they have often been) salable and transferrible in the market; such funds, present or expectant, might well be deemed within the legislative policy, and fit to pass to the creditors by assignment. It might otherwise happen, that large recoveries might ultimately vest in the bankrupt, for his own exclusive benefit, upon rights pre-existent, and vested at the time of his bankruptcy.

If such a course of legislation would not be unnatural, let us next see, what is the precise language of the statute itself. The fifth section declares, that it shall be the duty of the commissioners, after the party has been declared a bankrupt, "to take into their possession all the estate, real and personal, of every nature and description, to which the bankrupt may be entitled, either in law or equity, in any manner whatsoever, &c.; and also to take into their possession, and secure, all deeds and books of accounts, papers and writings, belonging to the bankrupt; and shall cause the same to be safely kept, until assignees shall be chosen or appointed." These words are certainly very general and comprehensive. "All the estate, real and personal, of every nature and description, in law or equity," are broad enough to cover every description of vested right and interest, attached to and growing out of property. Under such words, the whole property of a testator would pass to his devisee. Whatever the administrator would take, in case of intestacy, would seem capable of passing by such words. It will not admit of question, that the rights, devolved upon Vasse by the abandonment, would, in case of his death, have passed to his personal representative; and when the money was received, be distributable as assets. Why
*219] then should it not be asset in the hands of the assignees? *Considering it in the light in which Lord HARDWICKE viewed it, as an equitable trust in the money, it is still an interest, or at all events, a possibility coupled with an interest. Besides, "all deeds, books, accounts, papers and writings of the bankrupt," are to be taken into possession. Now, the abandonment, and other documents connected with it, fall precisely within these terms; and as we shall immediately see, whatever is taken possession of by the commissioners, is to be passed to the assignees. The sixth section provides "that the commissioners shall assign, transfer or deliver over, all and singular the said bankrupt's estate and effects aforesaid, with all muniments and evidences thereof," to the assignees chosen. And for the most part, the words "estate and effects," are used throughout the act, as descriptive of the property passing under the assignment. The 11th, 12th and 13th sections of the act respect more particularly the transfer of

the real estate, of the mortgages, and of the debts of the bankrupt. It is only necessary to say, that they contain no language abridging the proper inference deducible from the language of the fifth section.

The 18th section contains provisions respecting the surrender and examination of the bankrupt, and are very material. It provides, that upon such examination, he shall "fully and truly disclose and discover all his or her effects and estate, real and personal, and how and in what manner, and to whom, and upon what consideration, and at what time or times, he or she hath disposed of, assigned or transferred, any of his or her goods, wares or merchandise, moneys, or other effects and estate; and of all books, papers and writings relating thereunto, of which he or she was possessed; or in which he or she was in any way interested or entitled, or which any person or persons shall then have, or shall have had, in trust for him or her, or for his or her use, at any time before or after the issuing of the said commission; or whereby such bankrupt, or his or her family, then hath, or may have or expect, any profit, possibility of profit, benefit or advantage whatsoever, &c." It then goes on further to provide, that the bankrupt shall, upon such examination, execute, in due form of law, such conveyance, assurance and assignment, of his or her estate, whatsoever and wheresoever, as shall be deemed and directed by the commissioners, to vest the same in the "assignees;" and also requires the bankrupt to deliver up "all books, papers and writings relating thereunto," which are in his possession, custody or power, at the time of the examination: upon his default in these particulars, he is deemed a fraudulent bankrupt, and deprived of a right to a certificate of discharge, and subjected to severe punishments. If there were any doubt upon the meaning of the language of *the fifth section, we think it is cleared up and illustrated by that of the present. Here, [*220 the words "profit, possibility of profit, benefit, or advantage whatsoever," are used, and show that mere interests *in præsenti*, and capable of present enjoyment, were not alone within the scope of the legislative enactments, but also all such interests, or possibilities of interest, as might thereafter beneficially arise from present vested rights. It extends to such effects and estate, "whereby the bankrupt then hath, or may have or expect, any profit."

It has been supposed, that this clause looks solely to property, which was not capable of assignment, at the time of the bankruptcy, because not then vested; inasmuch as the bankrupt himself, and not the commissioners, is required to make an assignment of it. If this were so, it would not affect the present case, because we are of opinion, that the claim under consideration, was completely vested in right and interest in Vasse, at the time of his bankruptcy. We think, however, that this clause does not justify so narrow an interpretation. The disclosure is required of estate and effects, in which the bankrupt was interested, as well before as after the issuing of the commission; and the bankrupt is required to execute conveyances, not of such estate and effects merely, as accrued after the commission, but of his estate, "whatsoever and wheresoever." The object of the provision was to make such conveyances auxiliary to, and confirmatory of, the assignments made by the commissioners; and we believe, that in practice, it was so generally understood and acted on, while the statute was in force. The 50th section of the act has been supposed to demonstrate the correctness of the

construction of the statute contended for by the counsel for the original plaintiff. It declares, "that if any estate, real or personal, shall descend, revert to, or become vested in, any person, after he or she shall be declared a bankrupt, and before he or she shall obtain a certificate, &c., all such estate shall, by virtue of this act, be vested in the said commissioners, and shall be by them assigned and conveyed to the assignees, &c." This section plainly refers to estate to which the bankrupt had no right or title whatever, in law or equity, vested in interest or in possession, at the time of his bankruptcy. The cases put, are of property descending, reverting to, or becoming vested in the bankrupt. In respect to a descent cast, after the bankruptcy, it is manifest, that nothing could pass by any antecedent assignment of the commissioners. The heir, during the lifetime of his ancestor, has no right, claim, title or interest, in the ancestral estate. It is a mere naked expectancy, liable to be defeated at the will of the ancestor, at all times, and in no just sense, a possibility of interest, a right in the thing itself. The other words, "reverting *to, or become vested" in the
*221] bankrupt, require a like interpretation. They allude to cases, where the party had nothing vested in him, as a subsisting interest, either absolute or contingent, *in esse* or *in futuro*, until after the bankruptcy; and when any such interest falls in, before the certificate of discharge, the commissioners, and not the bankrupt, are to assign it; a circumstance, which demonstrates that no stress ought to be laid upon that part of the 18th section, already alluded to, respecting a conveyance by the bankrupt himself, except as a confirmation, and not as a principal assurance. It seems to us, then, that the 50th section aids, rather than shakes, the interpretation of the statute, which has been already announced. It applies to no possibility of profit, benefit or advantage vested at the time of the bankruptcy (as the present case is), but to interests accruing to the party for the first time, *de jure* as well as *de facto*, after the bankruptcy.

This view of the matter renders it unnecessary to consider, whether there is any substantial difference between the English statutes of bankruptcy and our own, on this subject; and of course, in the authorities applicable to it. Our opinion proceeds upon the purview and objects, and on the terms of our own statute. And we are accordingly of opinion, that the judgment of the circuit court ought to be reversed, and a judgment entered in favor of the original defendants. It is to be understood, that, upon the last point, this is the opinion of the majority of the court. The cause must be remanded, with directions to enter a judgment accordingly, for the original defendants.

This cause came on, &c.: On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said circuit court, in this cause, be and the same is hereby reversed and annulled; and that a judgment be entered in the suit, in favor of the plaintiffs in error, Cornelius Comegys and Andrew Pettit; and the cause remanded to said circuit court, with directions to enter judgment for the plaintiffs in error in this court, Cornelius Comegys and Andrew Pettit, accordingly.

*Charles W Karthaus, Plaintiff in error, *v.* Francisco Yllas y Ferrer and others, Defendants in error.

Arbitration.—Power of partners.

There is a class of cases upon awards, to be found in the books, in which arbitrators have been held to more than ordinary strictness, in pursuing the terms of the submission, and in awarding upon the several distinct matters submitted, upon the ground of this submission being conditional, *ita quod;* but the rule is to be understood, with this qualification—that in order to impeach an award made in pursurance of a conditional submission, on the ground of part only of the matters in controversy having been decided, the party must distinctly show, that there were other points in difference, of which express notice was given to the arbitrators; and that they neglected to determine them. p. 227.

One partner, during the continuance of the partnership, cannot bind the other partner to a submission of the interests of both to arbitration; but he may bind himself, so as to submit his own interests to such decision.[1] p. 228.

It is a settled rule in the construction of awards, that no intendment shall be indulged to overturn an award, but every intendment shall be allowed to uphold it. p. 228.

If a submission be of all actions, real and personal, and the awards be only of actions personal, the award is good; for it shall be presumed, no actions real were depending between the parties. p. 228.

Where, upon a submission by one partner of all matters in controversy between the partnership and the person entering into the agreement of reference, an award was made, directing the payment of money; in an action on the bond to abide by the award, the breach assigned was, that the partner who agreed to the reference did not pay, &c.; this is a sufficient assignment of a breach, as he only who agreed to the reference was bound to pay. p. 231.

Error to the Circuit Court of Maryland. On the 16th of January 1823, the plaintiff in error gave an arbitration bond, in the usual form, with sureties, to the defendants in error, in which it was set forth, that—

"Whereas, certain disputes, differences and controversies have arisen, and are still depending, between the above-bounden Charles W. Karthaus, acting for the late house of Charles W. Karthaus & Co., and himself, and the above-named Francisco Yllas y Ferrer and Josef Antonio Yllas, for the ending and determining the disputes, differences and controversies aforesaid, and all actions, suits and claims and demands whatsoever, concerning the same, the said parties have agreed to refer the same to the award, judgment and determination of Lewis Brantz and Henry Child, both of Baltimore, merchants, arbitrators indifferently chosen and named, by and on behalf of the said parties, to award, order, arbitrate, judge and determine concerning the same. And if the said arbitrators cannot determine the same, that then the same shall be fully ended and determined by a third person, to be by them chosen as an umpire, in such *manner as hereinafter is, in that behalf, mentioned and expressed. Now, the condition of this obligation is such, that if the above-bound Charles W. Karthaus, his heirs, [*223

[1] The general rule in England, and in many of the states of the Union, is, that one partner cannot bind his copartner by submission to arbitration; but in Pennsylvania, it is held, that he may so bind his copartner, by agreement not under seal, in any partnership matter. Taylor *v.* Coryell, 12 S. & R. 243; Gay *v.* Waltman, 89 Penn. St. 453. In the latter case, the chief justice says, "when the submission is confined to cases for settling and determining claims arising in the partnership business, it is difficult to assign any substantial reason for denying the power of one partner, in good faith, to bind his copartner, by a parol submission." And see Southard *v.* Steele, 3 T. B. Monr. 485; Hallock *v.* March, 25 Ill. 48. The English rule is followed in Jones *v.* Bayley, 5 Cal. 345; Wood *v.* Sheperd, 2 Pat. & H. (Va.) 442; Buchoz *v.* Grandjean, 1 Mich. 367; Martin *v.* Thrasher, 20 Vt. 460.

executors, administrators, and every of them, shall and do, for and on his and their parts, in and by all things, stand to, obey, abide, perform, fulfil and keep the award, arbitrament, order, determination, final end and judgment, which shall be by them, the aforesaid arbitrators, made, of and concerning the premises, and of all disputes, differences, actions, suits, claims, and demands whatsoever, touching and concerning the same, so as such award, arbitrament, determination, final end and judgment of the said arbitrators, of and in the premises, be by them made and given up in writing, under both their hands and seals, ready to be delivered to each of the said parties in controversy, in fifty days from the day of the date hereof. And if they, the said arbitrators, of and in the said premises, cannot agree, end and determine the same, in fifty days from the day of the date hereof, that then, if the said Charles W. Karthaus, his heirs, executors, administrators, and every of them, shall and do, for and on his and their parts, in and by all things, stand to, obey, abide, perform, fulfil and keep the award, arbitrament and umpirage of the above-named arbitrators, and such third person and umpire, as they the said arbitrators shall indifferently name, elect and choose, for the ending and determining the same premises, or a majority of them, so as such award, umpirage and judgment of the said arbitrators and umpire, or a majority of them, of and concerning the same, be by them so made and given up in writing, under their hands and seals, ready to be delivered to each of the said parties in controversy, in sixty days from the day of the date hereof ; this obligation to be void and of no effect, otherwise the same shall remain in full force and virtue."

Upon this reference, the following award was made, under the hands and seals of the arbitrators and the umpire :

"We, the undersigned, Henry Child and Lewis Brantz, as arbitrators, and Michael McBlair, as umpire, acting in virtue of the annexed bond or instrument of writing, do hereby award and adjudge, that the late firm of Charles W. Karthaus & Co. pay, or cause to be paid, unto Francisco Yllas y Ferrer and Josef Antonio Yllas, or their representatives, the sum of $1475, for a balance of the general account-current between the parties ; and also the sum of $1398, for a balance arising out of the moneys recovered for the brig Arrogante Barcelones and cargo ; in which award, a parcel of cutlasses, *224] or their *proceeds, are considered as becoming the property of said Yllas y Ferrer. Given under our hands and seals, in Baltimore, this 8th of March 1828."

To an action on the bond, against the plaintiff in error, he pleaded the condition, and that no award had been made. The defendants in error replied and answered, and set it out as stated ; and there was a demurrer to the replication, which the court overruled, and a judgment was entered for the plaintiff below. In this judgment, error was alleged ; and before this court, the plaintiff in error sought to maintain : 1. That the award is not agreeable to the submission. 2. It is not certain, final and mutual. 3. It directs an act to be done by strangers. 4. It is defective in other respects.

The case was argued by *Hoffman* and *Mayer*, for the plaintiff in error ; and by *Wirt*, Attorney-General, for the defendants.

For the *plaintiff* in error.—The object of the submission was, to have all

the matters in controversy adjusted by the arbitrators, and the words "certain disputes," so meant and intended. 2 Caines 320; 15 Johns. 197; Com. Dig. Arbitration, 4, D.

1. This was a submission between all the parties, the plaintiff in error, and the firm of which he was a member, there being partnership and individual disputes; and the award does not apply to all, but only to the plaintiff in error. It should profess to decide everything in the premises. The submission being conditional, *ita quod*, the referees were bound to pursue strictly the submission, in all its terms, and to award on all matters submitted to them. 2 Gallis. 77–8; *Baspole's Case*, 8 Co. 98; 1 Salk. 70; Kyd on Awards 176.

2. An award must be so certain, that it may be pleaded in bar to an action against the parties to it; which is not the fact in this case. 1st. It does not comprehend all the parties, nor decide upon all the subjects in dispute; it is uncertain and contradictory, and there are no averments in the replication which will supply these deficiencies; there should have been an averment as to the members of the firm, as to the accounts, and the transactions out of which the accounts grew. By no form of pleading, could the plaintiff in error show he had, in this case, satisfied the claims of the defendant in error. The award should have designated the claims on the plaintiff, individually, and on the firm; nor does it appear by it, that Charles W. Karthaus, and C. W. Karthaus & Co., were the same persons. [*225 *1 Bac. Abr., Arb. and Award, pl. E, 1, 216; 1 Com. Dig. 666, tit. Award, pl. E, 4; 7 East 81; 5 Wheat. 394. In an action on an award, the plaintiff is not bound to set out the particulars; but if he proceed on the bond, he must set out the breaches with particularity. The defendant may do it, but it is the duty of the plaintiff; Kyd on Awards 195. That part of the award, by which "a parcel of cutlasses, or their proceeds, are considered as becoming the property of the said Yllas y Ferrer," is altogether uncertain. It does not state what cutlasses, or what the amount of the proceeds, considered as the property of Yllas y Ferrer, were included or referred to.

Wirt, for the defendants in error.—The court are always disposed to maintain awards, Caldwell on Arbitrations 123. The pleadings do not exhibit anything from which error can be imputed; the defendant should have rejoined, and shown that there were other parties, and other matters, than those stated in the award; having failed to do this, there is nothing before the court but the submission and the award; and there is noting to show, that there were other persons interested, and other matter to be acted on, but those stated in the award. This form of pleading is only waived, when the submission sets out every matter at large. Kyd on Awards 171; 7 East 81. The firm is not a party to the submission; and the partner who submitted to the arbitration, will alone be bound by it, and to pay the amount awarded. Kyd 40. As to the set-off, in such a case of individual and partnership accounts: 5 T. R. 493; 6 Ibid. 582–3. Certainty to a common interest only, is required in awards. This award is sufficiently certain. Kyd 132; 1 Caines 314–5; 14 Johns. 108–9. If the award be certain in part, it may be executed for so much as is certain; although another part is uncertain; unless the part which is uncertain is the consideration for that which the uncertain part was given. 5 Wheat. 409. The award here is

entirely for the defendants in error, and if any part of it is uncertain, which is denied, the plaintiff in error cannot complain. 11 Wheat. 448. The cutlasses and the proceeds are sufficiently designated, and if they were not, it was for the plaintiff below only to complain.

Trimble, Justice, delivered the opinion of the court:—This was an action of debt, brought by Francisco Yllas and Josef Antonio Yllas, against Charles W. Karthaus, on an arbitration bond, in the circuit court of the district of Maryland. The defendant, after *oyer* of the condition of the
*226] bond, pleaded, no award, &c. The plaintiff replied, setting *forth the award *in hæc verba*, and assigning a breach; the defendants demurred generally, and the plaintiff joined in demurrer. The circuit court having given judgment upon the demurrer, in favor of the plaintiffs; the defendant has brought the case up, by writ of error, for the consideration of this court.

The first and principal ground relied on by the plaintiff in error, for the reversal of the judgment, is, that the award is not agreeable to the submission, in this: that two several distinct controversies, the first between the plaintiffs and the late house of Charles W. Karthaus & Co., and the second between the plaintiffs and Charles W. Karthaus, individually, were submitted to the referees, and that they left the latter undetermined. The condition of the bond, after reciting, that certain disputes, differences and controversies have arisen, and are still depending, between the above-bound Charles W. Karthaus, acting for his late house of Charles W. Karthaus & Co., and for himself and the above-named Francisco Yllas y Ferrer, and Josef Antonio Yllas, &c., "refers the same to the referees named, and their umpire, and binds the said Charles W. Karthaus, &c., to abide by and perform their award; so as such award, &c., "of the arbitrators, of and in the premises, be by them made and given up in writing, under their hands and seals, ready to be delivered to each of the said parties in controversy, in fifty days."

The arbitrators, and their umpire, within the time limited by the submission, made and delivered their award in writing, under their hands and seals, in the following words, to wit: "We, the undersigned, Henry Child and Lewis Brantz, as arbitrators, and Michael McBlair, as umpire, acting in virtue of the annexed bond or instrument of writing, do hereby award and adjudge, that the late firm of C. W. Karthaus & Co. pay to Francisco Yllas y Ferrer and Josef Antonio Yllas, or their representatives, the sum of $1475, for the balance of the general account-current between the parties, and also the sum of $1398, for a balance arising out of moneys received for the brig Arrogante Barcelones and cargo; in which award, a parcel of cutlasses, or their proceeds, are considered as becoming the property of the said Yllas y Ferrer."

It is plainly seen, from the face of the award, that the arbitrators have not contradistinguished between Charles W. Karthaus, as a member of the late house of Charles W. Karthaus & Co., and Charles W. Karthaus, as an individual, unconnected with his late house. The argument is, that this omission of the referees vitiates the award. It is said, that this, being a
*227] conditional submission, *ita quod*, the arbitrators were bound to pursue the submission strictly, and to award of and *concerning every

matter referred to them. In support of this argument, the counsel referred to *Randall* v. *Randall*, 7 East 80, and several other cases less apposite.

That there is a class of cases in the books, in which arbitrators have been held to a more than ordinary strictness in pursuing the terms of the submission, and awarding upon the several distinct matters submitted, upon the ground of the submission being conditional, *ita quod*, is conceded. The case of *Randall* v. *Randall* is a leading case of that class. Lord ELLENBOROUGH, C. J., in delivering the opinion of the court, says: "The arbitrators had three things submitted to them; one was, to determine all actions, &c., between the parties; another was, to settle what was to be paid by the defendant for hops, poles and potatoes in certain lands; the third was, to ascertain what rent was paid by the plaintiff, to the defendant, for certain other lands. The authority given to the arbitrators, was conditional, *ita quod*, they should arbitrate upon these matters, by a certain day. The arbitrators have stopped short, and have omitted to settle one of the subjects of difference stipulated for." This case was adjudged, according to the rule laid down in the books; that if the submission be conditional, so as the arbitrator decide of and concerning the premises, he must adjudicate upon each distinct matter in dispute, which he has noticed. Kyd 177.

But the rule is to be understood with this qualification; that in order to impeach an award, made in pursuance of a conditional submission, on the ground of only part of the matters in controversy having been decided, the party must distinctly show, that there were other points in difference, of which express notice was given to the arbitrator, and that he neglected to determine them. Caldwell 105; Kyd 177; Cro. Car. 216; *Baspole's Case*, 8 Co. 98; *Ingraham* v. *Milnes*, 8 East 445. That Lord ELLENBOROUGH understood and intended to apply the rule, as thus qualified, in *Randall* v. *Randall*, is manifest, For Mr. Espinasse, in commenting upon *Baspole's Case*, having observed, that it is said in that case, that though there be many matters in controversy, yet if only one be signified to the arbitrators, he may make an award for that, for he is to determine according to the *allegata et probata;* and it is in every day's practice, that an award may be good in part, and bad in part. Lord ELLENBOROUGH, in an answer to that argument, replies, "That is, where it does not appear the is any notice to the arbitrator, on the face of the submission, that there is any other matter referred to him, than those that are mentioned to him at the time of the reference; but here it does expressly appear, that there was another matter referred, on which there is no arbitrament."

*In this case, it is not pretended, that any notice was given to the arbitrators of any other matter, unless that notice was given on the face of the submission. The question then is, does it distinctly appear, from the face of the submission, that any other point of difference between parties, was submitted, and of which the submission itself gave the arbitrators notice, but which they have neglected to determine? If, as the argument supposes, there was any point of difference, which concerned Charles W, Karthaus, individually, as contradistinguished from the points in difference which concerned him as Charles W. Karthaus, of the late firm of Charles W. Karthaus & Co., what was that point of difference? [*228

No satisfactory answer has been given, and it is believed, none can be given, to this inquiry. How then can it be maintained, that a distinct point

in difference between the parties was referred, and by the reference itself notified to the referees, which they have neglected to determine? The case of *Ingham* v. *Milnes* is a strong authority to show, that although the submission be conditional, *ita quod*, there must be a distinct specification, as in *Randall* v. *Randall*, to sustain the objection, that part has been omitted by the arbitrators. Here, the submission is in very general, and, we think, in very vague and ambiguous terms. It speaks of disputes, differences and controversies between Charles W. Karthaus, acting for the late house of Charles W. Karthaus & Co., and for himself and the plaintiffs. But how, or in what he acted, for one or the other, is not specified. The terms "late house," imply the former existence, but present non-existence, of the late house of Charles W. Karthaus & Co. He may be the only surviving partner, the firm having ceased, by the death of the other members. But if the firm was continuing, Charles W. Karthaus, while he must be admitted to be perfectly competent to submit to reference his own interests in the firm, could not, by his submission, bind his partners. He might bind himself to perform whatever the award directed the firm of which he was a member, to do; so that, either way, it was a submission of his own interest only. In order to overturn the award, it is not enough, that he may have had different and distinct interests in his individual and in his partnership character. It is a settled rule, in the construction of awards, that no intendment shall be indulged to overturn an award, but every reasonable intendment shall be allowed to uphold it. Thus, if a submission be of all actions, real and personal, and the award be only of actions personal, the award is good; for it shall be presumed no actions real were depending between the parties. Kyd 72; and *Baspole's Case*, before cited.

*229] *So, in this case, although the submission speaks, in general terms, of disputes, differences and controversies, with Charles W. Karthaus, acting for his late house of C. W. Karthaus & Co., and for himself; it shall not be intended, there were any controversies with C. W. Karthaus, individually, other than those decided by the arbitrators. If any such did exist, inasmuch as they are not specifically and distinctly set forth in the submission, so as to give notice to the arbitrators, it was the duty of the party to show, by averment and proof *aliunde*, they were brought before the referees.

There is no analogy between this case and *Lyle* v. *Rodgers*, 5 Wheat. 394, cited at the argument. In that case, it was decided, that where claims against a party, both in her own right, and in her character of administratrix, were submitted to arbitrators, it was a valid objection to the award, that it awarded a gross sum to be paid by her, without distinguishing between what was to be paid by her in her own right, and what in her representative character. The Chief Justice, in delivering the opinion of the court, explained the reason and ground of the decision, by observing, "If this award was made against Mrs. Dennison, as administratrix, she would not only be deprived, by its form, of the right to plead a full administration (a defence which might have been made before the arbitrators, and on which their award does not show, certainly, that they have decided), but also of the right to use it in the settlement of her accounts, as conclusive evidence, that the money was paid in her representative character. If this objection to the award is to be overruled, it must be, on the supposition that it is

made against her personally; yet the statement of fact shows the claim against her to be in her representative character." This reasoning cannot apply to the case before the court. It is of no sort of consequence to C. W. Karthaus, whether he is directed to pay as Charles W. Karthaus, individually, or as Charles W. Karthaus, of his late house of C. W. Karthaus & Co. In each case, he is bound, personally, to pay, having bound himself so to do, by the submission; and the award, if in any case it would be evidence for him against the firm, would not be conclusive, as he had no power to bind his partners, if any existed, by his submission.

It is objected, that the award is not certain, final and mutual. It was said, in argument, that as the first sum awarded, is expressed to be for a "balance of the general account-current between the parties; the general account-current must be understood to include all accounts between them; and hence, that the second sum awarded, for a balance arising out of moneys received for the brig Arrogante Barcelones, is included in the first, and the party thus charged; or, at least, that it does not certainly appear otherwise." *We think there is no foundation for this argument. To indulge such a supposition, would impute either manifest injustice, or [*230 gross negligence, to the referees.

Great stress was laid, in the argument, on the uncertainty of the closing clause of the award, in these words, "in which award, a parcel of cutlasses are considered as becoming the property of said Yllas y Ferrer." There is considerable doubt and uncertainty, as to the meaning of the arbitrators, in these terms. And had this uncertainty appeared in any part of the award, intended for the benefit of the defendant, it would, perhaps, be fatal to the whole award. Had that been the case, it would be hard and unjust, to compel him to perform that part of the award which is onerous to him, when he could not have, on account of its uncertainty, that which would be beneficial to him. But however doubtful the precise intent and meaning of this part of the award may be, it is certain, it was intended as a benefit in some way, to Yllas y Ferrer, over and above the two sums of money directed to be paid to the plaintiffs. The defendant can have no reason to complain, that the plaintiffs, or either of them, may not, on account of this uncertainty, be able to obtain all the benefits intended by the award; nor can it furnish any reason for withholding from them, that to which they are certainly entitled.

It is deemed a sufficient answer, to the objection of want of mutuality in the award, to remark, that great stress was laid, in the early cases, upon the mutuality of an award; but at present, it is by no means considered necessary that each party should be directed to do, or not to do, any particular thing. Caldw. 113. Two had submitted to an award; nothing was awarded as to one party, but that all actions should cease. The court held it a good award. *Harris* v. *Knipe*, 1 Lev. 58. In *Palmer's Case* (12 Mod. 234), one party was directed to pay money to the other, without any directions being given to the latter in any way; and again, it was awarded that A. should pay B. 40 shillings for a trespass. Freem. 204. The respective awards were considered unimpeachable. These cases fully establish the principle above laid down. An award is regarded as final, when it is an absolute conclusive adjudication of the matters in dispute; and there is no reason to doubt the conclusiveness of the adjudication in this case, as to the two sums of money directed to be paid; and that the award will operate as

a bar to any future litigation, upon the accounts for which they are given.

Again, it is objected, that the award directs an act to be done by strangers. This objection grows out of the direction in the award, that "the late firm of C. W. Karthaus & Co. pay, &c." Whatever might be the force of this objection, if it were true in point of fact, we cannot so regard
*231] it. So far as *appears upon the record, the late firm or house of C. W. Karthaus & Co., and C. W. Karthaus, are one and the same person; or more properly speaking, it does not appear that there is any other person *in esse*, belonging to that firm, than C. W. Karthaus himself. If there be any other person *in esse*, of the late house of C. W. Karthaus & Co., it cannot be truly affirmed, that he, and the house of which he was a partner, are strangers to each other. But we cannot, consistently with the rules of law, presume or intend there is any other; indeed, in support of the award, it may reasonably be intended there is not, as the party objecting was cognisant of the fact, and might have shown it, if true, but has not. The direction that the late firm of C. W. Karthaus & Co. shall pay, unquestionably includes C. W. Karthaus; and no other person appearing to exist, it is equivalent to a direction that he shall pay. This reason is applicable to the last ground assumed by the counsel for the plaintiff in error, for a reversal of judgment; namely, that the replication is insufficient, because, in assigning a breach, it only alleges C. W. Karthaus had not paid. As no other was, or could be, bound by the submission and award, to pay, and he was bound; it was a sufficient assignment of a breach of the condition of his bond, to allege that he had not paid the money awarded in favor of the plaintiffs. Upon the whole, it is the opinion of this court, that there is no error in the judgment of the circuit court, and the same is affirmed, with costs and damages.

Judgment affirmed.

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*232] *Junius K. Horsburg, devisee of James Henderson, Appellant, *v.* Martin Baker and Hannah his wife, Francis Clark, Robert Boyce and Peter Mason, for himself, and as guardian to Susannah R. Hamlett.

Equity.—Forfeiture.—Discovery.

A court of chancery is not the proper tribunal to enforce a forfeiture; the remedy for the same being at law.[1] p. 236.

After an answer and discovery, the rule is, that a suit brought merely for discovery, cannot be revived; the object is obtained, and the plaintiff has no motive for reviving it. p. 236.

A bill had been filed originally for discovery, and afterwards became a bill for relief; the relief prayed for, was a forfeiture; which might be enforced at law; under such circumstances, it was proper to dismiss the bill, so far as it sought for relief against the forfeiture; but the dismissal should have been without prejudice to the legal rights of the parties, as absolute dismissal might be considered as a decree against the title the plaintiff claimed, and which, by the bill and the evidence obtained under it, he sought to establish. p. 236.

Appeal, from the Circuit Court for the District of Kentucky. The facts and the pleadings in the case, are fully stated in the opinion of the court.

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[1] Steedman *v.* Cooke, 13 S. & R. 172; Funk *v.* Haldeman, 53 Penn. St. 229; Railroad Co. *v.* Railroad Co., 57 Id. 65

Horsburg v. Baker.

The cause was argued by *Wickliffe*, on the part of the appellants—no counsel appearing for the appellees. The following points were stated in the argument, by Mr. Wickliffe.

1. The loan made in 1784, and as further evidenced by the deed of confirmation of 1787, was valid, as between the parties to it; and as Baker and wife are proved, in 1813, to be in possession of the negroes, and of a copy, or the original deed of 1781 is admitted, they are estopped from asserting any title to said slaves, which they may have had prior to that deed.

2. The deed of 1787, having been duly recorded in the proper office, on the 4th of July 1787, was notice to all the world; and the subsequent removal of the slaves out of the state of Virginia, without the knowledge and consent of Horsburg, did not destroy the legal effect of that deed, nor convert the loan into an absolute title, in Baker and wife.

3. Baker and wife cannot rely upon the lapse of time, or the length of possession, to defeat the right of Horsburg, and those claiming under them.

4. The court, in this cause, had jurisdiction upon two grounds; the one, arising from the nature of the contract, and its subject-matter; the other, from the peculiar circumstances of the case, the difficulty of proving and identifying the slave Charlotte and her increase, without the aid of a discovery on oath; and the repeated attempts by the defendants, and the just *fears of the complainant, that the negroes would be secreted, [*233 and removed out of the jurisdiction of the court.

When courts of chancery take jurisdiction upon the ground of discovery, or upon any other ground, they will retain the cause for the purpose of granting full relief. By the act of assembly of Virginia, of 1758, a parol gift of slaves was void. 1 Wash. 330, 331. The parties to a trust of real or personal property, may resort to a court of equity to avail themselves of its benefits. 1 Madd. Ch. 446. Between the *cestui que trust*, and his trustee, the statutes of limitation, or lapse of time, are no bar. 1 Madd. 453; 2 Ves. 680.

Baker and wife were trustees of the slave and her issue, for the persons entitled to the reversion of them, under the deed of Alexander Horsburg; and they were not authorized to dispose of them; and the sale made by them, while the suit was pending, was void as to the *cestui que trust*. 2 Johns. Ch. 441; 4 Ibid. 136. As to jurisdiction in this cause, and it being a case for relief in chancery: 3 Ves. 71. Slaves, the property of the wife, vest in the husband, without being reduced into possession: 1 A. K. Marsh. 517.

Marshall, Ch. J., delivered the opinion of the court.—In the year 1813, James Henderson and his wife filed their bill in the court of the United States for the seventh circuit and district of Kentucky, stating, that Alexander Horsburg, the former husband of the plaintiff, did, by deed, bearing date the 25th day of April, in the year 1787, confirm to Martin Baker and Hannah his wife, for their lives, and the life of the survivor, then residing in the county of Halifax, in Virginia, a negro girl, named Charlotte, previously loaned to them (which deed was recorded), reserving to himself and his heirs, the reversion of the said slave, and her increase; and prohibiting any

alienation of them, under the penalty of forfeiting the loan. This deed was recorded on the 4th day or July 1787, in the court of hustings for the town of Petersburg; the town in which the said Horsburg resided. The bill further states, that the said Alexander Horsburg departed this life in the year 1798, having first made his last will in writing, whereby he bequeathed the residue of his estate to his wife, who afterwards intermarried with the plaintiff, James Henderson. The bill proceeds to state, that Martin Baker and wife have removed to Kentucky, with the slave Charlotte and her increase; whom they profess to hold as their absolute property; and that
*234] the plaintiffs fear, that they will be secreted or conveyed *out of the state, to places unknown. The plaintiffs further allege, that they are unable to prove the identity of the said slaves, and pray that the said Baker and wife may be compelled to discover their number and names; and may be decreed to give security for their forthcoming, when the life-estate should determine. The court awarded an injunction, to restrain the defendants from removing Charlotte and her issue out of the state.

In May 1814, the plaintiff, James Henderson, filed an amended and supplemental bill, stating the death of his wife, and praying that the suit might be continued in his name. The bill also states, that Baker and wife had sold Charlotte and her increase to Francis Clarke and Robert Boyce; who intend removing out of the state, and concealing them. It prays, that the slaves may be rendered to the plaintiff, and that Clarke and Boyce may be restrained from removing them. The court extended the injunction to the other defendants. The defendants, Baker and wife, file their answer denying the loan; and insisting that certain friends of the defendant, Hannah, subscribed the sum of 43*l.* which was placed in the hands of Alexander Horsburg, to purchase the slave Charlotte for her. They insist on their title, but give a full description of all the descendants of Charlotte. The defendants, Clarke and Boyce, also deny the right of the complainant.

In 1817, the plaintiff again amended his bill, and charged, that Baker and wife had brought the deed from Horsburg with them into Kentucky, as their title to Charlotte.

In November 1819, Junius K. Horsburg appeared, by his attorney, and leave was given him to file a bill of revival. The bill is filed by the said Horsburg, as the administrator and devisee of James Henderson, and as the heir and only child of Mrs. Henderson, the wife of the said James, and the former wife and devisee of Alexander Horsburg. The bill recites the proceedings in the cause; exhibits the will of James Henderson, and his letters of administration, and charges the sale to Boyce and Clark, since the institution of this suit, who purchased at a low price, with the intention of removing the slaves beyond the jurisdiction of the court.

In answer to this bill, Baker and wife say, that, in the year 1773, Thomas Simmons and others, named in the answer, contributed 43*l.* for the purpose of purchasing a negro girl, for the said Hannah, which sum was placed in the hands of Alexander Horsburg, as their agent, with instructions to convey the said negro to the defendants, for their lives, and to their children, after
*235] the death of the survivor. They believe *this plan was adopted, for the purpose of protecting the property thus given by her friends, from the creditors of her husband. Under these instructions, Charlotte was purchased, and delivered to them. In the year 1787, after the defendants had

been in peaceable possession of Charlotte, about fourteen years; the said Horsburg, without any previous communication of any sort, sent to them, then residing in Halifax, about 120 miles from Petersburg, the deed; a copy whereof is annexed to their answer. They also say, that on the same day, the said Horsburg executed another writing, obliging himself to convey Charlotte and her increase, after the death of the defendants, to their children; to which they refer, as being filed in the office of the circuit court for the county of Garrard. They also refer to a letter, written by the said Horsburg, which they say was given up, to be filed in the cause.

In May 1824, leave was given to file an amended bill, and the cause was sent to the rules for further proceedings. The amended bill charges, that Clarke and Boyce purchased, not only pending the suit, but with knowledge in fact thereof; that they purchased the said slaves for a trifle, less than half their value, in consequence of an agreement to take upon themselves the risks of the title.

The deposition of John T. Mason states, that the deponent, as counsel for the original plaintiff, called on the defendants, Baker and wife; who, after some time, admitted that they claim Charlotte and her offspring, under a deed, from Alexander Horsburg, which they showed him. It is a copy, or the original, of the deed filed in the cause. They also showed the witness several other papers and letters in relation to the subject, and particularly two letters from Alexander Horsburg, which he believes to be the same, or to the same purport, with those filed in the cause.

The copy of the deed of 1787, recorded in the court for the town of Petersburg, is filed, together with the will of Alexander Horsburg, and of James Henderson; but neither the subsequent deed, stated in the answer of Baker and wife to have been executed by Alexander Horsburg, for the purpose of securing Charlotte and her offspring, to the children of Baker and wife, nor the letters from Horsburg, are found on the record.

The last amended bill was taken for confessed, and the cause set down for hearing. The court directed the bill to be dismissed.

Baker and wife being alive, the plaintiff could have no pretence to recover the slaves claimed by the amended bill, except under the clause of forfeiture for alienation, which the deed contains. *As a court of chancery is not the proper tribunal for enforcing forfeitures, no decree [*236 for the purpose of effecting that object, ought to have been made. But the plaintiff had a right to apply to the court of chancery for a discovery, in order to enable him to proceed at law, either immediately, or on the death of Martin Baker and his wife; and also, for an injunction, to restrain the tenants for life from removing the slaves out of the country. The decree dismissing the bill, entirely defeats both these objects. The bill, therefore, ought not to have been dismissed, unless the plaintiff had failed to show any title which might be litigated in a court of law. The court will not, in this case, decide upon the title; but is of the opinion, that it authorizes the plaintiff to come into a court of chancery to pray for a discovery; and as there was reason to fear, that the property would be removed, to obtain security for its forthcoming, if the title should be determined in his favor. This bill was, in its origin, merely a bill of discovery, and *quia timet.* Before the answer was filed, the original defendants are alleged to have sold the slaves, and by that act, to have forfeited their life-estate The amended bill, there-

fore, prays a decree for the slaves themselves. After this bill was filed, the defendants, Baker and wife, answer; and make the discovery with respect to the descendants of Charlotte. In this state of the cause, the plaintiff dies, and his administrator and devisee files a bill in the nature of a bill of revivor. After answer and discovery, the rule is, that a suit brought merely for discovery, cannot be revived. 1 Madd. 217; 1 Dick. 133; 10 Ves. 31. Its object is obtained, and the plaintiff has no motive for reviving it. But such a bill ought not to be dismissed. 1 Madd. 217; 1 Atk. 286.

The court might properly order, that no further proceedings be had in the case. Had this bill, then, been merely a bill of discovery, at the death of the original plaintiff, it ought not to have been sustained in the name of his devisee; because the discovery was made. But it had then become a bill for relief. The relief, however, prayed, is for a forfeiture, which might have been enforced at law. The present plaintiff was in possession of all the evidence which was necessary to support his action at law, and was not driven into a court of chancery for the purpose of obtaining its aid. In such circumstances, it was proper to dismiss the bill, so far as it sought relief on the ground of forfeiture; but it ought to have been dismissed, without prejudice to the legal rights of the plaintiff; an absolute dismissal may be considered as a decree against the title.

*237] The decree, therefore, is to be reversed, and the cause *remanded, with directions to dismiss the bill, so far as it asks relief, without prejudice. The injunction may be continued in the discretion of the court, till the plaintiff has time to institute a suit at law.

This cause came on, &c.: On consideration whereof, this court is of opinion, that after the discovery sought by the original bill was obtained, the suit ought not to have been revived, nor ought the bill, in the nature of a bill of revivor, to have been entertained, because the relief sought by that bill, was solely to enforce a forfeiture, to which the plaintiff's title, if he has any, is complete at law. It was therefore proper to refuse the relief for which that bill prayed; but as a general decree for a dismissal on the merits, may be considered as a decree against the title, on which the court ought not to have decided, and the bill ought to have been dismissed, without prejudice. It is, therefore, the opinion of this court, that there is error in so much of the decree of the circuit court, as dismissed the bill of the plaintiff generally; and that the said decree ought to be reversed, and the cause remanded to the circuit court, with directions to dismiss so much of the plaintiff's bill, as prays relief on the ground of forfeiture; and to continue the injunction, at the discretion of the court.

*Christian Breithaupt and Henry Shultz, Defendants below, *v.* The Bank of the State of Georgia and others.

Jurisdiction.

The complainants were stated in the bill, to be citizens of the state of South Carolina; the defendant, the Bank of Georgia, as a body corporate, existing under an act of the legislature; but the citizenship of the individual corporators was not stated; the averment, in the original bill, was that William B. Bullock and Samuel Hale were citizens of Georgia, and residents therein; William B. Bullock was afterwards designated in the bill, as "president of the mother bank, and Samuel Hale, as the president of the branch bank at Augusta, in the state of Georgia." The courts of the United States have no jurisdiction of the case; the record does not show that the defendants were citizens of Georgia, nor are there any distinct allegations, that the stockholders of the bank are citizens of that state.[1]

This was a bill, filed in the Circuit Court for the District of Georgia, and the case came up, on a certificate of division of opinion, which the judges ordered to be entered upon these points: 1st. Whether the complainants are entitled to relief? 2d. What relief should be decreed to them?

The only question presented for the decision of this court was, whether the circuit court had jurisdiction of the cause. It was alleged, there was no sufficient averment on the record, of the citizenship of the parties. The complainants, Henry Shultz and Christian Breithaupt, were stated to be citizens of the state of South Carolina; the defendant, the bank of the State of Georgia, as a body corporate; but the citizenship of the individual corporators was not stated. The averment, in the original bill, was, that "William B. Bullock and Samuel Hale were citizens of Georgia, residents therein." William B. Bullock was subsequently designated, as "president of the mother bank, and Samuel Hale, as president of the branch bank, at Augusta, in the state of Georgia." There were three amendments to the bill, but there were, in none of them, any further averments. The answer denied the jurisdiction. The defendant's counsel insisted, that the citizenship of the individual corporators should have been alleged; and that the want of jurisdiction was apparent upon the face of the record.

McDuffie, in support of the jurisdiction of the court, contended, that the objection to the jurisdiction was founded on a misapprehension of the decisions of this court. None of those decisions go further than to say, that if, on the face of *the record, it appears that there are parties, who are not citizens of another state, the courts of the United States [*239 will not accept jurisdiction. In the bill, the complainants are said to be citizens of South Carolina; and William B. Bullock, the president of the mother bank, and Samuel Hale, the president of the branch bank, are citizens of the state of Georgia; and there is no ground for the allegation, that other persons, not citizens of the state, are interested. The party who claims the jurisdiction, is not bound to prove that no other persons, but citizens of Georgia, are interested.

The bank exists under an act of incorporation, passed by the state of Georgia, and this court will look at the act; which having a general operation, may be considered as a public act. 1 Bl. Com. 85. If this is done by the court, they cannot say, others than citizens of Georgia, are members of

[1] See Sewing Machine Companies' Case, 28 Wall. 563, 575.

the corporation. Cases cited, in which the question of jurisdiction has been examined: *Bingham* v. *Cabot*, 3 Dall. 382; 5 Cranch 57; 3 Ibid. 267; 3 Wheat. 591.

The policy of the constitution, in relation to jurisdiction, is to include suits against corporations, although all who are interested are not citizens of the same state. The influence of such corporations, in the state where they exist, makes this appeal to other than state tribunals, expedient. When an action is instituted against trustees, by citizens of another state, would the jurisdiction of the courts of the United States be taken away, by showing that some of those who had a fiduciary interest, were not citizens of the same state with the trustees? The question must be settled, by adverting to the local usages of Georgia; and there suits are brought against the individuals who represent the bank.

Berrien and *Wilde*, for the defendant.—The pleadings show that there is no allegation of citizenship in the stockholders of the bank, the owners of its funds; and the point is fully settled, that all the parties who are sued shall be averred to be citizens of another state, from that of the plaintiff or complainant in the suit. A body corporate, as such, is incapable of citizenship, according to the true meaning of the law giving jurisdiction. This court has decided, that they will go behind the act of incorporation, and ascertain the character of the individual corporators, and if they find them citizens of another state, the suit may be maintained; but there must be an averment of such citizenship, as to every stockholder. 5 Cranch 57; 6 Wheat. 146.

The possession of the fund cannot give the court jurisdiction, as that was the possession of a corporation. No *jurisdiction can be obtained, *240] because of the difficulties in suits against the corporation of one state, by citizens of another; and it is denied, that any such difficulties exist in Georgia.

By the Court.—This is not a case within the jurisdiction of the courts of the United States. The record does not show, that the defendants were citizens of Georgia, nor are there any distinct allegations or averments, that the same was the fact, as to the stockholders in the bank.

This cause came on, &c.: On consideration whereof, this court is of opinion, that as the bill does not aver that the corporators of the Bank of the State of Georgia, which bank is defendant in the suit, are citizens of the state of Georgia, the circuit court has no jurisdiction of the cause, and can grant no relief. It is, therefore, ordered to be certified to the circuit court, as the opinion of this court, that, in the present state of the pleadings, it not appearing that the defendants are citizens of the state of Georgia, the complainants are not entitled to relief in that court.

*James Findlay, William Lytle, Charles Vattier, Robert Ritchie and others, citizens of Ohio, Appellants, *v.* Thomas S. Hinde and Belinda, his wife, citizens of Kentucky, Appellees.

Jurisdiction of equity.—Affidavit of loss of deed.—Discovery.—Parties. Joint appeal.

If, in case where the loss of a deed, or other instrument, is made the ground for coming into a court of equity, for discovery and relief, an affidavit of its loss must be made and annexed to the bill, and the absence of such affidavit is good cause of demurrer; yet, if the party charged by the bill fail to demur for that cause, but answer over, or permit the bill to be taken for confessed, by default, against him; it seems, that the absence of the affidavit is not a sufficient cause for the reversal of the decree. p. 244.

If a deed has not been proved, acknowledged and recorded, and would, therefore, be insufficient against subsequent purchasers, without notice; parties who claim under such deed, have a right to come into a court of equity, for a discovery, upon the ground of notice; and if notice be brought home to subsequent purchasers, the complainants have a right to relief, by a decree quieting the title. p. 245.

Where, in a bill filed for discovery and relief, the party relied upon a deed said to have been lost, but which had never been formally executed to convey the estate; and upon a receipt of the purchase-money, binding the party to convey the same; the person alleged to have executed the lost deed, and who gave the receipt, should have been made a party to the proceeding; although he had, subsequently, by a legal and formal conveyance, duly executed, conveyed the estate to others; and thus, so far as he could, divested himself of all title in the same. p. 245.

The decree of the circuit court directed two of the defendants, in whom was the legal title to the lot of ground claimed by the plaintiff in the bill, to convey the same; and awarded costs, generally, against all the the defendants; all the defendants appealed together to this court, some of whom held the legal title to the lot, and all the defendants had an interest in defending this title, standing as they did in the relation of vendors and warrantors, and vendees. Although the defendants, against whom there is a decree for costs only, could not appeal from this decree for costs; yet, the reversal of the decree of the circuit court was made general, as to all of the appellants, and the whole case opened. p. 247.

Appeal from the Circuit Court of Ohio. The appellees filed their bill in the circuit court of the United States for the district of Ohio, praying a discovery; and that the defendants might convey to the complainants such a title as they have acquired, to a lot of ground in the town of Cincinnati, and deliver up the possession acquired by them; and also that they account for the profits; and for general relief.

The title set up by the complainants was alleged to be derived from a receipt given by Abraham Garrison, in whom the title to the lot was then vested, which receipt was in the following terms:

"Received, Cincinnati, 10th September 1799, of Wm. and *Michael Jones, fifty pounds, thirteen shillings and three pence, in part of a lot [*242 opposite Mr. Conn's, in Cincinnati, for two hundred and fifty dollars, which I will make them a warrantee deed for the same, on or before the twentieth day this instant.

"Test.—Jacob Awl. (Signed,) Abraham Garrison."

And from a deed, executed on the following day, by which Abraham Garrison, for the consideration of $250, conveyed the lot to William and Michael Jones, which deed was said to have been lost by time and accident. The lot was, by subsequent conveyances, claimed to be vested in the complainants. No affidavit was attached to the bill, showing that the deed was not in the complainant's possession, or setting forth that it had been so lost

or destroyed. To this bill the defendants, James Findlay, Charles Vattier, William Lytle and Robert Ritchie answered separately; and a decree was entered against the other defendants for costs, the bill having been taken *pro confesso* against them, they not having answered. After hearing, the court gave a decree against the defendants who had answered; and all the defendants appealed to this court.

The bill, answer, exhibits and depositions showed a case containing many controverted facts and allegations; and the questions of law arising upon the same, were elaborately argued by *Webster* and *Caswell*, for the appellants; and by *Doddridge* and *Jones*, for the appellees.

The decision of this court, by which the decree of the circuit court of Ohio was reversed, and the cause remanded for further proceedings, was upon two questions of chancery practice; which were raised by the counsel for the appellants.

1. The court have decreed relief to the complainants, on the bare suggestion that the deeds once existed, which are lost, when no affidavit is attached to the bill, showing that the deeds were not in complainant's possession; and without such an affidavit, a court of chancery has no jurisdiction of the cause. The appellants cited the following cases, to show the error of this proceeding: Mitford's Pl. 52, 112; 2 P. Wms. 540–1; 3 Atk. 17, 132; 4 Johns. Ch. 297.

2. The complainants not having shown a deed from Garrison to the Jones's, must rely upon the receipt from Garrison to the Jones's, as an equitable title; and if they claim that equitable right, they, of course, must make Garrison, the elder, and the Jones's, parties of the suit. Upon this point, the counsel for the appellants cited *Simms* v. *Guthrie and others*, 9 Cranch 25.

No opinion having been expressed by the court, upon the merits of the cause, or upon the general questions presented by *the counsel; it *243] is not deemed proper to state the arguments of counsel, in this report.

Trimble, Justice, delivered the opinion of the court.—This is a contest for lot No. 86, in the city of Cincinnati. The appellees, who were complainants in the court below, claim the lot, in right of the complainant, Belinda, as half-sister and heir-in-law of Thomas Doyle, jr., only son of Thomas Doyle, the elder.

In the year 1795, Abraham Garrison became the proprietor, and was seised in fee of the lot in controversy. The bill charges that on the 10th of September 1799, Abraham Garrison, being so seised, sold the lot to William and Michael Jones, brothers, and partners in trade, for the price of $250; part of which being paid, the said Abraham Garrison gave a receipt for the same, binding himself to convey; which receipt is annexed, and made part of the bill: that a few days after, the said Abraham Garrison made a deed of conveyance, attested by two witnesses, to the Jones's, for the lot; which deed has been lost by time and accident: that on the 26th of March 1800, William Jones, in behalf of the firm of William & Michael Jones, conveyed the lot to Thomas Doyle, jr.; and that although the intention of that conveyance was to pass the title of both partners, as is in equity good for that purpose; yet, as it did not pass the legal title of Michael Jones, he has since, in the year 1819, for the purpose of confirming the title of the complainants,

made a deed of confirmation to the complainant, Thomas S. Hinde. Various other matters are stated in the bill, as strengthening and confirming the equitable right of the complainants, in right of the said Belinda, as heir-at-law of Thomas Doyle, jr. The bill charges, that the defendants have fraudulently, and with notice of the claim of Thomas Doyle, jr., and of the complainants, subsequently, obtained conveyances of the legal title, from and under Abraham Garrison, and seeks discovery and relief.

The defendants, James Findlay, William Lytle, Charles Vattier and Robert Ritchie answered; and the bill was taken as confessed, against the other defendants, for want of answer. The answer put in issue, generally, the allegations of the bill, and the title of the complainants; but it is not at present necessary to say, whether they do, or do not, sufficiently deny notice. It appears, from the answers, and title deeds filed in the cause, that all the defendants, as well those who have not answered, as those who have, are interested in defending the title *of the lot—they standing in relation to each other as vendors, warrantors and vendees. At the hearing of [*244 the cause, in the circuit court, the defendants, Vattier and Ritchie, were decreed to convey to the complainants; and costs were decreed against all the defendants; and all of the defendants have joined in the appeal to this court.

The appellants contend, that the decree is erroneous, upon several grounds, which have been very elaborately argued at the bar. Among these, two preliminary objections have been raised to the regularity of the proceedings and decree; and if either of them be sustained, it will be unnecessary to consider the more important objections made to the decree, upon the merits of the conflicting claims of the parties. The first preliminary objection is, that no affidavit of the loss of the deed, from Garrison to the Jones's, "by time and accident," as charged in the bill, was made and annexed to the bill. In support of this objection, the counsel for the appellants have cited numerous authorities, to prove, that when the loss of a deed, or other instrument, is made the ground for coming into a court of equity, for discovery and relief, an affidavit of its loss must be made, and annexed to the bill; and that the absence of such affidavit, is good cause of demurrer to the bill. But no case has been cited, and none is recollected, in which it has been decided, that although the party charged, failed to demur for that cause, but answered over to the bill, or permitted it to be taken for confessed, by default, against him, yet the absence of the affidavit is sufficient cause for a reversal of the decree. If such a decided case was shown, we should exceedingly doubt its reason and authority. The objection appears to us to be of that character, which ought to be made at the earliest practicable stage of the cause; and if not then made, should be considered as waived. Upon the face of the bill, there is an apparent jurisdiction, and the use of the affidavit is only to show, *primâ facie*, the truth of the matter. It is not like the cases in which there is an apparent want of equity, on the face of the bills, admitting all the facts stated to be true; nor like the case, in which it is apparent, on the face of the bill, that a court of equity could have no jurisdiction of the matters charged. In such cases, although a demurrer will lie to the bill, yet none is necessary; inasmuch as there is either an absolute want of equity, or of jurisdiction.

We think, the supposed former existence and loss of the deed from Gar-

rison to the Jones's, was not the only ground for *appealing to a court of equity for relief. If the deed, as stated in the bill, were produced, it, in consequence of not being proved, or acknowledged, and recorded, would be insufficient, as a legal title, against subsequent purchasers, without notice. The complainants had a right to a discovery, upon the ground of notice, against the defendants; and if notice should be brought home to them, the complainants had a right to relief, by a decree quieting the title, &c. Again, if the complainants should fail, as we think they have failed, to prove, by competent and satisfactory evidence, the former existence, execution and contents of a formal deed of conveyance, sufficient to pass the legal title; we perceive no reason why they might not rely upon the executory contract contained in the receipt; and in this latter view of the case, the jurisdiction of the court of equity is unquestionable; and a general demurrer to the whole bill, for want of an affidavit, would not be sustainable. At most, a demurrer to only so much of the bill as stated and relied on the deed, could have been maintained, for want of an affidavit of its loss.

The second preliminary objection to the proceedings and decree, is the want of proper parties. It has been argued, for the appellant, that Abraham Garrison was a necessary party; and that as the complainants claim through him, by an executory contract, he ought to have been before the court, before any decree could be made against the defendants; who also claim through and under him, by a subsequent conveyance of the legal title. The counsel for the appellees endeavored to overcome this objection, by arguing, that the deed from Garrison to the Jones's, conveyed the title from him to them; that the contract was, therefore, not executory, but executed between Garrison and the Jones's; and further, if it were not so, that there was no necessity for bringing Garrison before the court; he having conveyed away the legal title to the appellants; and that, therefore, no decree could be made against him. We have already said, the evidence in the cause does not establish a formally executed conveyance from Garrison to the Jones's, sufficient to convey the legal title; and that the complainants are, therefore, driven to rest their case upon the executory contract, contained in the receipt. Under this aspect of the case, was it necessary to make Garrison a party, to enable the court to pronounce a decree between the parties really before the court?

In the case of *Simms* v. *Guthrie*, 9 Cranch 25, this court declared the general rule to be, that, "regularly, the claimants who have an equitable title, ought to make those whose title they assert, as well as the person for whom they claim a *conveyance, parties to the suit." "And that for omitting so do so, an original bill may be dismissed." In the case of *Mallow and others* v. *Hinde*, 12 Wheat. 193, 196, the complainants claimed a survey in the military district in Ohio, by virtue of certain executory contracts with Elias Langham and the heirs of Sarah Beard; and sought, by their bill against Hinde, to obtain a conveyance from him of the legal title; which, it was alleged, he had fraudulently obtained, with notice of the complainants' prior equity. Langham and the heirs of Sarah Beard, were not made defendants; and for that cause the decree was reversed. There is no distinction, in principle, between that case and this. In that case, this court, in delivering its opinion, held the following language: "For the appellees, it is insisted, the proper parties are not before the court, so as to enable the court to decree upon the merits of the conflicting claims;

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and we are all of that opinion." "The complainants can derive no claim in equity to the survey, under or through Langham's executory contract with the Beards, unless these contracts be such as ought to be decreed against them, specifically, by a court of equity." "How can a court of equity decide, that these contracts ought to be specifically decreed, without hearing the parties to them? Such a proceeding would be contrary to the rules which govern courts of equity, and against the principles of natural justice."

This reasoning applies with equal force to the case at bar. Here, however perfect all the other links may be in the chain of the complainant Belinda's equitable title to the lot in contest, she can have no claim to it in equity, but through and under the executory contract of Garrison with the Jones's. Garrison has a right to contest the equitable obligation of that contract. No decree can be made for the complainants, without first deciding, that the contract of Garrison ought to be specifically decreed. He might insist, the purchase-money had not been paid, or make various other defences. It is not true, that if he were made a party, no decree could be made against him. It might not be necessary to require him to do any act, but it would be indispensable to decide against him, the invalidity of his obligation to convey, and overrule such defence as he might make; and if the purchase-money had not been paid, to provide by the decree for its payment, before any decree could be made against the defendants holding the legal title. We are all of opinion, that upon this second preliminary objection, the decree of the circuit court must be reversed.

A question of some difficulty presents itself, as to the extent of reversal. The decree of the circuit court directs the defendants, Ritchie and Vattier, to convey certain portions of *the lot of ground; and awards costs, generally, against all the defendants. There is no doubt, the defendants, [*247 against whom there is only a decree for costs, could not appeal alone, from the decree of costs. But the defendants below have all appealed together, and although some of them hold the legal title to the lot, yet they all have an interest in defending the title; standing as they do, in the relation of vendors and warrantors, and vendees. Under these circumstances, we think the reversal should be general, as to all of the appellants, and the whole case opened. And we are the more inclined to adopt this course, because, so numerous, and so great, have been the irregularities in conducting the cause in the court below, from its commencement to its termination, by decree; that it seems impracticable that justice be done between the parties, without sending the cause back, as to all the parties; with directions, that the complainants have leave, if asked by them, to amend their bill, and make the proper parties; and to proceed *de novo* in the cause, from filing such amended bill.

This cause came on, &c.: On consideration whereof, it is the opinion of this court, that there is error in the proceedings and decree of said circuit court, in this, that Abraham Garrison ought to have been made a party, but was not, before a decree was made between the parties in the cause. Whereupon, it is adjudged, decreed and ordered, that the decree of said circuit court for the district of Ohio, in this cause, be and the same is hereby wholly reversed, annulled and set aside. And it is further ordered, that the cause

be remanded to the court from whence it came, with instructions to permit the complainants, upon application for that purpose, to amend their bill, and to make proper parties, and to proceed *de novo* in the cause, from the filing of such amended bill, as law and equity may require.

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*248] *Old Grant, on the demise of Samuel Meredith, Plaintiff in error, *v.* John McKee, for the use of the Bank of the Commonweath of Kentucky.

Jurisdiction in error.

The court will not take jurisdiction of a case, where, although the whole property claimed by the lessor of the plaintiff in error, under a patent, and which was recovered in ejectment, exceeded $2000, the title to a lot of ground, part of the whole tract, which was of less value than $500, was only involved in the case before the court.

Wickliffe moved to dismiss this cause, which was brought by a writ of error from the Circuit Court of the district of Kentucky, on the ground, that the property in controversy was not of the value of $2000; although the whole property owned by the lessor of the plaintiff in error, was under a patent, and which was recovered in the ejectment, is 1000 acres; yet, the title to a lot in the town of Falmouth, of less value than $500, held under the patent, is only involved in this case, and can only be affected by the decision of this court.

Marshall, Ch. J., delivered the opinion of the court.—This is a writ of error to a judgment of the court of the United States for the seventh circuit, and the district of Kentucky, awarding restitution of lot No. 108, in the town of Falmouth, to the defendants in error; who had been turned out of possession, by virtue of a writ of *habere facias possessionem*, issued on a judgment in ejectment, in favor of the plaintiff in error.

Previous to the institution of the suit, the town of Falmouth had been laid out, in pursuance of an act of assembly, and lot No. 108 had been sold and conveyed to George Hendricks. The law establishing the town of Falmouth, directed that the lots should be sold, subject to the condition of making certain improvements thereon, within seven years; on failure to do which, the trustees are empowered to enter on any lot not improved, and sell it again. These improvements were not made on lot No. 108.

The defendant in error moves to quash the writ of error, because the matter in controversy is not of the value of $2000. The motion is resisted, because the whole property which was recovered in the ejectment, may be considered as involved in this motion; since each tenant may move separately for an award of restitution, on the supposition, that the regularity of
*249] the proceeding, under the law by which the town *was established, and the lots sold, may be examined; on this motion, the plaintiff in error has brought that subject into view, and has discussed it fully. But the court is of opinion, that the question of title connot be considered on this writ of error. The town of Falmouth was separated from the tract out of which it was taken, and this lot was sold, before the suit was instituted; neither the trustees of the town, nor the proprietors of the lot, were parties

to that ejectment. The motion to award restitution, therefore, involved nothing further than the lot to which the party prayed to be restored; and as that is not of the value of $2000, the court has no jurisdiction. The writ of error is to be dismissed.

Writ of error dismissed for want of jurisdiction; it not appearing that the value of the premises, in this suit, is $2000.

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*William Konig, an alien, Plaintiff below, *v.* William Bayard, William Bayard, jr., Robert Bayard and Jacob Le Roy, citizens of the state of New York. [*250

Bills of exchange.—Payment supra protest.

A stranger to the drawer and indorser of a non-accepted bill of exchange may intervene *supra* protest, to pay the same for the honor of an indorser or drawer. p. 262.

It is no objection to this intervention, that it has been done, at the request, and under the guarantee, of the drawees of the bill, who had refused to accept or pay the same; the arrangements made by the payee of the dishonored bill, with the drawees, by which he was to be protected from loss, do not affect the liability of the party to the bill, for whose honor it has been paid. p. 262.

If A., at the request of the drawee of a bill of exchange, and under his guarantee, accept and pay the bill, *supra* protest, for the honor of the indorser, the party against whom suit is brought for the amount paid, may avail himself of every defence which he could have had, if the bill had been paid, *supra* protest, for the honor of the indorser, by the drawee, and suit brought for the same.[1] p. 262.

Certificate of Division from the Circuit Court for the Southern District of New York. This was an action of *assumpsit*, instituted in the circuit court of the United States for the southern circuit of New York, by William Konig, a merchant of Amsterdam, carrying on business under the firm of William Konig and Co., against the defendants, merchants in New York, trading under the firm of Le Roy, Bayard & Co.

The action was upon a foreign bill of exchange, and the declaration charged, that the same was drawn at Baltimore, on the 2d day of September 1822, by John C. Delprat, on N. & J. & R. Van Staphorst, of Amsterdam, in Holland, at sixty days sight, for 21,500 florins, in favor of the defendants, and made payable to them, or order. That the defendants, on the 4th of September, in the same year, indorsed the same to L. H. Huder, who indorsed it to Rougemont & Behrends, and that they, on the 25th of November 1822, presented the bill (the same being unaccepted and unpaid) to the drawees, for acceptance, by whom acceptance was refused, and the bill protested for non-acceptance; and that the plaintiff, on the same day, at Amsterdam, to prevent the bill from being sent back to the defendants, did, under that protest, and for the honor and account of the defendants, accept the bill, in writing, and gave notice thereof to the defendants. That the bill was, afterwards, and before payment, indorsed by Rougemont & Behrends to N. M. Rothschild, who indorsed it to M. Rothschild & Sons, who indorsed it to B. J. De Jongh & Fils; and the last indorsees, when the bill became due *and payable, viz., on the 25th of January 1823, at Amsterdam, presented it to the drawees for payment; that payment [*251

[1] See Phillips *v.* Im Thurn, 18 C. B. (N. S.) 694; s. c. 1 L. R., Exch., 463.

was refused ; and the holders, being the last indorsees aforesaid, caused the bill to be protested for non-payment ; and the plaintiff, thereupon, upon the protest, and for the honor and account of the defendants, the first indorsers, paid the bill to B. J. De Jongh & Fils, together with 2000 guilders for the cost of the protest and other charges, and gave due notice thereof to the defendants.

The declaration also contained the usual money counts. Upon which, the general issue was pleaded ; and upon the trial of the cause, a verdict was taken for the plaintiff, for $9852.78 ; subject to the opinion of the court on the following case ; with liberty to either party to turn the same into a special verdict, or bill of exceptions.

It was admitted, that the bill was drawn by John C. Delprat, in favor of defendants ; and that on the 18th day of October 1822, the defendants indorsed it, and transmitted it to Messrs. Rougemont & Behrends, at London ; and that afterwards, the bill was indorsed by Messrs. Rougemont & Behrends to N. M. Rothschild, who indorsed it to M. Rothschild & Sons, who indorsed it to B. J. De Jongh & Fils, as charged in the declaration. And in order to prove that the bill was duly protested for non-acceptance and non-payment, and that after the same was so protested for non-acceptance, the same was accepted, *supra* protest, by the plaintiff, for the honor and account of the defendants, the indorsers ; and that after the said bill was protested for non-payment, the same was paid, *supra* protest, by the plaintiff, for the honor and account of the defendants, the indorsers ; the plaintiff read in evidence the protest for non-acceptance and non-payment, which were admitted by the counsel of the defendants to be read in evidence for that purpose. The indorsements on the bill were :

Pay Mr. L. Huder, or order, value received, New York, 4th Sept. 1822 (Signed) Le Roy, Bayard & Co. Pay to the order of Messrs. Rougemont & Behrends, of London, value in account, New York, 1st October 1822 (Signed) L. H. Huder. Dec. 28, No. 279, presented for stamp at Amsterdam, 22d Nov. 1822. Received, with the augmentation, fl. 13.75 (Signed) Elvester.

The protest for non-acceptance stated, that on the application of the notary to the drawees, N. & J. & R. Van Staphorst, Amsterdam, they refused to accept the bill, stating, "that whereas, the drawer has quite wrongfully drawn his bill, we, therefore, cannot accept the same, and moreover regret, that in order to preserve our just rights against him (meaning
*252] the *drawer), we cannot even interfere in behalf of those to whom this bill was passed."

The protest also stated the following "act of intervention :" And forthwith appeared and came forward those same gentlement, Messrs. Wm. Konig & Co., who declared, that they were actually ready, on account, and for the honor of the firm of Messrs. Le Roy, Bayard & Co., as indorsers upon this same bill of exchange, to accept the said bill, and for the purpose of paying the amount thereof, on the day of its maturity ; and accordingly, the same gentlemen, Messrs. Wm. Konig & Co., in fact did, and have signed the same.

The protest for non-payment stated the same answer to have been given by the drawees, when payment of the bill was demanded, as made when acceptance was applied for, and also that, after the protest for non-payment,

subsequently, the gentlemen, Messrs. Konig & Co., commission merchants, residing in this city, at the Cloveniers Burgwal, duly patented for the past year, as appears by their certificate, dated 24th June, No. 1333, to us the notaries exhibited, who, after having previously examined and read the afore-copied bill of exchange, as likewise this present protest, declared, that they, in consequence of their acceptance, under protest, should honor and pay this bill of exchange, and which, in fact, they have done, for the honor and on account of Messrs. Le Roy, Bayard & Co., as the first indorsers thereon, reserving, at the same time, their right against them, and all the others thereby interested.

The following letters were offered in evidence on the part of the defendants, and objected to on the part of the plaintiff; but the objection being overruled by the court, they were read in evidence as follows:

New York, 18th October 1822.

Messrs. Rougemont & Behrends, London.

Gentlemen:—We have now simply to request you to obtain acceptance of the inclosed draft; we do not wish it negotiated, until it should be first accepted, either for the honor of the drawer, or for ours as indorsers; we only wish that it may appear as having been sent to you for negotiation by the last indorser. It is drawn by the agent of the Amsterdam house, and as we inclose it as such, we wish it to be returned with the regular formality of law, should it not, contrary to our expectations, be accepted. With respect, we are, &c. Le Roy, Bayard & Co.

*It was admitted, that the above letter was not transmitted, nor the contents thereof communicated by Messrs. Rougemount & Behrends, to the plaintiff. [*253

Rougemont & Behrends to Messrs. William Konig & Co., Amsterdam.

London, 19th November 1822.

We beg you to have the inclosed accepted 1st of fl. 21,500, 60 days, on N. & J. & R. Van Staphorst, and hold the same to the disposal of the 2d, 3d and 4th. You will oblige me, by mentioning the day of acceptance, and, in case of refusal, you will have the bill protested. If accepted, please let us know the amount of stamp duties, &c.

The defendants also read in evidence the following extracts of letters from the plaintiff to Rougemont & Behrends.

Amsterdam, 22d November 1822.

Messrs. Rougemont & Behrends, London.

We had this pleasure, 19th instant, and are to-day in possession of your favor. The inclosed fl. 21,500, on N. &. J. & R. Van Staphorst, will be presented for acceptance, and kept to the disposal of duplicate; for stamp duty we debit you in postage-account, which is fl. 14. 5*s*. Messrs. Van Staphorst have deferred the answer whether they will accept said bill till to-morrow. We cannot inform you of the result until Tuesday, and in case of refusal, will forward you the protest.

Amsterdam, 26th of November 1822.

Messrs. Rougemont & Behrends, London.

We refer to our respects of the 22d instant. Messrs. N. &. J. & R. Van Staphorst, after having deferred the acceptance of the bill, fl. 21,500, 60 days,

till yesterday, now refuse to accept; we had also the bill presented for non-acceptance, at the same time, honoring it for account of Le Roy, Bayard & Co., New York. The bill has also been accepted on the 25th of November, and will be due on the 24th of January next. We will keep it at the disposition of the 1st, 3d or 4th, or any copy authenticated by your indorsement.

They also also read in evidence the following letters from the plaintiff to the defendants.

Amsterdam, 26th of November 1822.

Messrs. Le Roy, Bayard & Co., New York.

Gentlemen:—Having been charged by Messrs. Rougemont & Behrends, of London, to procure the acceptance of a second of exchange of bill of fl. 21,500, Mr. John C. Delprat, at Baltimore, of 2d September, to your order, on Messrs. N. & J. & R. Van Staphorst. These gentleman have refused to accept it, expressing their regret at being unable, on this occasion, even *254] to protect your signature, and save you heavy damages. *We have determined to offer it, on the assurance that this intervention would be agreeable to you, and we remit you annexed, in consequence, the protest for non-acceptance, and the act of intervention for the fl. 21,500, becoming due 24th January—accepted 25th November, for your account. At maturity, we will send you all the papers in order, and as it appears certain that Messrs. Van Staphorst will not pay the draft of Mr. Delprat, you can at present admit that you will leave it to reimburse us this intervention, with commission, expenses and interest. We renew, gentlemen, on this occasion, the offer of our services, desirous that it may be agreeable to you to require them.

Amsterdam, 28th January 1823.

Messrs. Le Roy, Bayard & Co., New York.

Gentlemen:—We have the honor to confirm our letter of 26th of November, of which a triplicate is annexed, and to inform you that Messrs. N. & J. & R. Van Staphorst, having persisted in their refusal to pay the bill of exchange of fl. 21,500, of Mr. John C. Delprat, to your order, upon them, we have paid it, under protest, and act of intervention, for your honor. Accompanying this, you receive the papers, consisting of first draft, in first and second. 2. Protest of act of intervention. 3. Amount relative thereto. Will you, gentlemen, please to acknowledge the accuracy of this amount, on 24th January, fl. 21,647, and credit us the amount.

Amsterdam, 2d September 1823.

Messrs. Le Roy, Bayard & Co., in New York.

Gentlemen:—On the 26th of November, past year, we informed you of our having intervened with acceptance, for your honor and account, as indorsers, a draft of fl. 21,500, John C. Delprat's draft, 60 ds. sight, Baltimore, 2d September, in your favor, protested for non-acceptance, against the said drawer, while on the 28th January, we had the honor to inform you that we had paid the above bill, by intervention, for your account; handing you, at the same time, the original bill duly discharged, together with necessary protest and act of intervention. Since that time, we have only received your lines of the 31st January last, by which you thank us for the intervention made by us, but observe, that Messrs. N. & J. & R. Van Staphorst had,

at the same time, informed you, that they had guarantied to us the reimbursement of that draft, for which reason you, refer us to these gentlemen. To our letter returning to you, duly discharged, and paid by us for your account, the afore-mentioned bill, you did not give us any reply. Messrs. N. & J. & R. Van Staphorst have only guarantied us, in case we should not be able to recover our *reimbursement from you, for whose account we interceded; and they are thus entitled to ask from us, that we [*255 enforce that payment from you, to which measure that guarantee obliges us, and the effect of which we cannot but maintain, so that, in order to obtain that payment which you owe us, we have now valued this day on you, at sixty days; $3600, $3400, $1932.80, order Gulian Ludlow, Esq., at the exchange of 50 stg., fl. 22,332, being the exact amount of our intervention, together with interest and charges to this day, as per note annexed, which we recommend to your protection, and request you to honor in payment of the amount expended by us for your account. If you, against our expectation, refuse to pay this bill, we must inform you, that we have given our most strict and precise order immediately to enforce payment by force of law, to which purpose we must then demand from you the original bill paid, with protest, &c., which we request and authorize you, by the present, to deliver to Gulian Ludlow, Esq., of your city, whom we have empowered to give receipt for these documents; which are our property, till you have paid us for them. We are obliged to do this act of *devoir;* in order to obtain final reimbursement; while we hope and trust you cannot take this measure, necessary to us, in any evil light. We remain, very sincerely, gentlemen. Your most obedient servants, William Konig & Co.

The following letter from N. & J. & R. Van Staphorst to the defendants, was also offered in evidence, and objected to on the part of the plaintiff, but the objection being overruled by the court, was read, as follows:

Amsterdam, 25th November 1822.

Messrs. Le Roy, Bayard & Co., New York.

Gentlemen:—We confirm our last respects of 12th inst., and have since received your esteemed letters of the 4th and 5th ult., first of which accuses receipt of our sundry letter up to the 23d of July, inclusive. The draft advised in your esteemed favor of 5th ult., 60 days sight, No. 368, fl. 7000, favor John Telfair, meets due honor at representation, to the debit of your account. We have yesterday received letters from Mr. Delprat, dated 10th, 11th and 15th of October, of which we cannot fail to communicate in a few words the purport. It is such as we might expect; instead of attempting to clear up any of the distressing items alluded to in our letters to him, or to refute any of the arguments which founded our conduct, Mr. D. merely falls on our circulars, as he calls them (written at the time to only four of those who were owing us moneys at Baltimore, and of which *we annex copy in our defence), as having injured his credit; and further declaims against an answer, [*256 which he had been erroneously informed that we had given in the protest of one of his bills; further, Mr. Delprat chiefly writes, that he is very desirous to have his accounts closed, and sent up to him; so that, all items being properly brought therein, it may be approved by him, and our intercourse finally closed. We, of course, shall not be backward in comply-

ing with that wish ; and, on correctness and justice, you will easily believe, that Mr. Delprat can safely calculate. When we wrote to you our last letters, and therein stated the amount drawn by Mr. Delprat, so much above anything that prudence or correctness warranted, we were, indeed, far from prepared for the appearance of a fresh draft from Mr. D., valued (as the French term it) *de but enblanc*, without any light being spread by the letter of advice being attached to it. Fl. 21,500—Baltimore, 2d September, at 60 ds. sight, in your favor. This draft, confirmed in no letter of Mr. Delprat, and dated at such an ominous time, was calculated to yield much matter to think on. If Mr. Delprat knew of the protests of his former drafts, to what ought this new flourish to serve ; if not, what was his intention by drawing such a large sum again, over and above all his former dispositions ; a valuation which, placing all possible folly and imprudence on our side, it could not yet possibly be thought that we should honor, without attempting to explain the matter. We have merely to express our regret at observing again your indorsement on the bill, and notwithstanding your silence in your last favor of 4th and 5th instant, with regard to former interventions, in fact rather disagreeable to us, and whatever might be the intentions of Mr. D., at drawing the bill, we were too much your friends, my dear sirs, not immediately to come forward on account of your signature ; but consulting our legal adviser on this so strange and surprising incident, we were sorry to find, that it was his positive opinion, that in this peculiar case, we ought not to value at all this draft, nor in the least manner to allow that such a draft might properly have been issued by the drawer, and thus that we ought not to consider it at all, nor to meddle with it in the least. So firm was our counsel in that idea, that he was completely against our intervening on behalf of any indorser, as being prejudicial to the system we ought to follow with regard to this bill ; but he thought that it was proper to note in the protest, our reason for non-acceptance and non-intervention. We were thus put in a disagreeable position ; as on the one side, we did not wish to act contrary to his advice, and to depart from a system which he thought necessary to us ; and on the other, we were fully determined, at all events, not to suffer *your signature to go back without being honored. In this predicament, we applied to our friends Messrs. Wm. Konig & Co., who had the said bill in hand, informed them of the whole case, and requested these gentlemen, under our guarantee, to intervene on behalf of your signature, with acceptance and payment of above bill ; which favor these gentlemen have not refused to us, so that, without our prejudice, and completely without yours, we have duly protected your interest. We are well persuaded, you would not wish us to have done any act which we might think detrimental to us, and we thus are confident, that you will duly appreciate our conduct in this truly awkward affair.

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The defendants also read in evidence the following letter from them to the plaintiff :—

New York, January 31st, 1823.

Messrs. Wm. Konig & Co., in Amsterdam.

Gentlemen :—We are favored with your letters of the 26th November, apprising us that Messrs. Rougemont & Behrends, of London, had sent you for acceptance, a draft for fl. 21,500, drawn at Baltimore, by Mr. John C.

Delprat, in our favor, at 60 days sight, upon Messrs. N. & J. & R. Van Staphorst, that these gentlemen had refused the acceptance, and that you had intervened for our honor as indorsers; that you had no reason to believe that it would, at maturity, be paid by the drawees, and that you would thus be called upon to discharge it. Messrs. N. & J. & R. Van Staphorst inform us, under the date of the 25th of November, that they had informed you of the whole case (in relation to this draft) and had requested you, under their guarantee, to intervene. It remains, therefore, but for us to thank you for the honor which you purposed doing us, and to refer you to Messrs. N. & J. & R. Van Staphorst for a release from the responsibility assumed under their guarantee, and for them. We have the honor to be, gentlemen, your humble servants, LE ROY, BAYARD & Co.

It was admitted, that the said bill for fl. 21,500, was drawn several days after the date of it. That the same was drawn by the said John C. Delprat, on his own account, generally, and not on any shipment; and that the said bill was drawn, after the said J. C. Delprat heard from the defendants, that his bills on Messrs. N. & J. & R. Van Staphorst had been protested. That the said J. C. Delprat sent to the defendants an order on Messrs. N. & J. & R. Van Staphorst, dated 4th September 1822 (a copy of which order is hereunto annexed), and that the said bill was sent therewith to the defendants; that there *were other dealings between the defendants and the said John C. Delprat, besides those growing out of the agency [*258 of the said John C. Delprat for the Messrs. N. & J. & R. Van Staphorst; that the defendants, in the course of those dealings, during the summer of 1822, loaned to the said John C. Delprat, a large sum of money on his own account, which loans were carried by them into their general account with the said John C. Delprat; and that the said bill was given to the defendants, by the said John C. Delprat, to repay them for the said advances to him, so far as the same would go.

Baltimore, Sept. 4th, 1822.

Messrs. N. & J. & R. VAN STAPHORST, Amsterdam.

Gentlemen:—You will please hold all balances due to me by you; all the proceeds of goods, sold or unsold, shipped in my name, per Virgin and other vessels, to the order and for the use of Messrs. Le Roy, Bayard & Co., and for which this letter will be your sufficient authority. I remain, with esteem, your obedient servant, JOHN C. DELPRAT.

The judges of the circuit court divided in opinion upon the following points, which were certified to this court: 1. Whether the letters offered in evidence by the defendants, and objected to, ought to have been admitted. 2. Whether the plaintiff had a right, under the circumstances, to accept and pay the bill, upon which the suit was brought, for the honor of the defendants; and is entitled to receive the amount thereof, with charges and interest. The first point was waived by the counsel for the plaintiff; and the whole argument was directed to the second point.

The cause was argued by *Webster* and *Ogden Hoffman*, for the plaintiff; and by *D. B. Ogden* and *Oakley*, for the defendants.

For the *plaintiff*.—The contents of the letter of instruction from Van Staphorsts to J. C. Delprat, not having been communicated to the plaintiff, ought not to affect him in any manner. Any stranger has a right to intervene in case of the non-acceptance, or non-payment, of a bill of exchange. This is an established usage in commercial operations, and contributes essentially to their safety and certainty. To the drawer and indorsers, it saves the damages on the bill, which would be payable on its return, and prevents other heavy expenses.

The guarantee of the drawees, in favor of the plaintiff, was an arrangement exclusively between the parties; and the defendants have no right to look to it in the transaction. *On the part of Van Staphorsts, there was no obligation to give the guarantee, and it was an act for the eventual protection of the plaintiff, in case of the inability of the defendants to repay the amount of the bill; and was not given under any supposition of the liability of the drawees to accept or pay the bill. If either the plaintiff or the Van Staphorsts, could pay the bill separately, both might pay jointly. The person who pays for the honor of another, may look to all the parties to the bill, as well as to the person for whose honor he pays it. The payment of a protested bill for the honor of another, is only a mode of becoming the holder, and although against the will of the parties to it, they thus become debtors to the payer.

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The common law and the law-merchant, as part of the common law, presumes a general standing request to be made by the drawer and indorsers of an unpaid bill, to every friend, to prevent the dishonor of the bill, and the burden of heavy damages in consequence of this. If acceptor *supra* protest, for the honor of an indorser, pays the bill, he may sue the indorser, as he is to be considered as an indorser paying full value for the bill. 1 Esp. 112; Chitty on Bills 441.

For the *defendants*.—This mode of proceeding, by the intervention of a third person, prevents and disables the defendants from proving that the Van Staphorsts were bound to accept, and ought to have paid the bill. This action is not upon the bill strictly, but it is for money paid for the use of the defendants, by one who was an entire stranger to them, and had not right to intervene. A suit cannot be brought upon the bill, because, by its payment, it is extinct. The plaintiff interfered, not for the honor of the drawer or indorser, but for that of the drawees. Laying aside his agency, he undertakes to pay the bill, at the request of the drawees, and they are liable to him, and have stipulated for his protection.

The general rule of law is, that no man can constitute himself the creditor of another, without his consent, express or implied. 6 T. R. 310; 1 Beawes's Lex Merc. 63–4. The only exception to this rule is, the case of acceptance of a bill, *supra* protest. The reasons for this rule are: 1. The law implies consent of the party for whose honor acceptance is made, from the nature of the favor conferred; being gratuitous, and incurring hazard, for the purpose of rendering a service, an acceptor, *supra* protest, may demand recompense for the credit given, from him for whose benefit acceptance is made. And in case he redraws *on such person, his bill ought to be promptly complied with, besides a grateful acknowledgment

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of the favor. Beawes's Lex Merc. pl. 44, 63, 64. Thus it appears, that the motive of the acceptor must be such as to entitle him to gratitude.

2. The consideration in the implied contract, in this case, cannot be solely the benefit conferred on the indorser; as voluntary services may be rendered in all other cases, and no contract will be implied. Can there be an acceptance for the honor of an indorser, under the guarantee of a third person? 1. It confers no honor. 2. Gives no credit. 3. It is not gratuitous or voluntary. 4. It is not founded on a consideration, which can alone lay the foundation of such a contract. Can there be an acceptance for the honor of the payee or indorser, under a guarantee of the drawee of the bill?

3. The drawee cannot do indirectly, what he cannot do directly. The law is settled, that, if the drawee has accepted, *supra* protest, for want of advice of effects, and before the bill is payable, he receives effects, he is bound to discharge the indorser, and advise him that he will pay the bill. 1 Beawes's Lex Merc. 109. Thus, if the Van Staphorsts had accepted, *supra* protest, for the honor of the defendants, and had afterwards received remittances from Delprat, they could not have paid the bill, *supra* protest, for the honor of the defendants; and by the acceptance, under guarantee, it is intended to deprive the defendants of the benefit of these principles of law.

An acceptor for the honor of the drawer, must do it, before he accepts generally, "or any ways engages or obliges himself thereto." Marius, Ex. 30, 31; Malynes, Lex Merc. vol. 1. By parity of reasoning, a person under any obligation to pay, cannot pay a bill, *supra* protest, for the honor of another. 1 Ld. Raym. 88. The consequence of such proceedings might be, that, under a secret guarantee, the drawee might avoid the fulfilment of his obligation to pay the bill. Another objection is, that the indorser has imposed upon him a contract, without his knowledge or consent, and this the law will not permit, under circumstances exposing him to injury. The party affected by this intervention, cannot have the same defence, or the means of the same defence, against a stranger, as against the drawee, as the guarantee may be, and is, generally, secret. The evidence in this case shows, that the defendants did not desire to have the bill paid by any one but the drawees. Rougemont & Behrends, of London, were the agents of the defendants, and they write to the Van Staphorsts, that the holders of the *bill desire that it may be protested, if not paid. The plaintiff, therefore, knew, that it was not the desire of the defendants to save the [*261 bill from dishonor. The plaintiff was the agent of the defendants, to have the bill accepted, if not honored. This is shown by the letter of 19th November 1822. He could not, therefore, interfere to pay the bill; it was against the nature of his agency.

Marshall, Ch. J., delivered the opinion of the court:—The suit was brought in the court of the United States, for the second circuit and district of New York, on a bill of exchange, drawn by John C. Delprat, of Baltimore, on Messrs. N. & J. & R. Van Staphorst, of Amsterdam, in favor of Le Roy, Bayard & Co., of New York, and indorsed by them. The bill was regularly presented and protested, after which it was accepted and paid by the plaintiff, for the honor of the defendants. The jury found a verdict for the plaintiff, subject to the opinion of the court on a case stated by the

parties. The judges of the circuit court were divided in opinion, on the following points: 1. Whether the letters offered in evidence by the defendants, and objected to, ought to have been admitted? 2. Whether the plaintiff had a right, under the circumstances, to accept and pay the bill in question, under protest, for the honor of the defendants; and is entitled to recover the amount, with charges and interest? The first question is understood to be waived. It is a question which was decided by the court, at the trial, and could not arise after the verdict, unless a motion had been made for a new trial.

The second requires an examination of the case stated by counsel. The bill was transmitted by Le Roy, Bayard & Co., to Messrs. Rougemont & Behrends, of London, to have it presented for acceptance, who inclosed it to the plaintiff, in a letter, from which the following is an extract: "We beg you to have the inclosed accepted; 1st, of fl. 21,500, 60 days, on N. & J. & R. Van Staphorst, and hold the same to the disposal of 2d, 3d and 4th. You will oblige me by mentioning the day of acceptance, and in case of refusal, you will have the bill protested." The plaintiff gave immediate notice of the dishonor of the bill, and of their intervention for the honor of the defendants.

Messrs. N. & J. & R. Van Staphorst addressed a letter to the defendants, dated the 26th of November 1822, giving notice that the bill was dishon-
*262] ored; the drawer having no right *to draw, and that they were advised by counsel not to interpose, in their own names, for the honor of the defendants. The letter adds, "In this predicament, we applied to our friends, William Konig & Co., who had the said bill in hand, informed them of the whole case, and requested these gentlemen, under our guarantee, to intervene on behalf of your signature, with acceptance and payment of the above bill; which favor these gentlemen have not refused to us; so that, without our prejudice, and completely without yours, we have duly protected your interest." The defendants also gave in evidence, a letter from the plaintiff, stating that he had intervened, at the request of N. & J. & R. Van Staphorst, and under their guarantee; but that they required him to proceed against the defendants, as preliminary to the performance of that guarantee.

It was admitted, that the bill was drawn by J. C. Delprat, on his own account, and not on any shipment for a debt due from him to the defendants, for advances previously made to him; and that he had given to the defendants an order on N. & J. & R. Van Staphorst, for all balances due from them to him. It is not alleged, that the drawees had any funds of the drawer in their hands.

The plaintiff in this case must be considered as the agent of N. & J. & R. Van Staphorst, and as having paid the bill at their instance; all parties concur in stating this fact. The Van Staphorsts adopted this circuitous course, instead of interposing directly in their own names, under the advice of counsel. They, however, immediately stated the transaction in its genuine colors, to the defendants. It is impossible to doubt, that a person may thus intervene, through an agent, if it be his will to do so. The suspicion which might be excited by proceeding, unnecessarily, in this circuitous manner, cannot affect a transaction, which was immediately communicated, with all its circumstances, to the persons in whose behalf the intervention had been

made; unless those persons were exposed to some inconvenience, to which they would not have been exposed, had the interposition been direct. This is not the case, in the present instance, since it cannot be doubted, that the defendants might have availed themselves of every defence in this action, of which they could have availed themselves, had N. & J. & R. Van Staphorst been plaintiffs. The case shows plainly, that the bill was not drawn on funds, and that the drawees were not bound to accept or pay it. No reason, therefore, can be assigned, why the person who has made himself the holder of the bill, by accepting and paying it under protest, should not recover its amount from the drawer and indorsers.

*This case came on to be heard, on a certificate of division of opinion of the judges of the circuit court of the United States for the southern district of New York, and on the points on which the said judges were divided in opinion, and was argued by counsel: On consideration whereof, this court is of opinion, that the plaintiff had a right, under the circumstances, to accept and pay the bill in question, under protest, for the honor of the defendants, and is entitled to recover the amount, with charges and interest; which is ordered to be certified to the said circuit court.[1] [*263

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*Gerrit Schimmelpennich, and Jan Adrian Toe Lear, aliens, *v.* William Bayard, Jun., Robert Bayard and Jacob Le Roy, citizens of the state of New York. [*264

Bills of exchange.—Promise to accept.—Right to draw.—Authority of agent.

In this case, the court confirm the principle established in the case of Coolidge *v.* Payson, 2 Wheat. 75, that a letter written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it; is, if shown to the person who afterwards takes the bill, on the credit of the letter, a virtual acceptance, binding the person who makes the promise.[2] p. 283.

If the drawees of a bill of exchange, who refuse to honor the bill, and thus deny the authority of the drawer to draw upon them, were bound in good faith to accept or pay the bill, as drawees, they will not be permitted to change the relation in which they stood to the parties on the bill, by a wrongful act; they can acquire no right, as the holders of the bill paid *supra* protest, if they were bound to honor it, in the character of drawees. p. 285.

A bill of exchange was drawn against shipments made to the drawees, but no letter of advice was written by the shipper, to the assignees of the property, and drawees of the bill, ordering the proceeds of the shipments to be applied to the discharge of the bill, but directions were given to charge the bill, generally, to the account of the shipper: *Held*, that the drawees were not bound to accept or pay the bill, in consequence of the proceeds of the shipment being received by them. p. 286.

A merchant has a right, by the usage of trade, to draw on effects placed in the hands of the drawee, by shipment, and the consignee must pay the bills, if the shipment places funds in his hands. p. 288.

It is believed to be a general rule, that an agent, with limited power, cannot bind his principal, when he transcends his power; it would seem to follow, that a person transacting business with him, on the credit of his principal, is bound to know the extent of his authority; yet, if the

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[1] For further proceedings in this case, see 2 Paine 251.

[2] See notes to Coolidge *v.* Payson, 2 Wheat. 66.

principal has, by his declaration or conduct, authorized the opinion, that he had given more extensive powers to his agent, than were in fact given, he would not be permitted to avail himself of the imposition, and to protest bills, the drawing of which his conduct had sanctioned.[1] p. 290.

Certificate of Division from the Circuit Court for the Southern District of New York. This action was instituted in the circuit court of the United States for the southern district of New York, upon nine several bills of exchange, drawn at Baltimore, at sixty days sight, by John C. Delprat, on the plaintiffs, carrying on business under the firm of N. & J. & R. Van Staphorst, merchants, in Amsterdam, and indorsed by the defendants. The cause was tried in April 1825, and a verdict taken for the plaintiffs, for $32,275.95, being for the whole amount of their claim ; subject to the opinion of the court, upon a case agreed.

*265] The judges of the court below, having divided in opinion *on the following points, the same were certified to this court, and the cause was argued upon the case agreed, and the points upon which there was a division of opinion by the judges of the circuit court.

1. Whether the authority of J. C. Delprat, to draw upon the plaintiffs, did or did not amount to an acceptance of the bills ?

2. Whether the bills paid by the plaintiffs, *supra* protest, for the honor of the defendants, were drawn and negotiated, in conformity to the authority and instructions of the plaintiffs to John C. Delprat ?

3. Whether the plaintiffs were bound to accept and pay the bills in question, and whether the same having been paid by the plaintiffs, *supra* protest, for the honor of the defendants, the plaintiffs are entitled to recover the amount of the defendants ?

4. Whether J. C. Delprat was a competent witness ?

5. Whether the letter, offered by the plaintiffs in evidence, and rejected, ought to have been admitted ?

6. Whether the plaintiffs are entitled to a judgment, on the verdict of the jury ?

All the facts, with the correspondence between the parties, which were considered by the court as necessarily connected with a full development of the case, are stated in the opinion of the court.

This cause was argued by *Ogden* and *Oakley*, for the plaintiffs ; and by *Webster* and *Ogden Hoffman*, for the defendants.

For the *plaintiffs*.—This action is upon bills of exchange, drawn by Delprat, and accepted *supra* protest, and paid by the plaintiffs, as they allege, for the honor of the defendants, who were the indorsers on the bills. It is admitted, that the plaintiffs, being drawees of the bills, could accept and pay in this form ; but it is claimed, that the bills were drawn under the arrangement between them and Delprat, and they were bound to accept them ; that arrangement being a promise so to do. This is the same question, as if the defendants in this suit had brought an action against the plaintiffs, on those bills, as accepted bills.

[1] Goodrich *v.* Thompson, 44 N. Y. 324 ; Talmage *v.* Nevins, 2 Sweeny 38 ; Armour *v.* Michigan Central Railroad Co.. 65 N. Y. 111.

Does the authority to draw, create a promise to accept? It is admitted, that the law of France is, that acceptance shall be on the face of the bill. The law of France is the law of Holland. We deny, that the contract between the plaintiffs is such a promise to accept, as that, even if all its provisions and conditions had been complied with, any third party could have taken advantage of it. *As it related to the parties themselves, it was a good promise, when Delprat conformed to the provisions of the arrangement; but strangers had no right to avail themselves of this. The promise in the contract was made to Delprat, and was not assignable, in its very nature. [*266

It is only when the promise points to some bill drawn, or to be drawn, with such minuteness and certainty as to sums, time and parties, as that it may be considered a complete transaction, and a finished agreement, that the promise can avail to the use of third parties; and then it does not so avail, as a promise to accept, but as an actual acceptance. There is no case of a *parol* promise to accept, being considered as an acceptance; and the doctrine has been already carried too far, so as to become the subject of regret. But there is no case which goes as far as the plaintiff claims in this. 3 Burr. 1663; 1 East 98; 4 Ibid. 57; *Wynne* v. *Raikes*, 5 Ibid. 54; *Coolidge* v. *Payson*, 2 Wheat. 66; Starkie 411. All those cases rest on the express promise to accept. *Goodrich* v. *Gordon*, 15 Johns. 6. Why, if the authority to draw was a promise to accept, say, there was also a promise to accept?

The case of *Coolidge* v. *Payson*, 12 Wheat. 66, before this court, settled all the principles relative to an obligation to accept; and this case does not come within the rules of law there established. The principles decided by the court in that case, were, in the language of the court: "Upon a review of the case, this court is of opinion, that a letter, written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill, on the credit of the letter, a virtual acceptance, binding the person who makes the promise." The decision of the supreme court of New York, recognises the same principles. That case was:

Gordon was sending a sloop from New York to Savannah, during war. Hogan wrote a letter of instructions, viz., "should he be captured, ransom the vessel, as low as possible, not to exceed $2000, and your draft on me will be duly honored." He was captured, and drew the bill, for ransom, within the sum, and gave the letter, with the bill. Chief Justice THOMPSON says, "the testimony is full evidence that this letter, at all times, accompanied the bill; that the bill was drawn on the faith of it; and that it was on the faith of this letter, that the plaintiff, who was an indorser, took the bill from the first indorser; and it would be a gross want of faith, now, to disclaim the captain's authority."

The arrangements between the plaintiffs and Mr. Delprat *were personal to him, and could have no effect upon the transactions of others. They were to operate on the general business to be carried on between them, and their main object was, consignments to the plaintiffs. Mr. Delprat might purchase parts of cargoes, and they were willing to "facilitate" all such commercial operations of his, as "they could, without [*267

prejudice to themselves." Under this arrangement, Mr. Delprat purchased and shipped goods, drew for them, and the proceeds of the shipments were carried to his account, and the bills paid, and charged to him. The defendants were not parties in those transactions, and they stood as mere purchasers of the bills in the market. These transactions are similar to many others in the United States, and have never been considered as involving an obligation to accept the bills, of which a purchaser can take advantage. Such a responsibility, on the part of the drawees of a bill, would give to it a greater effect, when in the hands of the assignee, than it had, before the transfer.

There is no usage making the authority to draw an acceptance. There is no case in which it has been ever so held; and it is inconsistent with the negotiable nature of bills. The question, therefore, which has been raised, is met in its most imposing form, with an answer in the affirmative; when acting under such an arrangement as that between the plaintiffs and Mr. Delprat, could the plaintiffs take the goods shipped to them, and refuse to pay to a third person, the bills drawn upon those goods? It is considered they could; such is the mercantile law, and it cannot be otherwise.

Bills of exchange are purchased on the faith of the names upon them, and not under an expectation that there is a collateral obligation to pay them, on the part of the drawee. There is always an expectation, that the bills will be paid: but this expectation does not constitute a legal right against the drawee. In reference to the present bills, it appears from the testimony, that the defendants actually charged Mr. Delprat a commission for indorsing them, without which, they could not have been advantageously negotiated.

It is said, that the shipments were made in trust to pay these bills, and that the plaintiffs could not take the property free from the trust. Let this be so; but who can enforce the trust? Certainly, not the assignees, as the trust is not assignable. To the drawer only, would the parties, under such circumstances, be answerable. The agreement made by the plaintiffs and Delprat, was never performed by him, in any case; and thus, the danger is manifested, of giving to a stranger rights which Delprat would not have had himself. No lien existed on the goods, by which the payment of the
*268] bills could have been *enforced; no such lien has ever been supposed to exist; all liens require possession in the party or his agent. The goods in this case went to Holland; the bills were sent to England; where is the possession to maintain the lien?

If the bills had been drawn upon particular shipments, and the invoices and bills of lading of the goods had been delivered with the bills, the plaintiffs being so advised, by Delprat; then, they must have opened a particular account with the party holding the bills, and have paid them out of the shipments. As to the suggestion of an equitable lien on the goods, for the payment of those bills, it cannot be contended, that the holder of the bills could follow the goods and enforce it. The law of Russia gives a party a right to follow goods, until he is paid, but this is not the law here. The policy of the English law, and that of all commercial countries, is, that the paper is disconnected with the property. It is well-settled law, that where goods are carried, under a permission to draw, the bills of lading being remitted, fixes the property in the consignee, against the creditors of the

consignor, although they get the goods. 1 Bos. & Pul. 563 ; 3 Chitty 550. If A. sends goods to B., and directs him to pay the proceeds to C., this creates no lien in favor of C. 1 Stark. 123, 143 ; 14 East 558 ; Chitty 550.

Mr. Delprat was not the agent of the plaintiffs, under the contract, to draw the bills. He stood in no other relation to them, than that of a corresponding merchant, with like powers. He did not draw the bills as agent ; they were said to be on his own account, nor did he pretend to bind the plaintiffs, by his acts, as his principals. Bayley on Bills 156, 164 ; 3 T. R. 757 ; Chitty on Bills 31. Agency may be inferred from analogous acts, but they must be of that character. There is no proof that similar bills were ever paid by the plaintiffs. The plaintiffs sent to the defendants their contract with Mr. Delprat, to show that they had granted him the credit. In their letter to the defendants, they do not say anything about the authority to draw ; in reference to the credit, they desired the defendants to supervise the transactions of Delprat ; in reference to any bills he might draw, they would take care of themselves, by refusing to accept them.

There is an answer to all the allegations, as to lien, and to an alleged liability to accept. The bills, it is manifest, were not taken on the credit of the drawees.

Oakley, for the defendants.—The mercantile house of the plaintiffs, at Amsterdam, were desirous to extend their business in the United States ; and they employed Mr. Delprat, giving him authority to draw upon them, according to particular directions, and with a credit of *$40,000, with the defendants. He acted under this arrangement for four years, [*269 and then failed ; and the question is, who shall sustain the loss arising in the course of his transactions, out of bills drawn by him, upon the plaintiffs. The business between Mr. Delprat and the plaintiffs, was not confined to the contract, nor were his acts in conformity to it ; and yet the plaintiffs went on, without communicating to the defendants ; who were deeply connected with them in mercantile business, and who had been particularly invited to an agency in their arrangements with Mr. Delprat ; that their confidence in Mr. Deprat, their agent, had diminished, or they proposed to withdraw the agency from him. They suddenly break off the relations between them and Mr. Delprat, and refuse to pay bills, drawn on property which had been shipped to them, and which were to provide for the payment of the bills ; taking the funds, the proceeds of the goods, to the credit of their general balance, arising out of their several transactions ; and they then pay the bills, *supra* protest, for the honor of the defendants, who were indorsers on their bills. Can this be done? can they take the goods, and not pay the bills ?

Had the plaintiffs a right to accept the bills *supra* protest, for the honor of the defendants? He who gives an acceptance for the honor of a party, must do it before he accepts generally, "or any ways engages or obliges himself thereto." 1 Lex Merc. (Malynes); Marius, Advice concerning Bills of Exchange, 30, 31. In 1 Ld. Raym. 88, Lord Holt says, "an acceptor for honor of drawer, is, when a stranger, having no effects of drawer, accepts out of respect to the drawer." The principle there is, that there can be no acceptance *supra* protest, for the honor of any party, when the acceptor is

under any obligation, legal or equitable, as it respects that party, to accept generally. This results from the nature of acceptance *supra* protest.

The rules of law are—1. An acceptor *supra* protest, may demand a recompense, for the credit given him, for whose honor he accepts, Beawes's Lex. Merc. pl. 44 ; and if he redraws, his bill ought to be readily complied with, besides a grateful acknowledgment of the favor. 2. Where a bill is paid *supra* protest, the payee may redraw, with addition of commission, and it ought, in gratitude, to be punctually complied with. Ibid. pl. 63, 64. Such acceptance must, therefore, be gratuitous, with a just motive ; and without connection with, or reference to the interests of, the acceptor. To examine this case, according to these principles :

*270] 1. As between the plaintiffs and the defendants, were those *bills such as should be considered as accepted bills ; or bills which the plaintiffs were "in any ways obliged to accept?" They were ; because they were drawn by Mr. Delprat : 1st. In pursuance of his written authority. 2d. If not in pursuance of a general authority, this authority was to be inferred from the general course of business. An authority to draw a bill, is virtually an acceptance of the bill, drawn in conformity to it. 9 Mass. 11 ; 2 Wheat. 72 ; 2 Gallis. 238.

2. A promise to accept a bill, is an acceptance, if the holder has taken the bill on the faith of the promise ; although the bill is for a pre-existent debt, or whether the promise be before or after the bill is drawn. This is also the law, although the promise be obtained from the drawee fraudulently.

3. A general authority to draw bills, is equivalent to an acceptance of all bills drawn ; or to a promise to accept all.

The facts in this case, were : By the agreement of January 11th, 1818, between the plaintiffs and Mr. Delprat, he was their agent : 1. To form commercial connections. 2. To promote consignments. 3. To act as directed in the agreement. As the plaintiffs' agent, Mr. Delprat was bound : 1st. To act for no other persons in procuring consignments, either from himself or from others. 2d. To use his utmost efforts for the benefit of the plaintiffs. The plaintiffs were bound : 1. To faciliate Mr. Delprat's commercial operations, without prejudice to themselves. The objects of this agreement were, to procure consignments, and that Mr. Delprat should act as the commercial agent of the plaintiffs, generally ; and the means of accomplishing them, were to draw bills, to make advances on cargoes, and for which he was also to use the credit opened with the defendants. To the consignments, there was no limit ; and of course, they could go beyond the credit. From a view of all the letters between the parties, and the evidence, it is manifest, that Mr. Delprat acted as the general agent of the plaintiffs ; to draw bills for advances on consignments, independent of the credit of $40,000, and after it was revoked. 2. That the plaintiffs paid such bills without regard to the balance of accounts with him, down to July 1822 ; 3. That the plaintiffs never set up the objection, that the bills were drawn without authority, until October 1822.

It is contended, that the agency of Mr. Delprat for the plaintiffs, appears : 1. By the written agreements of the parties. 2. By the relative situation of himself and the plaintiffs, he being a commercial agent to procure consignments, by making advances by drafts on the plaintiffs. 3. In the course

of the business, *and the long habit of the plaintiffs in paying the drafts drawn by him. The authority of an agent may by shown: 1. By his written power; or, in the absence of that, by himself. 2. From the relative situation of the parties. 3. From the habits and course of dealing between the parties. 4. From the recognition of the acts of the agent, by the principal, or similar acts. The evidence establishes the agency of Mr. Delprat, for the plaintiffs, upon all these principles. As to the bill for 1000*l.*, of July 31st, 1822: 1st. It was paid before it was due: it was drawn at 60 days; presented on the 14th September, and paid on the 1st October following. 2d. There can be no payment *supra* protest, until a demand and refusal of payment regularly made. This refusal cannot be until the bill falls due. Chitty on Bills 318.

Had the plaintiffs a right to pay those bills, *supra* protest? 1. In case of acceptance *supra* protest for honor of the indorser, the bill must be presented for payment, and duly protested. Chitty 313. 2. If the drawee has accepted *supra* protest, for want of funds or effects, and afterwards receives effects, he is bound to discharge the indorser, and to advise him that he will pay. Beawes's Lex Merc. 109. Thus, there may be an obligation to pay, when there was none to accept. As to the bills of July 31st, 1822, for 1000*l.* and 5000 guilders, they were drawn on shipments by the Virginia. The plaintiffs were so advised; the consignment of the property was received by the plaintiffs, after protest for non-acceptance, and before the bills were paid. They were, therefore, bound to pay those bills out of the proceeds of those shipments. The plaintiffs cannot take this property, and apply it to their general account with Mr. Delprat, refusing to pay the bills drawn on advances on the very property. The shipments, when they were advised of the facts, were received by them, subject to an equitable lien, in favor of the holders of their bills; and they have a right to their application to the payment of the bills.

As to the bills paid before the arrival of the ships. 1. Payment, *supra* protest, is evidence of money paid to the use of the defendants. It is an equitable action, and admits of any equitable defence. Can it be sustained, after effects to pay the bills have come into the hands of the plaintiffs? Does not the receipt of the proceeds of the property, reimburse the plaintiffs in the payment? Equity will frequently give a party relief, in effect amounting to a lien, though not in possession of the goods, to have his demand satisfied out of the proceeds of the goods, in preference *to any other party. Chitty's Commercial and Maritime Law, 550–1. [*272 The defendants ask the application of this principle to the bills upon which this suit has been instituted.

Ogden, on the same side.—This action is to oblige the defendants to pay the amount of bills paid for their honor, and which they say should have been paid by the drawees. The plaintiffs received the property, against which the bills were drawn; and the question is, whether property could be received, and the bills drawn upon it be left unprotected? The consignee of property is nothing more than a trustee, to receive the property, and appropriate the proceeds to the use of the consignee, and he must conform to the directions of the consignor. In this case, the bills of exchange drawn by Mr. Delprat, were the direction as to the appropriation of those funds.

It is no answer to this, to say, that the consignor is a debtor to the consignee; and that upon the principle, that a consignee can pay his general balance out of goods which come into his hands, the plaintiffs would make use of the funds, for their own purposes. They could not get possession of the property, but by a wrongful act; as they had not a right to receive it on any other terms, but those prescribed by the shipper. Those bills, or the letters of advice, state, that they were drawn for advances on goods shipped.

1. May not the drawees of the bills be considered as assignees of this property, bound to appropriate the proceeds to the payment of the bills? This would be the case in equity. In New York, the point has been decided. If the consignee takes goods, he takes them subject to the lien on them. The evidence shows, that Mr. Delprat was the agent of the plaintiffs, engaged in making shipments to them, against which he drew bills, similar to those on which this suit is brought; and that between January and July 1822, he shipped goods to the plaintiff to a very large amount, upon which bills were drawn, and which were accepted by the plaintiffs, and were paid. Mr. Delprat was the general agent of the plaintiffs. Paley on Agency 2; 1 Wash. 19; 11 Mass. 55.

It is said, an authority to draw, is not an agreement to accept. What else is it, but an implied promise to accept? In *Coolidge* v. *Payson*, 7 Wheat. 66, this court has decided the point as to a particular bill; these are bills of a particular class. It is not necessary, that the bill shall express to be drawn as agent, to bind the principal; the contrary practice is universal, and it was the practice not to draw the bills of those parties in that form. If it shall be said, that Mr. Delprat had authority *to draw *273] bills, under particular agreement, and that those bills were not drawn in conformity with that agreement; the answer is, that the letter of the plaintiffs, announcing their refusal to accept the bills, does not state the refusal to have been on that ground. It has been decided, that if underwriters refuse an abandonment, for reasons assigned, they cannot, afterwards, on the trial, allege other reasons for not paying the loss. The objections made by the plaintiffs to the bills, were, that accounts were not kept and settled by Mr. Delprat; and that a balance was due to them for their shipments; not because of mal-agency. The facts of the case show that those bills were drawn in conformity with instructions.

But even if they had not, still the principals were bound. The law is so settled, even if the agent violates instructions. 2 Kent's Com. 484. Another point in this case, which is in favor of the defendants, rests on the particular situation of the two houses of trade, formed by the parties to this cause. Whatever may be the law as between strangers, the attempt made by the plaintiffs to throw those bills on the defendants, is a violation of the good faith which had always existed between them. Between them, the highest confidence existed. The defendants were agents for a large amount of the stocks of the United States, held by persons in Holland, and which were under the care of the plaintiffs; and they had large transaction for mutual benefit. In 1818, Mr. Delprat was appointed, by plaintiffs, their commercial agent, and was recommended to the particular care of the defendants, who were asked to "facilitate his operations." The agreement with Mr. Delprat was inclosed to the defendants, for the purpose of showing to

them the nature of his agency, and informing them of his powers, and of the credit they had given to him. The defendants were to render such services, as would enable Mr. Delprat to execute the purposes of the contract. Thus were the defendants brought into a close connection with Mr. Delprat, for the purpose of promoting the designs and interests of the plaintiffs; and those bills, believed by them to be drawn in the regular course of the transactions, authorized by the relations between Mr. Delprat and the plaintiffs, were indorsed to "facilitate the operations" of Mr. Delprat, supposed to be beneficial to all parties.

It is said, that the plaintiffs were, by the contract entered into by them with Mr. Delprat, to have nothing to do with the drawing of bills. They did not so construe the agreement, nor did the plaintiffs so consider it. The construction of commercial agreements is best made by the understanding of the parties to them, and the *use made of the same. The evi- [*274
dence shows, that the construction which was assumed as proper, by the defendants, and upon which they acted, in indorsing those bills, had been frequently affirmed, in the course of former transactions by the plaintiffs.

Marshall, Ch. J., delivered the opinion of the court.—This action was brought on nine bills of exchange, drawn by John C. Delprat, on the plaintiffs, and indorsed by the defendants, a list of which follows:—

Baltimore,	May 23, 1822,	500*l.*,	favor of J. P. Craft.
"	" 27, "	200,	favor of defendants.
"	" " "	300	"
"	" " "	500	"
"	June 12 "	1000	"
"	" 18 "	300	"
"	July 31 "	1000	"
"	" " "	10,000*fr.*	"
"	" " "	5000	"

These bills were regularly protested for non-acceptance and non-payment; but were accepted and paid, *supra* protest, by the drawees, for the honor of the defendants, the indorsers. The jury found a verdict for the plaintiffs, subject to the opinion of the court, on a case stated. The judges were divided in opinion, on the following points, which have been certified to this court: 1. Whether the authority of John C. Delprat to draw on the plaintiffs, did, or did not, amount to an acceptance of the bills? 2. Whether the bills paid by the plaintiff, *supra* protest, for the honor of the defendants, were drawn and negotiated in conformity to the authority and instructions of the plaintiffs to J. C. Delprat? 3. Whether the plaintiffs were bound to accept and pay the bills in question, and whether, the same having been paid by the plaintiffs, *supra* protest, for the honor of the defendants, the plaintiffs are entitled to recover the amount of the defendants? 4. Whether J. C. Delprat was a competent witness? 5. Whether the letter offered by the plaintiffs in evidence, and rejected, ought to have been admitted? 6. Whether the plaintiffs are entitled to a judgment on the verdict of the jury?

These questions require an examination of the relations which existed

between the drawer of these bills, and the drawees. On the 11th January 1818, the plaintiffs entered into a contract with John C. Delprat, of which the following is a copy :

The undersigned N. & J. & R. Van Staphorst, merchants, in this city,
*275] and John C. Delprat, of Philadelphia, present the *last, choosing for the present act his *domicilium citandi et exequendi*, at the office of the youngest notary here, have entered with one another into the following arrangement and stipulations :

ARTICLE I. The second undersigned (viz., J. C. Delprat) shall, to the benefit of the first undersigned (N. & J. & R. V. Staphorst), manage in the United States of America, the mercantile interest of said first undersigned, consisting chiefly in the forming of new solid connections, and procuring of consignments ; and shall further perform everything the first undersigned will appoint him to do as their agent.

ART. II. The second undersigned binds himself to procure to no person or persons in this kingdom, any consignments or commissions from himself or any other, except to the first undersigned ; but on the contrary, to use his utmost exertions towards the benefit of the mercantile house of the first undersigned, they being willing on their side to facilitate all such commercial operations as might benefit the second undersigned, without their prejudice.

ART. III. The first undersigned allows to the second undersigned the faculty to value on them direct, or payable in London, at no shorter date than sixty days sight, for such moneys as the second undersigned shall employ to make advances on whole or part of the cargoes of current articles, viz., to the amount of two-thirds of the invoice price of articles laden in chartered vessels, and of three-fourths, in vessels owning to the shippers, and likewise consigned to the first undersigned ; it being left to the knowledge and prudence of the second undersigned, to judge of the invoice price of the afore-mentioned goods ; and it being understood, that the second undersigned, at the same time that he gives advice of his drafts furnished in the above manner, shall inclose and forward, or cause to be inclosed and forwarded, to the first undersigned, the bill of lading and invoice of the goods on which the above-mentioned advances might have been made ; and shall cause the above goods to be duly insured in America, to that effect, that the policy of said insurance be delivered up, duly indorsed, to the second undersigned, and rests with him until the end of the expedition. It being further a fixed rule, that the first undersigned must never come in the predicament of having made any advances on cargoes, which are not duly insured in America. The first undersigned further oblige themselves to open a credit of $40,000, say forty thousand dollars, with Messrs. Le Roy, Bayard & Co., New York, to be made use of by the second undersigned, in case any advances are required on consignments to be made to the said first undersigned, that credit
*276] be renewed *every time by the said first undersigned, after the arrivement of the consigned goods shall have been duly advised by them. If, however, against all probability, it happened, that the multiplicity of consignments rendered it desirable to the first undersigned to stop for a while further consignments, then the said first undersigned retain the faculty to prescribe to the second undersigned such limits and orders as they shall find proper, according to circumstances, which orders and limits the second undersigned shall be obliged to follow.

ART. IV. As sometimes an opportunity might offer to procure a good consignment to the first undersigned, on condition of their taking an interest in that expedition, they authorize the second undersigned to make use likewise of the above-mentioned credit of $40,000, to interest the first undersigned, in such expeditions, for a proportion not larger than one-fourth, with this restriction, that said proportion must never exceed the amount of $10,000, say ten thousand dollars. The choice of the articles to be shipped to the first undersigned on their own account, being left to the commercial knowledge of the second undersigned. This authorization will be considered as renewed after the termination of each expedition, viz., after that termination shall have been duly advised to the second undersigned, by the first undersigned.

ART. V. That the first undersigned, in consideration of the services to be rendered by the second undersigned, shall grant to the second undersigned, one-third of the amount of the two per cent. commission, to be earned by the first undersigned on the consignments to be procured, and further one per cent. from the purchase of such goods which might be shipped for the account of the first undersigned, as is more amply specified in article four; it is to be understood, that then no benefit arises from the third of the two per cent. commission of those goods; and finally, that the second undersigned is promised an allowance for traveling, and other expenses, the sum of $2000, say two thousand dollars, per annum, to commence with the first of February 1818.

ART. VI. These arrangements shall last for the term of two consecutive years, and thus end with the last day of January 1820. It being understood that (in case of no denunciation to the contrary, made by any of the parties aforesaid) this contract will be continued from year to year, but that in case one of the parties should desire the annullation of the present contract, said party shall be obliged to signify his intention to the other party, four months before the expiration thereof.

Art. VII. Ultimately, it has been stipulated, that in the unhoped for and wholly unexpected case of any differences taking place between the undersigned, respecting the fulfilment of any *of the articles above [*277
mentioned, those disputes or differences shall be entirely adjusted and decided by the decision of two arbiters, to be chosen in the city of Amsterdam, one by each party, who, in case of difference of opinion between them, shall have the faculty of appointing a third or super-arbiter, which arbiters then must decide and finally terminate all such differences; both parties renunciating to all law measure and impediments, and especially to the faculty of laying any arrests or hindrance on moneys, goods or possessions, belonging to any one of the parties undersigned, all such aforesaid measures to be considered now and then as null, void, and of no effect whatsoever, the consequences thereof to be suffered by the party which might have made use of the aforesaid measures. Of the present act, have been made two copies, &c.

Amsterdam, 11th January 1818.

(Signed) N. & J. & R. VAN STAPHORST.
JOHN C. DELPRAT.

A copy of this contract was transmitted by the plaintiffs to the defendants, in a letter dated the 21st of the same month, a copy of which follows:—

Amsterdam, 21st Jan. 1818.

Messrs. Le Roy, Bayard & Co., New York. (Confidential.)

Gentlemen:—Thinking it useful for the extension of our commercial relations in the line of consignments (one of the branches of our establishment), to appoint an agent to that purpose in the United States of America, we have been decided by the confidence we place in the character and commercial notions of Mr. John C. Delprat, to appoint that gentleman to the aforementioned trusts, in which choice we have chiefly been directed by the reliance we have on the principles of loyalty and prudence, which must actuate a person employed during such a long period by your worthy house. We judged it necessary for the obtaining of said purpose, to leave at the disposal of Mr. Delprat, sufficient means to facilitate his exertions, viz., by opening with you, in his favor, a credit, to be made use of by him, in the manner pointed out in the inclosed abstract of our contract with said gentleman. We, therefore, request and authorize you to furnish Mr. Delprat to the extent of $40,000, say forty thousand dollars (to be made advances with by him on such cargoes or part thereof, as he might procure the consignment of to our house, and to be made use of to interest our house in part of cargoes to the fore-mentioned purpose). The credit to run for the space of two years, unless countermanded by us, in such a manner that when Mr. Delprat has availed himself of the whole or part of said credit of $40,000, that credit or part of the same must be considered renewed, when you receive our approbation of the said disposition of Mr. Delprat.

*278] *You will observe, the sole object of the mission of Mr. Delprat, is, to obtain solid consignments from good houses throughout the U. S., and the disposal of the credit opened in his behalf with your house, is exclusively intended to facilitate said business. In this important matter, it will be a point of great security, and as such, eminently satisfactory to us, that our said agent may be able to have recourse in every circumstance, to wise and friendly counsel, and we, therefore, request you to assist Mr. Delprat, as far as opportunity may offer, with the lessons of your long experience, particularly with respect to those transactions for which, by virtue of the credit afore-mentioned, we may have recourse to your cash, it being, as you will observe, a material point that we are secured, that the moneys he may dispose of will have no other than the destination just mentioned. To this effect, we authorize you, gentlemen, in case of moral certainty, that the moneys Mr. Delprat should demand from you, by virtue of the above-mentioned credit, would not be employed in the afore-mentioned manner, and earnestly request you not to pay, and to refuse him, any moneys whatsoever on account of the above credit.

In general, as a trust of this nature, which is to have its effect at such a distance, is always a delicate matter, we must claim and dare expect from your known sentiments towards us, that you will give the strictest attention to the line of conduct followed by Mr. Delprat; and if, unexpectedly, that line of conduct could appear in the least exceptionable, we mean, either imprudent or equivocal, then, gentlemen, do give us, with all the frankness of long-experienced friendship, your ideas respecting that subject, and be

perfectly secure that every information, of what nature soever, will not only be thankfully acknowledged by us, but received with the most religious secrecy. We have now, gentlemen, only to request your kind offices in favor of Mr. Delprat, and to solicit your friendly co-operation towards the attaining the object of his mission, which we are fully persuaded can be much facilitated by your kind recommendation to the numerous friends you have in different parts of your country. Be assured, gentlemen, of the high sense we have of the obligation we will have to you, for your friendly services through the whole of the business we just now took the liberty to explain to you, and of the earnest desire we have to be often in the opportunity of rendering you the like, or any services in our power. Referring for commercial information to our general letter of this date, we are, with sincere regard, gentlemen, your most obedient servants,

N. & J. & R. Van Staphorst.

(Indorsed)—Confidential. Amsterdam, 21st of January 1818. N. & J. & R. Van Staphorst. Received, March 19th. Answered, 24th do.

*This letter was answered by Le Roy, Bayard & Co., in the following terms: [*279

PRIVATE.

New York, 24th of March 1818.

Messrs. N. & J. & R. Van Staphorst, Amsterdam.

Gentlemen:—We have the honor of replying to your esteemed favor of 21st of January, acquainting us with the arrangement you have made with our mutual friend, Mr. Delprat, who has undertaken the agency of procuring you consignments from this country. In the furtherance of the object, we shall be very happy to render our services useful, and beg to offer our best wishes for the success of Mr. Delprat's operations in your behalf. Due note is taken of the credit you are pleased to open to that gentleman with us, to the amount of 40,000 dollars, subject to renewal, as fully expressed in your letter. We doubt not, from the knowledge we possess of Mr. Delprat's character, that he will fully justify the confidence you repose in him; and though he may, under existing circumstances, find it difficult to enlarge to the extent that could be mutually wished, we are persuaded that no exertion will be wanted on Mr. Delprat's part, to reap the utmost benefit from the mission instrusted to him. Believe us, with honor and esteem, gentlemen, Your obedient servants,

Le Roy, Bayard & Co.

It is proper to observe, that several merchants of Holland, whose agents the plaintiffs were, had become large holders of government stock, and of shares in the Bank of the United States. Le Roy, Bayard & Co. had been employed to draw the interest and dividends, and to remit them to Europe. The credit of $40,000, therefore, which was raised for Delprat, with Le Roy, Bayard & Co., was merely the application of so much of their funds, in the United States, to the business of his agency, in aid of the bills he was authorized to draw on them. The continuance or discontinuance of this credit, might depend on the eligibility of continuing this mode of remittance, as well as on the withdrawal of their confidence in their agent. Several letters passed between the plaintiffs and defendants, respecting their transactions, in consequence of this credit; which manifest, unequivocally, the

desire of the plaintiffs that its amount should not be exceeded, but which betray no want of confidence in Delprat. In a letter of the 24th June 1819, they renew the credit of $40,000 ; and add, "at the same time, we confirm our former orders not to exceed said amount, for our account. In case you have funds in hand, for any of our institutions, and you think proper to remit us, for the same, Mr. Delprat's bills on us, (the nature of which you
*280] are well acquainted with), you allow him then, the same credit, *which you do to all persons from whom you take bills, in persuasion of their solidity, and of the reality of the transaction on which the bills are issued."

In answer to this letter, the defendants say, on the 24th of September 1819 : "You also accord us the permission to remit this gentleman's (Delprat's) drafts, for any moneys we may have on hand, belonging to your various institutions. The confidence which we mutually have in this gentleman's character, must, with us, act in lieu of vouchers, to exhibit the reality of transactions, which may give origin to such drafts ; the whole of this gentleman's operations having been hitherto beyond our immediate knowledge."

This correspondence continued until the 12th of May 1820, when N. & J. & R. Van Staphorst addressed a letter to Messrs. Le Roy, Bayard & Co., of which the following is an extract: "There being frequent opportunities of drawing here, now, on New York, we will probably have, for some time to come, occasion to dispose of the dividends which you will receive for our account, in October next, and so on; and we have, therefore, directed Mr. Delprat not to make use of his credit of $40,000, lately opened in his favor. We thus also request you, by the present, to consider the same as annulled, until we may again renew the same."

The agency of Delprat continued, after this revocation of his credit with Le Roy, Bayard & Co. He continued to solicit consignments for their house in Amsterdam, and to draw bills on them for advances, without any other alteration in his powers, than is contained in a letter of the 6th February 1821, which contains the following clause. "The advances, therefore, to be made by you on our behalf, on shipments to our consignments, either from funds belonging to us, in your hands, or by drawing and indorsing the shipper's draft, must not exceed, henceforth, one half of the 'true invoice.'" As a compensation for this reduction of the advance to be made in the United States, J. & N. & R. Van Staphorst engaged, on the arrival of the shipments, to remit to the consignors, the estimated value of the cargoes, in bills on their house in the United States. Delprat acknowledged the receipt of this letter on the 17th of April 1821, and promised to conform to its directions.

The correspondence between the plaintiffs and defendants, respecting Mr. Delprat's agency, appears to have ceased on the 12th of May 1820, when his credit with the house of the latter was annulled. At least, no subsequent letter appears in the record, until the 9th of July 1822, when the plaintiffs announced to the defendants, the sudden termination of their connection with Mr. Delprat ; whose conduct, they said, had been so imprudent as to oblige them, at the same time, to protest *several of his
*281] drafts. Their knowledge, they say, of the former intercourse between Le Roy, Bayard & Co. and Mr. Delprat, and of the great regard felt for him by those gentlemen, induce them to state the chief reasons

which compelled them to this measure. These are, his irregularities in keeping his accounts, and omission to furnish an account since the 31st of December 1820, although the balance then due from him was fully $7837.54, being "for the proceeds of gin consigned by us to him; for proceeds of drafts, issued by him on us, for our account, in order to employ the proceeds to make prudent advances with," &c. They then proceed to state, that Mr. Delprat owed, at that date, upwards of 82,000 florins, against which he might be entitled to a credit of $6000. The account, they say, has accrued to this height, in a great measure, "in consequence of shipments made to him for his account, in full confidence of his making us, for the amount, remittances; which we, till now, have not received; though the goods were with him for many months." The letter complains of the large advances made by Mr. Delprat, on consignments, notwithstanding their repeated remonstrances; and dwells on the high opinion they had entertained of him; "his integrity," they say, they "even now will not question." Thus, the letter proceeds, "were matters situated, when last Friday, contrary to anything we could expect or anticipate, we found ourselves drawn upon by Mr. Delprat, for 200*l.*, 300*l.*, and 500*l*; issued, as he informs us, for the amount of purchases which he is making of articles not yet shipped; and on the other hand, 2d, 500*l.*, fl. 1250 and 1750, issued on us, as advances made to Mr. Krafft, already so much our debtor, on shipments, which he made some long time ago, and which Mr. Delprat could clearly perceive, that taken at an average, did not diminish the balance due by him." The letter proceeds to state, in substance, that they could choose only between the alternatives, of allowing the debt due from Mr. Delprat to be swelled to a still larger amount; and protesting his bills. They had chosen the latter, however it might pain their feelings. They express their regret to find, that among the drafts to be protested for non-acceptance, and perhaps, afterwards, for non-payment, are several indorsed by the defendants, for whose honor, however, they had intervened.

This letter was received by the defendants, on the 1st day of September 1822. The immediately obtained from Mr. Delprat an order on the plaintiffs, to hold at their disposal all the proceeds of the goods shipped in his name, by the Virgin and other vessels, and all balances due to him. This order was inclosed to the *plaintiffs in a letter of the 7th September 1822, in which they say, "We can of course only consider this [*282 order as applying to the balance that may possibly accrue to him, upon the settlement of your account; and if any shall accrue, we will thank you to take such legal steps, which you may deem necessary, as will place it with us, without fear of contention. His drafts, which you may have paid for our account, will probably furnish sufficient authority to enable you to do so."

At the trial, John C. Delprat was examined as a witness. He deposes, that the several bills of exchange, on which this suit was instituted, were drawn in his capacity as agent, on account of, and for the purpose of making advances on shipments consigned to the plaintiffs; and, except that in favor of J. P. Krafft, for 500*l.*, were accompanied by letters of advice. That during the whole period of his agency, he was in the habit of making shipments on his own account, and of drawing for advances on the said shipments, precisely in the same manner as when they were made by

others; that this was done with the full knowledge and approbation of the said N. & J. & R. Van Staphorst, who never found fault with him for doing so: but to encourage him to make such shipments, gave him credit for one-half the commission, upon the sales of the shipments, so made upon his own account. On his cross-examination, the witness stated, that the bill for 500*l.* in favor of Krafft, was drawn for shipments by the Edward, Jason and May Flower. He cannot say, when the Edward sailed. The Jason had arrived, and the May Flower had sailed, before the bill was drawn. Krafft was at that time indebted to the plaintiffs. The bill was issued to Krafft, but was returned to witness, who sent it to the defendants; the bills of lading and the invoices, were not sent with it. The three bills of the 27th of May, for 1000*l.*, were drawn on account of shipments, in his own name, by the Virgin; she sailed about the 30th July; they were not accompanied by invoices or bills of lading. The two bills of the 12th and 18th June, for 1000*l.*, and for 300*l.*, were drawn on tobacco, shipped by the Henry, belonging to the witness and to Mr. Krafft; the bill of lading and invoice did not accompany them. The three bills of the 31st of July, were drawn on the shipments by the Virgin, generally; they were not accompanied by bills of lading or invoices. The defendants received a commission for indorsing his bills on the plaintiffs. In making the advances on shipments on his own account, he drew on the plaintiffs, sent his bills to the defendants, to whom they were charged; and then drew on the defendants, as the money was required, either on his own shipments, or the shipments of others; which bills were
*283] credited to the *defendants. He understands that all his transactions with the defendants were carried, by them, into their general account with him. These transactions were not confined to his agency for the plaintiffs. He remains considerably indebted to them. He was concerned in shipments with Mr. Krafft, and did a great deal of business with him; but did not consider himself as a general partner.

The connection between the plaintiffs and J. C. Delprat, was formed by the agreement of the 11th January 1818. He was constituted their agent for purposes therein described; and received such powers as were deemed sufficient to enable him to perform the duties which devolved on him. That duty was, to manage their mercantile interest in the United States, "consisting chiefly in the forming of new solid connections, and procuring of consignments." To enable him to perform this duty, he was allowed the faculty to value on them direct, or payable in London, at no shorter date than sixty days sight, for such moneys as he should "employ, to make advances on the whole, or part of cargoes of current articles;" viz., to the amount of two-thirds of the invoice price, &c. It being understood, that his letters of advice should be accompanied by the bills of lading and invoices of the goods, on which the advances may have been made.

John C. Delprat, then, had no general authority to personate the plaintiffs in all respects whatever; but was an agent appointed for particular purposes, with limited powers, calculated to subserve those purposes. To procure consignments, it was indispensable, that he should advance money to the consignors, and this money was to be raised by bills on the plaintiffs. But he was authorized to draw only for a special purpose, and to a limited extent; out of the limits assigned to him, he had no power. The plaintiffs not being, as a matter of course, the acceptors of every bill he might draw,

must have performed some act in relation to the particular bills, which imposes on them, in law, the character of acceptors.

This point was considered by this court, in the case of *Coolidge and others* v. *Payson and others*. Coolidge & Co. held the proceeds of a cargo claimed by Cornthwaite & Cary, whose claim depended on the decision of this court, of a case depending therein. Cornthwaite & Cary were desirous of drawing these funds out of the hands of Coolidge & Co., and offered a bond, with sureties, as an indemnity, in the event of an unfavorable decision. Coolidge & Co., in a letter to Cornthwaite & Cary, state some formal objections to the bond, and add, "we shall write to our friend Williams, by this mail, and will state to him our ideas respecting the bond, which he will probably determine. If Mr. Williams *feels satisfied on this point, [*284
he will inform you; and in that case, your draft for $2000 will be honored." In answer to the letter addressed by Coolidge & Co. to Williams, on this subject, he declared his satisfaction with the bond, as to form; declared his confidence, that the last signer was able to meet the whole amount himself; but that he could not speak certainly of the principals, not being well acquainted with their resources. He added, "under all circumstances, I should not feel inclined to withhold from them, any portion of the funds for which the bond was given." On the same day, Cornthwaite & Cary called on Williams, who stated the substance of the letter he had written, and read a part of it. One of the firm of Payson & Co. also called on him, and received the same information. Two days afterwards, Cornthwaite & Cary drew on Coolidge & Co., for $2000, and paid the bill to Payson & Co., who presented it to Coolidge & Co., by whom it was protested. Payson & Co., sued them as acceptors. The court instructed the jury, that if they were satisfied that Williams, on the application of the plaintiffs, made after seeing the letter from Coolidge & Co. to Cornthwaite & Cary, did declare, that he was satisfied with the bond referred to in that letter; and that the plaintiffs, on the faith and credit of the said declaration, and also of the letter to Cornthwaite & Cary, did receive and take the bill in the declaration; they were entitled to recover in the action. The jury found a verdict for the plaintiffs; the judgment on which was affirmed in this court.

In this case, the drawee had written a letter to the drawer, promising to honor his bill for $2000, if Mr. Williams should be satisfied with a bond of indemnity, which had been placed in their possession. Mr. Williams declared his satisfaction with it, both to the drawer and holder of the bill, within two days after this declaration. In this case, the promise to accept was express, and applied to a particular bill, the precise amount of which was specified in the promise. The court, in its opinion, reviews several decisions in England, on this point; in all of which, the promise to accept was express; and in some of which, the court declared the opinion, that the promise ought to be accompanied by circumstances, which may induce third person to take the bill. After reviewing these cases, this court laid down the rule, "that a letter written within a reasonable time before or after the date of the bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person, who afterwards takes the bill on the credit of the letter, a virtual acceptance, binding the person who makes the promise." *It cannot be alleged, that these bills are [*285

brought within this rule. The plaintiffs, therefore, cannot be considered as acceptors of them.

But although the plaintiffs cannot be viewed as the acceptors of these bills, it does not follow, necessarily, that they can maintain the present action. To entitle them to maintain it, the court must be satisfied, that the payment is, in fact, what it professes to be, a payment really for the honor of the indorsers. If the drawees, thus refusing to honor the bill, and thus denying the authority of the drawer to draw upon them, were bound in good faith to accept or pay, as drawees; they will not be permitted to change the relation in which they stand to the parties on the bills, by a wrongful act. They can acquire no rights as the holders of bills paid *supra* protest, if they were bound to honor them in their character of drawees. The single and unmixed inquiry, therefore, on the second and third questions, is, whether the drawees were bound to accept or to pay these bills. And first, were they so bound, because the bills were drawn in pursuance of the authority they had given to the drawer? This demands a more critical examination of the evidence, than was required when considering the first question.

It is apparent, from the contract of the 11th of January 1818, that Mr. Delprat came to the United States, as the agent of N. & J. & R. Van Staphorst, to manage their mercantile interest; "consisting chiefly in forming new solid connections, and procuring of consignments;" and also with commercial views of his own. The principal object of the contract is to define his authority, and to regulate his conduct as agent. He is allowed to draw on the plaintiffs, for such moneys as he should employ in making advances on current articles, consigned to his principals, to the amount of two-thirds of the invoice price of articles laden in chartered vessels. He was still further restricted, in his advances, by orders received long before the bills in question were drawn, to one-half of the true invoice. Mr. Delprat's authority, then, to make advances, was limited, at the date of this transaction, to one-half the invoice price. One, and, perhaps, the most usual mode of conducting business of this description, is to draw in favor of the consignor, or to indorse his bill. The agent might, however, if not otherwise instructed, draw immediately on his principal, and advance the money to the consignor, which was raised by the bill. In either case, however, drafts beyond one-half the invoice price of the consignments actually made, would exceed the authority given. Circumstances may exist, which would impose on the principal the obligation to pay such drafts; but the question we are now considering, relates only to the authority under which the bills were drawn. That authority *restricted the agent in the amount of his drafts, to one-half the invoice price of the articles actually consigned; and also required him to accompany his letters of advice, with bills of lading and invoices.

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Were the bills in question drawn in conformity with powers and instructions thus limited? The first bill on the list is for 500*l.*, drawn in favor of J. P. Krafft, on the 23d of May 1822, and indorsed by him to the defendants. The letter of advice states this bill to be drawn on account of shipments by the Edward, Jason and May Flower, as by letter of 21st, which is to be charged to account of P. Krafft. The letter of the 21st is not in the record. The shipment by the Jason had arrived, and the May Flower had

sailed, before the bill was drawn. Mr. Krafft was, at the time, indebted to N. & J. & R. Van Staphorst. The bill was returned by Krafft to Delprat, and then indorsed by the defendants. It does not appear, certainly, who remitted this bill; although the probability is, that, as it was indorsed by the defendants, not as purchasers, but for a commission; it was remitted by Delprat, to whom it was returned by Krafft, as is stated in Delprat's testimony, or by some person to whom Delprat sold it. It is true, that he further states, that, after the bill was so returned, he sent it to the defendants; but this was, no doubt, done for the purpose of having it indorsed by the defendants, in order to give it credit. Neither does it appear, from the evidence in the cause, that Krafft accompanied the shipments on account of which this bill was drawn, by any letter of advice, or otherwise, directing the proceeds thereof to be applied to the discharge of this bill. But on the contrary, the letter of advice addressed to the plaintiffs, by Delprat, directed the bill to be charged to the account of Krafft, generally. Under these circumstances, taken in connection with the additional one, that Delprat was concerned, generally, with Krafft, in the shipments made to the plaintiffs, the court is of opinion, that there is no material difference between this bill, and those drawn on account of shipments made by, and in the name of Delprat, which are now to be considered.

It has already been stated, that Mr. Delprat was a merchant, trading on his own account, at the same time that he was the agent of N. & J. & R. Van Staphorst. His transactions, in his two characters, were as distinct from each other, as if they had been the transactions of different persons. As an agent, he was bound to act "in conformity to the authority and instructions" of his principals. As a merchant, he was himself the principal, and acted in conformity with his own judgment. It would seem, then, that the contract must contain some very peculiar *and unusual provisions, to [*287
place Mr. Delprat under the authority of the house in Amsterdam, whilst carrying on trade in the United States on his own account. Upon reference to the contract, we find a stipulation between the parties in the following words: "The second undersigned (Delprat) binds himself to procure to no person or persons, in this kingdom, any consignments or commissions, from himself or any other, except to the first undersigned; but on the contrary, to use his utmost exertions towards the benefit of the mercantile house of the first undersigned; they being willing on their side, to facilitate all such commercial operations, as might benefit the second undersigned, without their prejudice." This article contains the only limitation on the entire independence of Mr. Delprat, as a merchant. It is, perhaps, a necessary limitation; which was, in part, the price of his agency, and for which he finds a compensation in the profits of the business confided to him. This restriction does not change the character of his transactions as a merchant. His waiving the right to consign to any other house, does not impress on his consignments to the Van Staphorsts, or on his bills drawn on those consignments, a character different from that which would have belonged to them, had his shipments been made from choice. He does not bind himself to make consignments to them; but not to make consignments to any other house in the Netherlands. If any doubt could arise from this article, it would be produced by the peculiar manner in which it is expressed. Mr. Delprat binds himself to procure to no person in the kingdom of the Netherlands,

any consignments or commissions, from himself or any other, except to the Van Staphorsts. The singular application of the word procure, to consignments made by Mr. Delprat himself, may be connected with the succeeding article, which authorizes him to draw bills, and may have some influence on its construction. In that article, the Van Staphorsts allow Mr. Delprat "the faculty to value on them direct, or payable in London," for such moneys as he shall employ to make advances on the whole, or part of cargoes, of current articles consigned to them, to the amount of two-thirds of the invoice price.

It may be said, that, as in the preceding article, consignments made by Delprat, on his own account, were considered as procured by him, and were placed on the same footing with consignments made by others; so in this, the express authority to draw bills, might embrace transactions of both descriptions. But we do not think, that the inaccurate use of words in one article, will justify a departure from the correct construction of a suceeding
*288] article; unless the same words are used, or the *bearing of the one on the other is such, as to require that departure. The same motives existed for restraining the agent from making, as from procuring, consignments to any other house in the Netherlands; his utmost exertions were required for the benefit of his principals. The restriction, therefore, might be expressed in the same sentence; and a slight inaccuracy of language was the less to be regarded, because it could produce no possible misunderstanding with respect to the extent of the prohibition.

The third article might not be intended to prescribe the same rules for the conduct of Mr. Delprat, as a merchant, and as the agent of the Van Staphorsts. As a merchant, he had a right to draw on effects placed in their hands, independent of contract. The usage of trade allows such drafts to be made on a shipment; and the consigned must pay the bills, if the shipment places funds in his hands to pay them. But as agent, his line of conduct was to be prescribed by contract. We must, therefore, consult the language of the agreement, in order to determine whether it provides for the future connection between the parties, further than as regards their characters as principal and agent. The faculty given to Mr. Delprat, by the third article, to value on the Van Staphorsts, is, "for such moneys as he should employ to make advances" on articles *consigned* to them. Money laid out in the purchase of articles on his own account, cannot, with any propriety of language, be denominated money employed in making advances on articles consigned to him. The distinction between money advanced on articles consigned, and money employed in purchases, although the articles may be purchased for the purpose of being consigned, is obvious. Money advanced, is always to another, never to the individual making the advance. This language shows, we think, incontestably, that the article was drawn with a sole view to bills drawn by Mr. Delprat, as agent; not on his own account, as a merchant.

A subsequent part of the article gives additional support to this construction. Mr. Delprat is to draw for two-thirds of the invoice price of the article, and is himself the judge of the price which may be inserted in the invoice. This power might be safely confided to him, in making advances to others; but might not be trusted to him in his own case. The case shows the Van Staphorsts to have been men of extreme caution; their letter to

Le Roy, Bayard & Co., inclosing their contract with Delprat, shows an unwillingness to commit themselves to him further than was necessary. It is not probable, that they *would have given him an express authority [*289 to draw on his own account, on invoices to be priced by himself. But the language of the article applies, we think, entirely to his bills drawn as agent, not to those drawn as a merchant transacting business for himself.

When examined as a witness, Mr. Delprat says, that during the whole period of his agency, he was in the habit of making shipments on his own account, to the said house in Amsterdam, and of drawing for advances on account of the said shipments so made, precisely in the same manner as when the shipments were made by others; and this was done with the full knowledge of N. & J. & R. Van Staphorst, who never found fault with him for doing so; but in order to encourage him to make such shipments, gave him credit for one-half the commission upon the sales of the shipments, so made on his own acconnt. The Van Staphorsts were commission-merchants, desirous of extending their business. No doubt can be entertained of their willingness to receive consignments from Mr. Delprat, as well as from others. But this does not prove, that the power given him as their agent, to make advances to others, was intended to regulate the intercourse between them as merchants. That intercourse was regulated by the general principles of mercantile law; and the contract between the parties, does not show that either was dissatisfied with those principles, or wished to vary them.

This question refers, we presume, to the authority given by the contract on the 11th of January 1818. The first article describes the objects which were committed to Mr. Delprat, by the Van Staphorsts. These were the management "of their mercantile interest in the United States, consisting chiefly in the forming new solid connections, and procuring of consignments." The second article restrains the right Mr. Delprat might otherwise have exercised, of consigning to other houses in the Netherlands. The third authorizes him to draw bills on his principals, for the purposes of his agency, under such limitations as they deemed it prudent to prescribe. This contract, we think, does not contemplate bills drawn by Mr. Delprat on his own account, as a merchant. The bills mentioned in the declaration, which were drawn in favor of the defendants, and indorsed by them, do not come within the authority given by the contract. No instructions from the plaintiffs, extending this authority, appear in the record.

The third question comprehends the whole matter in controversy, and has been partly answered, in answering the preceding question. It asks, whether the plaintiffs were bound *to accept and pay the bills in [*290 question; and whether, the same having been paid by the plaintiffs, *supra* protest, for the honor of the defendants, the plaintiffs are entitled to recover the amount of the defendants? The opinion has been already expressed, that the bill drawn on the 23d of May 1822, for 500*l.* sterling, in favor of J. P. Krafft, is not distinguishable from those which were drawn by Mr. Delprat, to enable him to purchase articles on his own account, which were shipped to the plaintiffs. In making these shipments, and in drawing these bills, Mr. Deprat acted for himself, as an independent merchant. The relation between him and the plaintiffs, was that of consignor and consignee. The obligation of the plaintiffs to accept and pay his bills, depended essentially on the state of their accounts. So far as the informa-

tion furnished by the case goes, Delprat appears to have been indebted to the plaintiffs. In their letters of 19th July and 10th September 1822, which were given in evidence by the defendants, they state him to be then their debtor; and it is not shown, that this debt has been discharged. The plaintiffs, therefore, were not bound to accept and pay these drafts, unless they have acted in such a manner as to give the holders of the bills a right to count on their being paid.

It is believed to be a general rule, that an agent, with limited powers, cannot bind his principal, when he transcends his power. It would seem to follow, that a person transacting business with him, on the credit of his principal, is bound to know the extent of his authority. Yet, if the principal has, by his declaration or conduct, authorized the opinion, that he had given more extensive powers to his agent, than were in fact given, he could not be permitted to avail himself of the imposition, and to protest bills, the drawing of which his conduct had sanctioned. But the defendants in this cause cannot allege that they have been deceived. They were the intimate correspondents of the plaintiffs, from whom they received a copy of the contract. The letter which transmitted it, requests their friendly supervision of the conduct of Mr. Delprat, and desires them not to pay the money for which the plaintiffs had given him a credit with them, in case of "a moral certainty" that it would not be employed for the purposes of his agency. In the course of correspondence between the plaintiffs and defendants, we find several letters written during the continuance of Mr. Delprat's credit with the latter, which show the determination of the former not to approve of advances beyond that credit. In their letter of the 24th of June 1819, the plaintiffs expressly caution the defendants, should they think proper to remit in Mr. Delprat's bills, the nature of which
*291] they are well acquainted with, that they (the *defendants) allow him the same credit that they do other persons, from whom they take bills, in the persuasion of their solidity, and of the reality of the transaction on which the bills are issued. They add, "this is not the effect of any want of confidence in our agent, but merely flowing from our invariable rule, to limit and circumscribe the credits we allow." The letters from the defendants show a perfect understanding, on their part, of the terms on which Mr. Delprat's bills were to be taken. On the 11th May 1819, announcing that he had filled his credit, they say: "In addition to it, he has expressed an anxiety that we should negotiate his drafts on you, payable in London, for about 3000*l.* sterling, or that we should take his drafts on Amsterdam, for a similar value. The personal regard which we bear for Mr. Delprat, would have induced us promptly to accede to his request, had not the restriction laid upon us, of not permitting him to exceed, but for a few hundred dollars, the credit you give him, and the total absence of any indication from you of a wish for us to interfere in his pecuniary arrangements, in any other than the mode marked by the credit, led us to believe that our negotiations for purchase of his drafts, was neither wished nor contemplated by you." And in their letter of the 7th of September 1822, inclosing the order of Mr. Delprat on the plaintiffs, for any balances belonging to him in their hands; so far from complaining of the protest of the bills, they say, "we can, of course, only consider this order as applying to the balance that may possibly accrue to him, upon the settlement of your account."

Messrs. Le Roy, Bayard & Co., then, were not deceived by the plaintiffs. Unfortunately for themselves, they placed too much confidence in Mr. Delprat. They took his bills, as they were cautioned to do, in the letter of the 24th June 1819, "in the persuasion of their solidity, and of the reality of the transaction on which they were issued." If, in this, they were mistaken, the responsibility and the loss are their own.

The 4th and 5th questions have been waived by the parties, and do not properly arise in the case. They are on exceptions taken in the trial of the cause, which could not be brought before the court after verdict, but on a motion for a new trial, which was not made. The 6th question, whether a judgment can be rendered on the verdict of the jury, has been answered, so far as this court can answer it. We do not understand it as referring to the amount of the verdict, for on that the circuit court alone can decide. If it is intended to repeat, in another form, the question whether the plaintiffs can maintain their action, as *the holders of bills, accepted and paid, *supra* protest, for the honor of the drawers; it is already answered. The decision of a majority of this court, on the points on which the judges of the circuit court were divided, will be certified in conformity with the foregoing opinion. [*292

This cause came on to be heard, on a certificate of division of opinion of the judges of the circuit court of the United States, for the southern district of New York, and on the points on which the said judges were divided in opinion, and was argued by counsel, on consideration whereof, this court is of opinion—

1st. That the authority of John C. Delprat to draw on the plaintiffs, did not amount to an acceptance of the bills.

2d and 3d. That the bills mentioned in the declaration were drawn by the said Delprat, not under the authority of the plaintiffs, but on his own account; and the plaintiffs were not bound to accept and pay them, unless funds of the drawer came to their hands.

4th and 5th. These questions are understood to be waived, and do not appear to arise in the case.

6th. The 6th question is decided by the answer to the 2d and 3d, so far as respects the right of the plaintiffs to maintain their action. On the *quantum* of damages, this court can give no opinion. All which is ordered to be certified to the court of the United States for the second circuit and district of New York.

*Daniel Parker, Plaintiff in error, *v.* United States.

Army officers.—Rations.—Separate post.—Military department.

The adjutant and inspector-general of the army of the United States, was not entitled to double rations, from the 30th of September 1818, to the 31st of May 1821.

The president of the United States has a discretionary power to allow such additional number of rations to officers commanding at separate posts, as he may think just, having respect to the special circumstances of each post; the law granting this authority, is not imperative; and in the exercise of his discretion, the president may allow, or refuse to allow, additional rations, as in his opinion he may deem proper. p. 296.

The secretary of war, as the legitimate organ of the president, under a general authority from him, may exercise the power, and make the allowance to officers having a separate command. p. 297.

No officer is entitled to the addititional allowance, unless he be a commandant at a separate post; and then the claim must be sanctioned by the executive. The allowance cannot be made to more than one officer at the same station.[1] p. 297.

In the discharge of his ordinary duties, the adjutant and inspector-general, has no distinct command; his duties consist in details of service, and not in active military command. p. 297.

An officer may be said to command at a separate post, when he is out of the reach of the orders of the commander-in-chief, or of a superior officer in command in the neighborhood; he must then issue the necessary orders to the troops under his command, it being impossible to receive them from a superior officer. p. 297.

The general order of the war department, of 16th March 1816, directing double rations to be allowed to officers commanding military departments is construed to relate to the geographical sections of country, into which the two divisions of the army are divided, and which were denominated "departments," and intended to designate the extent of actual command given to the officer commanding such department; it does not relate to the law of the 3d of March 1813, "for the better organization of the general staff of the army." p. 297.

Error to the Circuit Court of the District of Columbia, for the County of Washington.

This case was submitted to the court, without argument, by *Jones*, for the plaintiff in error; and by *Wirt*, Attorney-General, for the United States. All the material facts of the case are stated in the opinion of the court; which was delivered by—

Duvall, Justice.—An action was commenced in the circuit court, by the United States, against the plaintiff in error, to recover the sum of $2337.60, which he had received from Mr. Leslie, the paymaster, then stationed at the seat of government, on a claim for double rations, due him in his capacity of adjutant and inspector-general of the army of the United
*294] States, from the *30th of September 1818, to the 31st of May 1821. On the settlement of the account of the paymaster, this item was disallowed by the second auditor, who considered it as wrongfully paid; and the amount was afterwards directed to be charged to the personal account of General Parker.

The office of adjutant and inspector-general of the army, with the rank, pay and emoluments of a brigadier-general, was created by the act of March 3d, 1813. The plaintiff in error was appointed to that office; and his commission bears date on the 1st May 1816, with the rank of brigadier-general, from 22d November 1814. The pay and emoluments of the officers of the

[1] The fact of appropriations having been made by congress for double rations, does not determine what officers are entitled to them United States *v.* Freeman, 3 How. 557.

army are fixed by the act of 16th March 1802, and the act of 12th April 1808. By the fifth section of the first-mentioned act, it is provided, that the commanding officers of each separate post shall be entitled to such additional number of rations, as the president of the United States shall, from time to time, direct, having respect to the special circumstances of each post. Under this authority, the president has, at various times, designated military posts and stations, and allowed double rations to the commanding officers; and in the case of General Wilkinson, when stationed at New Orleans, and commanding there, in quality of a commanding officer, at a separate post, he allowed that officer treble rations. It appears by the record and documents referred to in this case, that on the 25th of August 1812, the president ordered, that generals commanding separate armies, should receive double rations. In February 1814, an order was issued by the war department, on the subject of double rations, of which the following is an extract: "It is ordered, that general or other officers commanding districts, shall, while so doing, receive double rations; which will supersede all other grants of double rations, at posts within the district." On the 6th March 1816, a general order was issued, in the words following:—" Generals commanding divisions; officers commanding military departments; and all officers, while in the command of permanent posts and garrisons, separate from the stations of commandants of departments, which subject them to the additional expense of independent commands, are allowed double rations. No more than one officer can be entitled to double rations, at the same station."

The adjutant and inspector-general performed the duties of his office, from November 1814, and charged the compensation as allowed by law, until the year 1816, when a difficulty arose on the subject of his fuel and quarters, from the circumstance of there being no disbursing office in the quartermaster's department, at the seat of government; and from the regulations *of the war department, then in force, prohibiting an allowance in money, to be made to officers in lieu of these emoluments. The secretary of war then issued the following order: " A commutation of double rations is allowed to the adjutant and inspector-general, in lieu of fuel and quarters." Under this authority, he claimed and was allowed double rations from November 1814; refunding to the government the allowance he had received for fuel and quarters, from the time of his acceptance, until the date of the above order. He continued to receive double rations, making no charge for fuel and quarters, until an order was issued by the secretary of war, on the 10th of August 1818, to the following effect: "The reason for the allowance to the chief of the engineers, and to the adjutant and inspector-general, in lieu of fuel and quarters, no longer existing, since the establishment of the quartermaster's department, at the termination of the present quarter, such allowance will cease; and the quartermaster-general will, on requisition, furnish them with fuel and quarters, agreeably to their respective ranks." The commutation of double rations, ceased accordingly; and the adjutant and inspector-general continued to charge and receive single rations only, from the first of October 1818, to the 31st of May 1821, when the office was abolished. [*295

The defendant in the court below, now plaintiff in error, in support of his claim, produced a certificate from Richard Cutts, second comptroller of

the treasury; "that the senior officer of the engineer department, stationed at Washington, has charged and been allowed double rations, since the first of January 1818. The senior officers of the quartermaster's, subsistence and ordnance departments, have charged and been allowed double rations since the 27th July 1821; and Major-General Brown has charged and been allowed double rations, since the 1st of June 1821, when he was stationed in this city." And also the following regulations: The regulation and general order of the 27th July 1821, issued by the war department, allowing to the quartermaster-general, commissary-general of subsistence, the colonel of engineers, and the chief of the ordnance department (while stationed at the seat of government), double rations from the date of the said order.

The regulations of general order, duly issued from the war department, dated 21st of May 1821, addressed to the defendant, as adjutant and inspector-general, directing him, among other things, to hand over the records and files of his office to Major-General Brown, on the next day, being the first of June 1821; and said major-general having from the time he had assumed command, and has relieved the said adjutant and inspector-general, *296] at the seat of government, pursuant to the *last-mentioned order, been allowed and paid double rations, as certified by the second comptroller; which regulation or general order is in the following words: "The adjutant-general, under the law of the 2d of March last, being attached to the major-general commanding the army, and now absent, you will, to-morrow, pass over the records and files of your office to Major-General Brown and will assume the duties of paymaster-general. Major-General Brown has been advised of this order; and Colonel Towson will be instructed to hand over the papers and records of the pay department to you." That the brigadiers-general of the army of the United States, have all been regularly allowed double rations, since the said general order and regulation of the 6th of March 1816. That the defendant continued at the head of the department of adjutant and inspector-general, and stationed at the seat of government, from the time of his appointment and commission, as such, until the 31st of May 1821, and until he was relieved by Major-General Brown, as before mentioned.

The defendant then proved, by Thomas S. Jessup, quartermaster-general, that in his opinion, and according to the general usage of the army, the department of adjutant and inspector-general was a military department; and that the defendant, whilst exercising that office, was commandant of a military department; and as such, was subject to the additional expense of an independent command.

The declaration in this cause is founded on a transcript from the treasury, certified in the usual form, and contained a count for money had and received, and other counts not necessary to be mentioned; issue was joined on the plea of *non assumpsit;* and by agreement of counsel, a verdict for the United States was taken for the sum claimed, subject to the opinion of the court upon the laws of the United States relative to the pay and emoluments of the officers of the army, and the regulations and orders of the executive department, issued in pursuance of those laws. The court, on consideration, gave judgment in favor of the United States; and the cause is now before this court, by writ of error, for their decision.

The claim of the plaintiff in error to double rations, as charged, rests

altogether upon a correct construction of the 5th section of the act of the 16th of March 1802, and of the regulations and orders of the executive department, issued in pursuance of that section. The president of the United States has a discretionary power to allow such additional number of rations to officers commanding at separate posts, as he may think just; having respect to the special circumstances of each post. The law granting this authority, is not imperative, and in the exercise of his discretion, the president may allow, or *refuse to allow, additional rations, as in his opinion he may deem just. [*297

The reason of the authority to grant the allowance is obvious. By an independent command, at a separate post, the officer is subject to additional expense, and an increase of duty. An officer may be said to command at a separate post, when he is out of the reach of the orders of the commander-in-chief, or of a superior officer, in command in the neighborhood. He must then issue the necessary orders to the troops under his command; it being impracticable to receive them from a superior officer; his authority is the source from which they must flow.

There can be no controversy about additional rations, if the president makes the allowance. He may issue the order himself, or it may be done by the secretary of war, with his approbation. The secretary of war, as the legitimate organ of the president, under a general authority from him, may exercise the power, and make the allowance to officers having a separate command. The language of the law is plain and unambiguous. No officer is entitled to the additional allowance, unless he be a commandant at a separate post; and then the claim must be sanctioned by the executive. The allowance cannot be made to more than one officer at the same station.

It is not contended, in the case under consideration, that the grant was made by the president; but the plaintiff in error claims it, under the orders which have been recited, and which are spread upon the record; and because officers of equal rank, and in his opinion similarly circumstanced, have received the additional allowance. Double rations form no part of the regular and legal emoluments of a brigadier-general, and can only be claimed under circumstances before enumerated. The plaintiff in error seems to rely, with more confidence, on the order of the 6th of March 1815, taken in connection with the opinion of General Jessup. That order directs the additional allowance to be made to generals commanding divisions, and to officers commanding military departments, &c.; and General Jessup was of opinion, that, according to the general usage of the army, the department of adjutant and inspector-general, was a military department; and that whilst exercising that office, he was commandant of a military department; and, as such, subject to the expense of an independent command.

The record contains no evidence, that the adjutant and inspector-general was ever ordered to an independent or separate command. In the discharge of his ordinary duties, he has no distinct command; his duties consist in details of service, and not in active military command. The order of the *16th of March 1816, directing double rations to be allowed to officers commanding military departments, is construed to relate to [*298 the geographical sections of country, into which the two divisions of the army are divided, and which were denominated departments; and intended to designate the extent of actual command, given to the officer commanding

each department; and that it does not relate to the law of the 3d of March 1813, for the better organization of the general staff of the army. This appears to have been the construction given to the order by the war department, as none of the staff officers created by that act, with exception of the plaintiff in error, ever made a claim for double rations; and the claim under consideration was disallowed by the accounting officers of the war department.

During the time the adjutant and inspector-general was stationed at the seat of government, comprehending the space for which double rations are claimed, it does not appear, that there was any recognised commanding officer. The staff officers, then stationed at the seat of government, were subject to the authority of the secretary of war, and under his direct and exclusive control.

It is the opinion of the court, that the claim of the plaintiff in error, is not sanctioned by the act of the 16th of March 1802, nor by the regulations and orders of the executive department, issued in pursuance of that law. The judgment of the circuit court is affirmed, with costs.

Judgment affirmed.

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*299] *Mechanics' Bank of Alexandria, Appellants, *v.* Louisa and Anna Maria Seton, Appellees, by their Guardian, etc.

Chancery.—Specific performance.—Parties.—Depositions.—Trustees.—Notice.—Transfer of interest.

Although it seems to be a general rule, that a court of chancery will not decree specific performance of contracts, except for the purchase of lands, or things which relate to the realty and are of a permanent nature, and that where contracts are for chattels, and compensation can be made in damages, the parties must be left to their remedy at law; yet, notwithstanding this distinction between personal contracts for goods, and contracts for lands, there are many cases to be found, where specific performance of contracts relating to personalty, have been enforced in chancery; but courts will weigh with greater nicety, contracts of this description, than such as relate to lands.[1] p. 305.

Although an objection, for want of proper parties, may be taken at the hearing, yet the objection ought not to prevail, upon the final hearing of an appeal; except in very strong cases, and where the court perceives a necessary and indispensable party is wanting. p. 306.

All persons materially interested in the subject of a suit in chancery, ought to be made parties, either plaintiffs or defendants; but this is a rule established for the convenient administration of justice, and is more or less within the discretion of the court; and it should be restricted to parties whose interests are in the issue, and to be affected by the decree; the relief granted, will always be so modified, as not to effect the interests of others.[2] p. 306.

The cross-examination of a witness by the opposite party, is considered as a waiver of exceptions to the regularity of the deposition. p. 307.

By the rules of this court, "in all cases of equity and admiralty jurisdiction, no objection shall be allowed to be taken to the admissibility of any deposition, deed, grant or other exhibit, found

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[1] See Roundtree *v.* McLain, Hempst. 243; Ross *v.* Union Pacific Railway Co., 1 Woolw. 26; Sunbury and Erie Railroad Co. *v.* Cooper, 33 Penn. St. 278; Dungan *v.* Dohnert, 11 W. N. C. 330 n.; Sank *v.* Union Steamship Co. 5 Phila. 499; Philadelphia and Reading Railroad Co. *v.* Stichter, 11 W. N. C. 325; Foll's Appeal, 91 Penn. St. 434; White *v.* Schuyler, 31 How. Pr. 38.

[2] The circuit court cannot make a decree, in the absence of a party whose right must necessarily be affected by it, and the objection may be taken at any time, upon the hearing, or in the appellate court. Coiron *v.* Millaudon, 19 How. 113.

in the record, as evidence; unless objection was taken thereto in the court below; but the same shall otherwise be deemed to have been taken by consent." p. 307.

It is not a correct construction of the 3d and 21st sections of the act of congress, incorporating the Mechanics' Bank of Alexandria, that the stock of the bank shall be deemed to belong to the persons in whose names it stands upon the books of the bank, and that the bank is not bound to recognise the interests of any *cestui que trust*, and may refuse to permit the stock to be transferred, whilst the nominal holder is indebted to the bank. p. 308.

Full notice of a trust, draws after it all the consequences of a full declaration of the trust, as to all persons chargeable with such notice. p. 309.

It is well settled in equity, that all persons coming into possession of trust property, with notice of the trust, shall be considered as trustees; and bound, with respect to that special property, to the execution of the trust. p. 309.

A subsequent board of directors of a bank, is to be considered as knowing all the circumstances communicated, or known, to a previous board. p. 309.

It is a well settled rule, that a court is not bound to take notice of any interest acquired in the subject-matter of the suit, pending the dispute. p. 310.

*300] *APPEAL from the Circuit Court of the District of Columbia, for the county of Alexandria. The suit was instituted on the chancery side of the circuit court, by the appellees, complainants in that court, against the Mechanics' Bank of Alexandria, to compel them to permit a transfer to be made of $3000 of the capital stock of the bank, standing in the name of Adam Lynn, and held by him as trustee of the complainants.

The bill charged, that the complainants' grandfather, John Wise, to make provision for the support of his children and grandchildren, had made sale, in 1815, of an establishment called the City Tavern, at the price of $14,000; of which $10,000 were paid by the transfer of that amount of United States six per cent. stock, made by the purchasers to the said Adam Lynn, the nephew and agent of the said John Wise, for his use; that the residue, $4000, was paid to the said Adam, in money, to be by him invested in stocks, for the use, and subject to the control, of the said John Wise. That out of this sum, the said Adam purchased from one James Sanderson $3000 of the capital stock of the bank, which was in like manner transferred to him; and that although no trust was in terms declared, in the transfer of either of the said stocks, they were both avowedly purchased and held by the said Adam, in his character of agent and trustee for Wise. That on the 29th of April 1815, the said John executed a deed to the said Adam, by which he conveyed to him the said stocks, described as standing in the said Adam's name, in trust for use of the said John, during his life, as to the dividends, and after his death, then, as to the bank-stock, to the use of the complainants; and that he had since died. That when the purchase of the bank-stock was made, and when it was transferred to the said Adam, it was well known to the president and directors of the bank, that the purchase was made, and the transfer received by him, in his fiduciary character. That the bank-stock was purchased on the 11th of February 1815, from one James Sanderson, at a small advance; and on that day, a payment of $720 was made in part of the purchase-money, and as Sanderson had obtained a discount from the bank, on the pledge of all the stock he held in it, it became necessary to know on what terms the board of directors would permit a transfer. That this application was accordingly made by the said Adam, who distinctly stated that the purchase was to be made for the benefit of the said John Wise, was to be paid for in his funds, and was to be transferred to the said Adam, for his use. He further proposed to the board, as an

accommodation to himself, that he should be allowed to discharge a part of the purchase-money to Sanderson, by assuming on himself a part of
*301] *Sanderson's debt to the bank, and continuing to that extent, the lien the bank then held on the stock to be transferred. That this proposal was rejected, distinctly on the ground, that the board must consider the said John Wise as the owner of the stock. That the said Adam then paid $2400 to the bank, in discharge of the said Sanderson's stock debt; which being done, the transfer was permitted and on the 15th of March 1815, was made to the said Adam, as trustee, though the trust was not declared in the transfer. That it was, however, officially made known, previously to the transfer, and was afterwards frequently a subject of conversation amongst the directors, at the board. That the complainants having expressed to the said Adam, their desire that he would transfer their stock to their guardian, he offered himself ready to do so; but that on application at the bank, permission was refused; on the allegation, that he was a debtor to the bank, and that it held a lien for that debt on all its stock which stood in his name. That the said Adam was proprietor of other stock in the bank, in his own right, to the amount of $18,014, and had a discount on it to the amount of $15,360, which was little more than the sum permitted to be loaned on stock security, by a by-law of the bank—that is to say, four-fifths of the amount of such stock. The bill further charged, that when the said Lynn's debt to the bank was contracted, he was one of the directors; and that by the ninth article of the charter of incorporation, the president and directors were prohibited from receiving discounts or loans on accommodation, beyond $5000. That all the loans to him were of that description; and that so far as they exceeded $5000, being in violation of the charter, could create no lien under it. The bill, after propounding special interrogatories, corresponding with the previous allegations, prayed that the bank might be compelled to open its transfer book, and to permit Lynn to transfer the stock; and for general relief.

The answer denied that the board of directors had notice of the fiduciary character in which Lynn held the stock claimed by the complainants. It averred, that at the time the answer was put in, there was no stock standing in his name, on the books; the whole of the stock which stood in his name, having been applied to the payment of his debts to the bank, under articles of agreement between him and the cashier. It admitted, that Lynn had received accommodation loans on stock, to an amount exceeding $5000, but asserted, that loans of that description did not fall within the prohibition
*302] of *the charter; but if they did, it could not affect the bank's right, claiming as purchasers, under the contract before mentioned.

The purchase of the stock by Lynn, in his fiduciary character, and the knowledge of that fact by the board of directors, officially and individually, was claimed to be fully proved by the testimony of the said Adam Lynn, a director of the bank, and by that of Robert Young, president, and Daniel McLeod and John Gird, directors. The special agreement under which the respondents claimed the stock, appeared to have been entered into on the 30th day of May 1821, nearly a year after the bill had been filed. By this contract, Lynn agreed at once to transfer all his stock, except that claimed by the complainants; for the transfer of this, he gave a power of attorney,

which by agreement was not to be executed by a transfer, until the decision of the court on the respondents' claim of lien in this suit.

The circuit court, on hearing, decreed a transfer; from which decree, this appeal was entered.

Swann and *Wirt*, for the appellants.—The Mechanics' Bank of Alexandria did not know of the trust; this stock stood in the name of Adam Lynn, and they had no notice of any other ownership in it; no trust was declared upon the books of the bank: and by the provisions of the charter, the persons who appear as stockholders upon the books, are the only stockholders. By the charter, no one who is a debtor to the bank, can transfer stock owned by him, the bank having a prior lien on the same for their debt.

The claim of the plaintiffs below, is resisted on the followings grounds:—

1. Adam Lynn made a special agreement to transfer this stock to the bank.

2. Adam Lynn was a debtor to the bank, and this stock standing in his name, on the books of the bank, without a declaration of the trust, was properly retained as a security for the debt due by him.

3. The subject in controversy in this case, is not proper for the decision of a court of chancery. There cannot be a specific performance decreed by this court, as the stock cannot be designated, or specially described. 1 Madd. Chan. 403; 1 P. Wms. 570.

4. By the charter of the bank, the only evidence of ownership of stock, is the books of the bank. In the case of a corporation existing under a law, the forms prescribed by the law must be complied with. 17 Mass. 1; 2 Bl. Com. 127.

5. In this case, it was considered by the complainants, that *Adam Lynn should be a party to the bill, and a rule was taken on him to [*303 appear; but the court went on to a hearing and decision of the suit, without his having been made a party The court will, therefore, having this fact upon the proceedings *ex officio*, turn the parties out of court. *Duguid* v. *Patterson*, 4 Hen. & Munf. 445.

Jones and *Taylor*, for the appellees.—1. As to the specific lien claimed by the appellants, under a power of attorney, given by Adam Lynn. It was granted after the bill of the complainants was filed, and is, therefore, of no value. The transfer, by the power of attorney, was also a violation of the agreement, under which it was given.

But, if this is not an answer to the claim of specific lien; the transfer of the stock, by power of attorney, was made, with notice of the right of the complainants.

2. If it does not appear, that the debt due by Adam Lynn to the bank, arose after the purchase of this stock; and therefore, no new credit was given upon this stock. The trust was known to the board of directors, when the stock was transferred by Sanderson to Lynn; and from that time, they dealt with the trustee, subject to the trust. A corporation, by the decisions of this court, is like an individual, in transactions of this kind; and the succeeding board of directors were bound by the circumstances which occurred when the trust commenced.

3. The bank were the trustees of the complainants, either by an original contract, or as trustees, resulting from the payment of the purchase-money for the stock, out of their funds. 2 Ves. & Beam. 388; 5 Ves. 43; 1 P. Wms. 112; 1 Ves. 275; 10 Ibid. 360; 1 Ves. jr. 32, 42. As to constructive notice, were cited, 8 Com. Dig. 363, 15th div.; 2d div. 10, 20, 21, 15, 385.

4. This is the case of trust, which is in the *peculium* of a court of chancery; and the number of shares which are claimed, is a sufficient designation of the property. The original shares bought of Sanderson, remained in the name of Adam Lynn, when the bill was filed.

5. The provisions of the charter, relative to evidence of ownership of stock, can only apply, when parties are the holders of stock, in their own right. The practice of the bank to hold stock as mortgagees, shows a different construction of the charter, by the bank itself, from that which is claimed in this case.

6. The rules of the court of chancery are, that all persons who were parties to the transaction, and all who must be before the court, for the purposes of complete justice in the case, must be made parties. It was not deemed necessary to make Adam Lynn a party, as he was willing to do all
*304] that the *court would have required from him; and it was the bank only, who, having the control of the stock, could make the transfer, sought by the complainants.

Thompson, Justice, delivered the opinion of the court.—The appellees, who were the complainants in the court below, filed their bill against the Mechanics' Bank of Alexandria, setting out their right to $3000 of the capital stock of that bank, which was standing in the name of Adam Lynn; but which was avowedly purchased and held by him, as trustee for John Wise, the grandfather of the complainants, and from whom they derived their right and title to the stock in question. That they were desirous of having their stock transferred to their guardian, which the trustee, Adam Lynn, was willing to do, and offered to transfer the same; but that, on application to the bank, permission was refused, on the allegation, that Adam Lynn was a debtor to the bank, and that it held a lien for that debt, on all the stock of the bank which stood in his name. The bill alleges, that when the stock was purchased by Adam Lynn, for John Wise, and transferred to him upon the books of the bank, it was well known to the president and directors, that the purchase was made by, and transferred to, Lynn, in his character of trustee for John Wise, although the trust was not expressed in the transfer. The bill prays, that the bank may be compelled to open its transfer-book, and permit Adam Lynn to transfer the $3000, in stock, to the said Louisa and Anna Maria Seton, or to their guardian, Nathaniel S. Wise.

The bank, by its answer, denies that the board of directors knew, or had any notice, that Adam Lynn held the stock as trustee; but alleges, that all the stock standing upon the books of the bank, in the name of Adam Lynn, was considered by the board of directors as his own stock: and avers, that at the time the answer was put in, there was no stock standing in his name on the books, but that the whole of it had been applied by the bank to the payment of his debts to it; according to articles of agreement between him and the cashier of the bank. The bank also sets up the right, under its

charter, to hold the stock, for the payment of Lynn's debt; but had, under the agreement made with the cashier, as before mentioned, become the purchaser of the stock, for a full and fair consideration; without any knowledge that the complainants had any interest in the same.

The court below, upon the bill, answer, and exhibits and proofs taken in the cause, decreed that the bank should cause its transfer-book to be opened, and permit Adam Lynn to *transfer the stock to Nathaniel S. Wise, guardian of the complainants, to be by him held in trust for their use. From this decree, there is an appeal to this court, and the following points have been made, upon which a reversal of that decree is claimed. 1. That the subject-matter of the bill is not properly cognisable in a court of chancery; but that the remedy is at law, and the party to be compensated in damages. 2. That there is a want of proper parties. 3. That upon the merits, the bank has a right to hold and apply the stock, in payment of Adam Lynn's debt to it. [*305

With respect to the first objection, it has been said, that a court of chancery will not decree a specific performance of contracts; except for the purchase of lands or things that relate to the realty, and are of a permanent nature; and that, where the contracts are for chattels, and compensation can be made in damages, the parties must be left to their remedy at law. But notwithstanding this distinction between personal contracts for goods, and contracts for lands, is to be found laid down in the books, as a general rule; yet there are many cases to be found, where specific performance of contracts, relating to personalty, have been enforced in chancery; and courts will only weigh with greater nicety, contracts of this description, than such as relate to lands.

But the application of this distinction to the present case, is not perceived. If this had been a bill, filed against the bank, to compel a specific performance of any contract entered into with it, for the sale of stock, it might then be urged, that compensation for a breach of the contract, might be made in damages; and that the remedy was properly to be sought in a court of law. But the bill does not set up any contract between the complainants and the bank; nor does it seek a specific performance of any express contract whatever, entered into with the bank. It only asks, that the bank may be compelled to open its transfer-book, and permit Adam Lynn to transfer the stock. By the charter and by-laws of the bank, such transfer could only be made upon the books of the bank; and it was by their consent alone, that this could be done. Although it might be the duty of the bank to permit such transfer, it would be difficult to sustain any action at law, for refusing to open its books, and permit the transfer. Nor have the appellants shown such a claim to the stock, as to authorize the court to turn the appellees round to their remedy at law, against Lynn, admitting they might have it. At all events, the remedy at law is not clear and perfect; and it is not a case for compensation in damages, but for specific performance; which can only be enforced in a court of chancery.

*2. The second objection, that Adam Lynn ought to have been made a defendant, would seem to grow out of a misapprehension of the object of this bill, and the specific relief sought by it. It ought to be observed here, preliminarily, as matter of practice, that although an objection for want of proper parties may be taken at the hearing; yet the ob- [*306

jection ought not to prevail, upon the final hearing on appeal; except in very strong cases, and when the court perceives that a necessary and indispensable party is wanting. The objection should be taken at an earlier stage in the proceedings, by which great delay and expense would be avoided.

The general rule, as to parties, undoubtedly is, that when a bill is brought for relief, all persons materially interested in the subject of the suit, ought to be made parties, either as plaintiffs or defendants; in order to prevent a multiplicity of suits, and that there may be a complete and final decree between all parties interested. But this is a rule established for the convenient administration of justice, and is subject to many exceptions; and is, more or less, a matter of discretion in the court; and ought to be restricted to parties, whose interest is involved in the issue, and to be affected by the decree. The relief granted, will always be so modified, as not to affect the interest of others. 2 Madd. Ch. 180; 1 Johns. Ch. 350.

Where was the necessity, or even propriety, of making Lynn a party? No relief is sought against him. The bill expressly alleges that he was perfectly willing to make the transfer; but permission was refused by the bank. There is no allegation in the bill, upon which a decree could be made against Lynn; and it is a well-settled rule, that no one need be made a party, against whom, if brought to a hearing, the plaintiff can have no decree. 2 Madd. Ch. 184; P. Wms. 310, note 1. The contest, with respect to the right to the stock, is between the complainants and the bank; and it cannot be necessary to bring Lynn into the suit, in order to determine that question. He claims no right to the stock; and if the bank has established its right to hold it, for the payment of Lynn's debt, the complainants have no pretence for requiring the books of the bank to be opened, and to permit the transfer to be made, as prayed in the bill. The bank cannot compel the complainants to bring Lynn before the court, as a defendant, for the purpose of litigating questions between themselves, with which the complainants have no concern. No objection to the decree can, therefore, be made for want of proper parties.

3. The remaining inquiry is, whether the bank is entitled to hold this stock as security, or apply it in payment of Lynn's *debt; either by virtue of its charter, or under the agreement between him and the cashier? *307]

An objection, however, has been made, preliminarily, to this court's noticing the deposition of Adam Lynn; because, as is alleged, it was taken after the cause was set down for hearing, and without any order of the court for that purpose. Admitting this to have been irregular, no objection appears to have been made in the court below, to the reading of the deposition; and had it been made, it ought not to have prevailed even there; because the defendants cross-examined the witness, which would be considered a waiver of the irregularity. But at all events, the objection cannot be listened to here, according to the express rule of this court (February term 1824), which declares, "that in all cases of equity and admiralty jurisdiction, no objection shall be allowed to be taken to the admissibility of any deposition, deed, grant or other exhibit, found in the record as evidence; unless objection was taken thereto, in the court below, and entered of record; but the same shall otherwise be deemed to have been admitted by consent."

It is deemed unnecessary to enter into an examination of the proofs in the cause, to show that, in point of fact, the stock in question was held by

Lynn, in trust for the complainants; and that this fact was known to the board of directors, when it was transferred to him by James Sanderson. The evidence establishes these points, beyond any reasonable ground of doubt; and the real question is, whether the bank, with full knowledge of the board of directors, that this stock was not the property of Lynn, but held by him in trust for the appellees; can assert a lien upon it for the private debt of Lynn, either under the charter, or the agreement made with Chapin, and the transfer made by him to the bank.

The equity of the case must strike every one very forcibly, as being decidedly with the appellees. And unless the claim of the bank can be sustained, by the clear and positive provisions of its charter, the decree of the court below ought to be affirmed. This claim is asserted, under the provisions of the 3d and 21st sections of the act of congress, incorporating the bank. The third section, after providing for the opening the subscription for the stock, and pointing out the manner in which the excess shall be reduced, in case the subscription shall exceed the number of shares allowed to be subscribed, has this proviso: "Provided always, that it is hereby expressly understood, that all the subscriptions, and shares obtained in consequence thereof, shall be deemed and held to be for the sole and exclusive use and benefit of the persons, *copartnerships or bodies politic, subscribing, or in whose behalf the subscriptions, respectively, shall be [*308 declared to be made, at the time of making the same; and all bargains, contracts, promises, agreements and engagements, in any wise contravening this provision, shall be void." The 21st section declares, "that the shares of the capital stock, shall be transferrible at any time, according to such rules as may be established, by the president and directors; but no stock shall be transferred, the holder thereof being indebted to the bank, until such debt be satisfied; except the president and directors shall otherwise order it." These sections, when taken together, have been supposed to require a construction, that the stock shall be deemed to belong to the person, in whose name it stands upon the books of the bank; and that the bank is not bound to recognise the interest of any *cestui que trust;* and may refuse to permit the stock to be transferred, whilst the nominal holder is indebted to the bank.

This construction, however, in the opinion of the court, cannnot be sustained. The third section must clearly be understood as applying to the first subscription for the stock; and was intended to prevent one person subscribing for stock in the name of another, for his own benefit. The construction of the 21st section will depend upon the interpretation to be given to the word *holder*, as there used. This term is not, necessarily, restricted to the nominal holder. It will admit of a broader and more enlarged meaning; and may well be applied to the party, really and beneficially interested in the stock. And there can be no good reason why it should not be so applied, when the bank is fully apprised of all circumstances in relation to the stock, and knows who is the real holder thereof. This provision was intended to put into the hands of the bank, additional security for debts due from stockholders. But when it is known, that the person in whose name the stock stands, has no interest in it, he will acquire no credit upon the strength of such stock; and that such was the understanding of the bank, in this case, is clearly shown by the evidence. For, when the transfer was made to Lynn, he asked to

have the discount continued to him, which Sanderson, from whom he purchased, had upon the stock. But this was refused, on the ground, that the stock did not belong to Lynn, but to Wise. There is no evidence in the cause, to show, that Lynn's debt was contracted with the bank, after the stock was transferred to him; or that he has, in any manner, obtained credit with the bank on account thereof; but the contrary is fairly to be understood from the proofs. Nor does the bank allege the *insolvency *309] of Lynn; or that it has not a full and complete remedy against him, without having recourse to this stock.

To permit the bank, under such circumstances, to avail itself of this stock, to satisfy a debt contracted without any reference to it as security, and with full knowledge that Lynn held it in trust for the complainants, would be repugnant to the most obvious principles of justice and equity. Suppose, the trust had been expressly declared upon the transfer-book of the bank; would there be the least color of sustaining the claim now set up? And yet Lynn would be the legal holder of the stock, in such case, as much as in the one now before the court. Full notice of a trust draws after it all the consequences of an express declaration of the trust, as to all persons chargeable with such notice. It is a well-settled rule in equity, that all persons coming into possession of trust property, with notice of the trust, shall be considered as trustees, and bound, with respect to that special property, to the execution of the trust. 2 Madd. Ch. 125; 1 Sch. & Lef. 262. Notice to an agent is notice to his principal. If it were held otherwise, it would cause great inconvenience; and notice would be avoided in every case, by employing agents. 2 Madd. Ch. 326. Notice to the board of directors, when this stock was transferred to Lynn, that he held it as trustee only, was notice to the bank; and no subsequent change of directors could require a new notice of this fact. So that, if the bank had sustained any injury, by reason of a subsequent board not knowing that Lynn held the stock in trust; it would result from the negligence of its own agents, and could not be visited upon the complainants. But no such injury is pretended. From anything that appears to the contrary, Lynn is fully able to pay his debt to the bank.

The case of the *Union Bank of Georgetown* v. *Laird*, 2 Wheat. 390, has been supposed to have a strong bearing upon the one now before the court. But the circumstances of the two cases are very dissimilar. In the former, Patton was the real, as well as the nominal holder of the stock, when he contracted his debt with the bank, and when his acceptance fell due, and the lien of the bank, no doubt, attached upon the stock; and this was previous to the assignment of it to Laird; and the question there was, whether the bank had done anything which ought to be considered a waiver of the lien. But in the present case, Lynn never was the real owner of the stock, and the bank well understood that he held it as trustee, and no lien for Lynn's debt ever attached upon it. The appellants cannot, therefore, under any provisions in their charter, apply this stock to their own use, for the debt of *Lynn, to the prejudice of the rights of the known [*310 *cestuis que trust.*

Nor is there any ground upon which the claim of the bank can be sustained, under the agreement made between Lynn and Chapin, the cashier, and the transfer thereof, made by the latter to the bank. If the bank, as

has already been shown, was chargeable with the knowledge that Lynn was a mere trustee, it could acquire no title from him, discharged of the trust; and if necessary, might itself be compelled to execute the trust. Nor has the bank any title to this stock, under the transfer made by Chapin. This was done, without any legal authority, being several months after Lynn had revoked the power of attorney, under which the transfer was pretended to be made; and with full knowledge that Lynn was not the owner of the stock.

But another and complete answer to the whole of this arrangement between Chapin and Lynn, is, that it was made long after the bill in this case was filed; and it is a well-settled rule, that the court is not bound to take notice of any interest acquired in the subject-matter of the suit, pending the dispute. The decree of the court below, must accordingly be affirmed, with costs.

Decree affirmed.

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*Robert Barry, Plaintiff in error, *v.* Thomas Foyles. [*311

Variance.—Declarations of partners.—Pleading.

The defendant in error had sued out an attachment, under the law of Maryland, against Robert Barry, and had filed an account against James D. Barry, said to have been assumed by Robert Barry, the plaintiff in error; Robert Barry appeared, gave special bail, and discharged the attachment; the plaintiff below, then filed a declaration in *indebitatus assumpsit* "for money had and received," and "for goods sold and delivered," to which Robert Barry pleaded the general issue; the parties went to trial, and a verdict and judgment were rendered for the defendant in error.

The court attaches no importance to the variance between the account filed when the attachment issued, and the declaration filed after the attachment was dissolved by the entry of bail and the appearance of the defendant; the defendant having pleaded to the declaration, the cause stood as if the suit had been brought in the usual manner, and no reference can be had to the proceedings on the attachment. p. 315.

Where the general agent of parties carrying on business in a tan-yard, instead of a journal of hides received for the parties from day to day, gave, at considerable intervals, certificates of the total amount of hides received from the last preceding settlement, up to the periods when the certificates bore date; such certificates are equally binding, as certificates detailing the separate transactions of each day; and may be read in evidence to charge the parties, whose agent the person giving the certificates was. p. 316.

The principle is, that a contract made by copartners is several as well as joint, and the *assumpsit* is made by all and by each; it is obligatory on all, and on each of the partners. If, therefore, the defendant fails to avail himself of the variance in abatement, when the form of his plea obliges him to give the plaintiff a proper action; the policy of the law does not permit him to avail himself of it, at the time of trial. p. 317.

The declaration in an action against one partner only, never gives notice of a claim being on a partnership transaction; the proceeding is always as if the party sued was the sole contracting party; and if the declaration were to show a partnership contract, the judgment against the single partner could not be sustained. p. 317.

Where the suit was brought upon a partnership transaction, against one of the partners and the declaration stated a contract with the partner who was sued, and gave no notice that it was made by him with another person, evidence of a joint *assumpsit* may be given, to support such a declaration;[1] the want of notice has never been considered as justifying an exception to such evidence at the trial. p. 317.

Error to the Circuit Court of the District of Columbia, for the county of Washington. In the circuit court, the defendant in error issued an

[1] Moore *v.* Bank of the Metropolis, 13 Pet. 311; Gay *v.* Cary, 9 Cow. 44; Collins *v.* Smith, 78 Penn. St. 423.

attachment against Robert Barry, the plaintiff in error; and according to the established practice, the plaintiff in the attachment filed, at the time it was issued, an account or statement of his claim; by which he alleged that
*312] Robert Barry, the defendant below, was indebted to him in the *sum of $3410.25, for debts due from the firm of James D. Barry & Co., assumed by him to pay to the plaintiff in the attachment. This account or statement was accompanied by an affidavit, that "it was just and true, as it stands stated." The plaintiff in error appeared and gave special bail; and a declaration was then filed, in *indebitatus assumpsit*, &c., and the plea of the general issue entered.

On the trial of the cause, the plaintiff offered in evidence, to sustain his case, three paper writings, signed by E. Rice, which are stated, *in extenso*, in the opinion of the court. In order to prove the defendant chargeable with the amount delivered by the plaintiff below, Thomas Rice was produced and sworn as a witness; who testified, as set forth in the opinion of the court. The counsel for the defendant below objected to the evidence, and the objection being overruled, the case was brought by writ of error to this court.

Coxe and *Worthington*, for the plaintiffs in error, contended: 1st. That the evidence is not competent and sufficient to charge the plaintiff in error, upon his alleged *assumpsit*. 2d. That under the declaration in *indebitatus assumpsit*, the evidence is also incompetent and insufficient.

By the statement filed upon oath, the claim of the plaintiff is averred to be a debt due by James D. Barry & Co., which the defendant below assumed to pay. The evidence on the part of the plaintiff below did not show such a firm as James D. Barry & Co.; nor did the same prove an implied, much less an express, *assumpsit* by Robert Barry. The plaintiff below complied with the law of Maryland, by stating his cause of action, when the attachment was issued; and the defendant appeared and entered a plea thereto. Subsequently, he filed a declaration in *indebitatus assumpsit*, which was irregular. This cannot be done, and therefore, the evidence applied only to the first declaration; which stated an assumption of the debt of James D. Barry & Co., and no proof was offered of such assumption. The evidence does not show any connection between Rice and the defendant, nor any authority from Robert Barry, by which his acts or acknowledgments could become binding on him; the plaintiffs did not, therefore, make out the case spread upon the record by the first declaration. The papers signed by Rice were improperly admitted. No. 1 is given in the name of James D. Barry. The other two refer to transactions in which the defendant is not named.

2. Upon a general declaration in *assumpsit*, the issue is not maintained by proof of a partnership debt. The general rule, that the defendant, who
*313] is charged *separately for a joint debt, should plead this in abatement, does not apply, when the plaintiff has, by his pleadings, given no notice of the nature of his demand, until the time of trial. *Jordan* v. *Wilkins*, 3 W. C. C. 112. In the case of *Rice* v. *Shute*, 5 Burr. 2611, Lord Mansfield adverts strongly to the circumstance, that the defendant was the person with whom the business was transacted. Also cited, *Abbott* v. *Smith*, 2 W. Bl. 947.

3. The agency of Rice was a special agency, and his acknowledgments

were not evidence. He might have made entries in the books to charge his principal, but no more. 1 Esp. 375 ; 2 Stark. Ev. 60. Nor does his testimony prove the interest or partnership of Robert Barry, in the dealings to which the papers have reference. 3 Stark. Ev. p. 4, 1067.

Jones, for the defendant.—The objections to the proceedings, as they apply to the first and second declarations, have no force. The account filed, when the writ issued, against Robert Barry alone, states his assumption of the partnership debt ; and if this was objectionable, it should have been pleaded in abatement. It was at one time supposed, that in all cases of attachment, a second declaration should be filed ; but this was afterwards considered as not essential ; but the party has at all times a right to vary his pleadings, and even at "the rules," to file a new declaration. To the pleadings in this case, no exception was taken, nor was any objection made at the trial. The objection to the evidence, as applicable to the account filed, ought not to prevail. If Robert Barry was a partner in the transactions to which the papers refer, the law raises an assumption. The plaintiff is not tied down to prove an *assumpsit*, when proof is given that he was a partner ; and an action will lie against one partner alone, on his express *assumpsit*.

2. The evidence of debts due by J. D. Barry & Co. was properly applied to charge Robert Barry, the plaintiff in error. There must always be a plea in abatement, where the parties are not joined. As to joinder of parties, Mr. *Jones* cited, with other cases, *Minor* v. *Mechanics' Bank of Alexandria* (*ante*, page 46); and also 5 Burr. 2611. If the evidence could in any way charge the defendant below, it was admissible. Partnership may be proved by circumstances ; and the court did not decide upon the effect of the testimony, but only that it should go, generally, to the jury. This is a case in which the principal is charged with the acts of the agent, within the scope of his authority ; the business of the concern being intrusted to the management of Rice by the parties.

*Marshall, Ch. J., delivered the opinion of the court.—This is a writ of error to a judgment of the circuit court of the United States [*313 for the district of Columbia, sitting in the county of Washington. The defendant in error had sued out an attachment against Robert Barry, and had filed an account against James D. Barry & Co., said to be assumed by Robert Barry. Robert Barry appeared, gave special bail, and discharged the attachment. Thomas Foyles then filed a declaration in *indebitatus assumpsit*, for money had and received, and for goods, &c., delivered ; to which Robert Barry pleaded the general issue, and the parties went to trial.

At the trial, the plaintiff in the circuit court offered in evidence, three paper writings, signed by Edmond Rice ; and also produced Thomas Rice, a witness, who swore, that at the time the said paper writings bear date, and for a long time before and after, E. Rice, whose name is signed to the said writings, was foreman and manager of a tan-yard in Washington ; kept the books, bought and sold leather, and managed the whole concern for the proprietors ; that the said papers are in his handwriting ; that the said Foyles, for about seven years (including the dates of said writings), being a butcher, was in the habit of delivering, from time to time, great numbers of hides, to

the said Rice, at the said yard, and had contracted with the said Rice to deliver there all the hides of the cattle slaughtered by him. That the said business was carried on in the name of James D. Barry, living in Washington, till a settlement, which witness understood took place between the said James D. Barry and Robert Barry; after a while, it was carried on in the name of Robert Barry. The witness was not present at the settlement, and does not know its nature or terms. During the time that the business was carried on in the name of James D. Barry, Robert Barry (who resided in Baltimore) came about twice a year to the yard in Washington; where he spent considerable time in examining and posting the books, with the said E. Rice. Upon one of these occasions, he directed a parcel of leather, which E. Rice had prepared to send on to him to Baltimore, to be kept in the yard, till he should return to Baltimore, or ascertain the price of leather there, and give further directions concerning it. During all the time the business was conducted at Washington, in the name of James D. Barry, the greater part of the leather manufactured in the yard was sent on to Baltimore to the defendant, and there disposed of by him.

The following are the paper writings offered in evidence, to which the testimony of Thomas Rice refers.

*315] *No. 1. Balance due by James D. Barry to Thomas Foyles on settlement, say sixteen hundred and forty dollars, seventy-five cents, up to this date, say April 5th, 1817.

$1640 75. EDMOND RICE.

No. 2. Amount of hides and skins received of Mr. Thomas Foyles, from the first of April 1817, to this date, say December 27th, 1818.

755 hides, at $3.75 per hide, ...	2831 25
10 sheep skins, at 50 cents each, ...	5 00
7 calf skins, do. at $1 each, ...	7 00
	$2843 25

January 13th, 1819. EDMOND RICE.

No. 3. Amount of hides and skins received of Thomas Foyles, from the 2d of February 1819, to 2d of December 1819.

346 hides, at $3.75 each, ... $1297 50

EDMOND RICE.

The counsel for the defendant objected to the admission of these papers. His objection being overruled, an exception was taken to the opinion. A verdict was found for the plaintiff below, the judgment on which has been brought into this court by writ of error.

In argument, some observations were made on the variance between the manner in which the plaintiff in error was charged in the account filed in the attachment, and in the declaration on which the cause was tried. In the account, he is charged on his *assumpsit*, for a sum due from James D. Barry & Co. The declaration charges him as being originally indebted on a transaction with himself. The court attaches no importance to this variance, because when the attachment was discharged, by the appearance of the defendant, and giving bail, and the plaintiff, in consequence thereof, filed a declaration, to which the defendant pleaded, the cause stood in court, as if

the suit had been brought in the usual manner; and no reference can be had to the proceedings on the attachment.

Considering the case as it is made out in the pleadings, the defendant in the circuit court is charged, on his original liability, for a transaction of his own. Edmond Rice, having been manager of the whole concern, for the proprietors of the tan-yard, in Washington, with power to buy hides and sell leather, there can be no doubt of his power to charge them for skins and hides, received by him in the course of business. The papers, No. 2 and 3, purport, on their face, to be an account of transactions of this description. The only objection made to them, is, that instead of the journal of hides delivered *on each day, the manager has given, at considerable intervals, the total amount of hides received from the last preceding settlement, up to that time. We are not aware of any principle which can make such a general certificate less binding, than one detailing the separate transactions of each day. The proprietors themselves, or either of them, might have made the same acknowledgment; and we perceive no reason why the acknowledgment of the manager, so far as respects the form in which it is made, should not be of the same obligation as that of the proprietors. [*316

The paper No. 1 is more questionable. It does not purport to be given for hides received at the tan-yard, nor does it express the items which constitute the charge; but it is said to be the balance due from James D. Barry (in whose name the business was conducted), "on settlement." Edmond Rice, the person who gave this certificate, had authority to give it on account of the transactions of the tan-yard; and it does not appear that he had authority to give it on any other account. It is an additional circumstance, of no inconsiderable weight, that the account closes on the 5th of April 1817, the day on which the subsequent account, which is avowedly for hides, commences. These circumstances combined, were, we think, sufficient to justify the submission of this paper also to the jury.

The next objection to the admission of these papers, is, that the plaintiff in the circuit court, has failed to prove that Robert Barry was one of the proprietors of the tan-yard, while the business was conducted in the name of James D. Barry. The evidence, on this point, was given by Thomas Rice, and has been already fully stated. We think, the testimony of a partnership was very strong. It could not, with propriety, have been withheld from the jury.

The question on which the plaintiff in error most relies, remains to be considered. This suit is brought on a partnership transaction, against one of the partners. The declaration states a contract with the partner who is sued, and gives no notice that it was made by him with another. Will evidence of a joint *assumpsit* support such a declaration? Although it has been held from the 36 Hen. VI. 38, that a suit against one of several joint obligors, might be sustained, unless the matter was pleaded in abatement; yet with respect to joint contracts, either in writing or by parol, a different rule was formerly adopted; upon the ground of a supposed variance between the contract laid, and that which was proved. This distinction was overruled by Lord MANSFIELD, in the case of *Rice* v. *Shute*, 5 Burr. 2611. The same point was *afterwards adjudged, in *Abbott* v. *Smith*, 2 W. Bl. 695; and has been ever since invariably maintained. The prin- [*317

ciple is, that a contract, made by copartners, is several as well as joint, and the *assumpsit* is made by all and by each. It is obligatory on all, and on each of the partners. If, therefore, the defendant fails to avail himself of the variance, in abatement, when the form of his plea obliges him to give the plaintiff a proper action, the policy of the law does not permit him to avail himself of it, at the trial.

The course of decisions, since the case of *Rice* v. *Shute*, has been so uniform, that the principle would have been considered as too well settled for controversy; had it not lately been questioned by a judge, from whose opinions we ought not lightly to depart. That judge supposed, that if the defendant had no notice, in the previous stage of the proceedings, which might inform him of the nature of the action, he was guilty of no negligence in failing to plead in abatement, and ought not to be deprived of his defence at the trial. But the declaration never gives this notice, where the suit is brought against one only of the partners. He is always proceeded against, as if he were the sole contracting party; and if the declaration were to show a partnership contract, the judgment against the single partner could not be sustained. The cases cited by Mr. Serjeant Williams, in note 4, on the case of *Cabell* v. *Vaughan* (1 Saund. 291, n. 4), shows conclusively, that the want of notice has never been considered, since *Rice* v. *Shute*, as justifying this exception to the evidence at the trial. We think, there is no error, and the judgment is affirmed.

Judgment affirmed.

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*318] *Peter Dox, Gerrit La Grange and Isaiah Townsend, impleaded with Gerrit L. Dox, Plaintiffs in error, *v.* The Postmaster-General of the United States, Defendant in error.

Postmasters' bonds.—Laches.

The act of congress for regulating the post-office department, does not, in terms, discharge the obligors in the official bond of a deputy-postmaster, from the direct claim of the United States upon them, on the failure of the postmaster-general to commence a suit against the defaulting postmaster, within the time prescribed by law; their liability, therefore, continues; they remain the debtors of the United States; the responsibility of the postmaster-general is superadded to, not substituted for, that of the obligors. p. 323.

The claim of the United States upon an official bond, and upon all parties thereto, is not released by the *laches* of the officer, to whom the assertion of this claim is intrusted by law; such *laches* have no effect whatsoever on the right of the United States, as well against the sureties, as the principal in the bond. p. 325.

United States *v.* Kirkpatrick, 9 Wheat. 720, re-affirmed.

This case was brought up from the Circuit Court of the United States for the Southern District of New York, in the second circuit, upon a certificate of the judges of that court, that they disagreed on certain points, set forth in the certificate.

The cause was commenced in the district court of the United States for the northern district of New York, and removed by writ of error, to the circuit court. The following were the points of disagreement: 1st. Whether the district court had jurisdiction of the cause? 2d. Whether, by the facts appearing on the record, and admitted by the pleadings, or found by the jury, the sureties are exonerated, or discharged from their liability upon the

bond set forth in the record? 3d. Whether the said bond, from the facts so found or admitted by the pleadings, or appearing on the record, can, in judgment of law, be considered as paid and satisfied, or otherwise discharged?

The original suit was commenced in the district court, in August 1823, and the plaintiff declared in debt, on a bond, in the penal sum of $6000, executed on the 1st of January 1816, by Gerrit L. Dox, Peter Dox, Gerrit La Grange and Isaiah Townsend; conditioned for the faithful performance of the duties of postmaster, at Albany, by Gerrit L. Dox.

The declaration alleged two breaches of the condition of the bond: 1. That said Gerrit L. Dox did not, at any time between the *first [*319 day of January 1816, and the 1st day of January 1817 (he being, during the whole of that time, postmaster as aforesaid), render any accounts of his receipts and expenditures, according to the condition of said bond; but utterly neglected so to do. 2. That after the date of said bond, and more than three months previous to the commencement of the suit, there came to the hands of said Gerrit L. Dox, as such postmaster as aforesaid, the sum of $6000, for postages, over and above commissions, &c., which he had not paid over to the postmaster-general; but had refused so to do, although often requested, &c.

Gerrit L. Dox, the principal obligor, pleaded separately three pleas: 1. *Non est factum*, and tendered an issue. 2. To the first breach, that he did render true accounts of his receipts and expenditures as such postmaster, &c., and tendered an issue. 3. To the second breach, that he had paid to the postmaster-general all the moneys he had received, over and above his commissions, &c., and tendered an issue. Issues were joined on these pleas as tendered.

The defendants, Peter Dox, Gerrit La Grange and Isaiah Townsend, the sureties of said Gerrit L. Dox, pleaded six pleas: 1. *Non est factum*, and tendered an issue. 2. To the first breach, that Gerrit L. Dox did render true accounts of his receipts and expenditures, &c., and tendered an issue. 3. To the second breach, that the said Gerrit L. Dox had paid to the postmaster-general all the moneys he had received over and above his commissions, &c., and tendered an issue. 4. To the second breach, that they executed the bond as sureties; that Gerrit L. Dox was removed from office, on the first day of July, A. D. 1816; that the postmaster-general, knowing there were sureties, did not open an account against Gerrit L. Dox, and make any claim and demand on him for the moneys received by him as postmaster, until the first day of July, A. D. 1821; at which time, the postmaster-general did open an account against, and claim and demand of said Gerrit L. Dox, the sum of $3041.35; that Gerrit L. Dox, at the time of his removal from office, was solvent, and able to pay his debts, and continued so for three years, and until the first day of July 1819; and that after the first day of July 1819, and before the first day of July 1821, to wit, on the first day of January, A. D. 1820, he became insolvent, and still continues to be insolvent. This plea concluded with a verification. *5. To the [*320 second breach, that they executed said bond as sureties for said Gerrit L. Dox; that said Gerrit L. Dox was removed from office on the first day of July, A. D. 1816; that the postmaster-general, well knowing that they were sureties for Gerrit L. Dox, and that Gerrit L. Dox had neglected and

refused to pay over to the postmaster-general, the balance due from him at the end of every quarter, while he was such postmaster, did not commence a suit against said Gerrit L. Dox for his neglect and refusal to pay, until August, in the year 1821, at which time a suit was commenced against him and his sureties, on the bond in question; that Gerrit L. Dox was solvent at the time of his removal from office, viz., on the first day of July 1816, and continued so for three years, and until the first day of July, A. D. 1819; and that, after the first day of July 1819, and before the first day of July 1821, viz., on the first day of January, A. D. 1820, he became insolvent, and still continues to be insolvent. This plea also concluded with a verification.

The plaintiff took issues on the first, second and third pleas of the sureties, as they were tendered; and to the fourth, fifth and sixth pleas, respectively, he replied, that said Gerrit L. Dox was not solvent, at the time of his removal from office, nor did he continue to be solvent for the space of three years thereafter, or any part of said time; nor did he, on the first day of January 1820, nor at any other time after the first day of July 1819, become insolvent; and thereupon issues were joined.

The issues were tried at the May session of the court, in the year 1824. All the issues were found for the plaintiff, except those joined on the fourth, fifth and sixth pleas of the sureties, which were found in favor of said sureties; the breaches assigned having been found to be true, as above stated, the damages on them were assessed at $6000. After the verdict, and at the same session of the court, a motion was made on behalf of the said postmaster-general, for judgment in his favor, notwithstanding the verdict against him, on said fourth, fifth and sixth issues with the sureties, and judgment given for the said plaintiff.

The case was argued, on the part of the plaintiffs in error, by *Samuel A. Foot*, of New York; and by *Wirt*, attorney-general of the United States, for the postmaster-general.

Foot.—This suit was instituted to recover a balance due to the United States, by Gerrit L. Dox, as postmaster, at Albany, in New York. Gerrit L. Dox was appointed postmaster, in January 1816, and was removed from office in July 1816. The breaches assigned were: 1. Not rendering accounts
*321] as postmaster. *2. Not paying over the moneys he ought to have paid. The issues upon all the pleas put in by Dox alone, and by him and his sureties together, were found for the plaintiff below; the only questions in the case arise on the fourth, fifth and sixth pleas, put in by the sureties only. The district court held these pleas to be immaterial, and gave judgment for the postmaster-general.

It is admitted, that since this suit was commenced, cases have been decided in this court, which bear upon the question, whether the neglect of the officers of the government to proceed against a debtor to the public, will discharge the sureties. *United States* v. *Kirkpatrick*, 9 Wheat. 720; 11 Ibid. 134; *United States* v. *Vanzandt*, 12 Ibid. 136. But the principles settled in these cases, are not entirely applicable to this. The law of the United States, relative to the post-office establishment, makes it the duty of the postmaster-general to file, every six months, in the treasury department, a transcript of the balances due from the postmasters, and to sue for the

same ; and if he omits so to do, the balances are to be charged to the postmaster-general, and to be collected from him. Thus, the postmaster-general becomes himself a debtor to the government, for the amount of the delinquency of every postmaster ; unless he has taken measures to collect the same ; and he may use the name of the government for the purpose. This suit is, therefore, for the use of the postmaster-general, as he had neglected to proceed against Gerrit L. Dox, for six years ; and the sureties are entitled, against him, to the benefit of his *laches*. This case is different from those referred to ; and the plaintiff, who had a verdict in his favor on the fourth, fifth and sixth issues, is entitled to the presumption, that the postmaster-general was charged with the balances due by Gerrit L. Dox, and that he has paid the same to the United States. In the case of the *Postmaster-General* v. *Early*, 12 Wheat. 136, the court is understood to have said, that if this suit had been brought for the postmaster-general only, the jurisdiction could not have been sustained ; here, the postmaster-general is the only person beneficially interested. If the United States were the parties really interested, a special averment should have been made ; and the general formal averment in the declaration, is not sufficient. The postmaster-general is the guarantor of the debt to the United States ; he could not be a witness in the case, and the suit should have been stated to be for his use ; and then the jurisdiction would have been at an end.

2. Are the issues found for the plaintiff in error, material? If they are, the district judge erred in giving judgment ; if they are not, there should be a repleader. When the finding upon the issue does not determine the right, the court ought *to award a repleader ; unless it appears from the whole record, that by no manner of pleading, the matter in issue [*322 could have availed. 1 Burr. 381. The fourth, fifth and sixth pleas aver the solvency of the principal of the bond, for a considerable time, during which suit was not brought ; and by these *laches* the sureties have become involved. It is not necessary to show, that the sureties applied to know what was the balance due to the United States. At common law, the question is, whether the case is such that the creditor might have been injured or have lost by it. The case of *Law* v. *East India Company*, has some application to the principles claimed in this case. 4 Ves. 824.

The issues in the fourth, fifth and sixth pleas were material, as the solvency of Gerrit L. Dox was of the highest importance to the sureties.

Wirt, Attorney-General, having, upon the authority of a private statement of the facts, made to him by the counsel of the plaintiffs in error, explained why the suit for a delinquency in 1816, was not instituted until 1823 ; thus vindicating the postmaster-general from the imputation of *laches ;* proceeded :—

The case is a plain one, in favor of the postmaster-general. All the material issues are found for him : 1. That it was the bond of the obligors. 2. That the principal in the bond did not render an account. 3. That he did not pay over moneys received by him.

The district court considered the fourth, fifth and sixth pleas immaterial, and gave judgment for the plaintiffs, *non obstante veredicto*. If these pleas were really immaterial, the judgment so given was correct. 2 Arch. Pract. 229 ; 1 Chit. Pl. 634. If the postmaster-general did not open an account

with Gerrit L. Dox, the postmaster at Albany, or bring a suit according to law; would the sureties be absolved? This question has been already settled in this court. The provisions of the law are directory to the post-master-general; but they create no contract with the deputy-postmaster, or his sureties, that he shall open an account, or institute a suit, in case of delinquency. The case of the *United States* v. *Vanzandt*, 11 Wheat. 184, was one of great hardship; but the sureties were held answerable, upon the principles stated.

The finding of the jury on the second plea establishes, that no account was rendered by the postmaster; and therefore, the plaintiff below had no materials to make out an account. The provisions relative to opening of accounts, have been held to be for the use of the United States, and for the direction of their officers; and with which others have nothing to do.

*323] *Whether these provisions will be enforced, depends, and properly, on the discretion of the executive.

The question of jurisdiction should have been brought forward in the form of a plea. There is no averment, that the postmaster-general was asserting this claim for himself.

Marshall, Ch. J., delivered the opinion of the court.—This suit was instituted against Gerrit L. Dox, a deputy-postmaster, and against his sureties, on a bond given for the faithful performance of his duty. It was brought in the court for the northern district of New York, and was removed, by writ of error, into the circuit court, sitting in the southern district of New York, composed of the associate justice of this court, and the judge of the southern district. On the hearing, the judges were divided in opinion upon three questions; which have been certified to this court. 1st. Whether the district court had jurisdiction of the cause? 2d. Whether, by the facts appearing on the record, and admitted by the pleadings, or found by the jury, the sureties are exonerated, or discharged from their liability upon the bond so given by them, as set forth in the record? 3d. Whether the said bond, from the facts found, or admitted by the pleadings, as appearing by the record, can, in judgment of law, be considered as paid and satisfied, or otherwise discharged?

1. The question first to be considered, respects the jurisdiction of the court. The difficulties which were believed to attend it, when this cause was adjourned, have been removed by the opinion of this court, in the case of the *Postmaster-General* v. *Early*, 12 Wheat. 136. In that case, the question was fully considered, and deliberately decided. The time which intervened between the default of the officer, and the institution of the suit, exceeded the time prescribed by the act of congress, in that case, as well as this. Consequently, the circumstances of the two cases, are, in this respect, precisely the same. But the counsel for the deputy-postmaster says, that this point was not brought into the view of the court, and has not been considered. The opinion of the court, undoubtedly, did not take a view of the question, whether the postmaster-general possessed such an interest in the cause, that it ceased to be a suit brought for the United States. This inquiry was not made in terms, but could not have escaped observation. The act of congress for regulating the post-office establishment, does not, in terms, discharge the obligors from the direct claim of the

United States on them, on the failure of the postmaster-general to commence a suit against the *defaulter, within the time it prescribes. [*324
Their liability, therefore, continues; they remain the debtors of the United States. The responsibility of the postmaster-general himself, is superadded to, not substituted for, that of the obligors. The object of the act is, to stimulate the postmaster-general to a prompt and vigilant performance of his duty, by suspending over him a penalty, to which negligence will expose him; not to annul the obligation of his deputy. Had the object of the act been to favor the sureties, its language would have indicated that intention. If this construction be correct, the obligors in this bond remain the debtors of the United States, and the superadded responsibility of the postmaster-general, cannot affect the reasoning on which the jurisdiction of the court was sustained, in the case of the *Postmaster-General* v. *Early*.

The second question proposed for the consideration of the court, is, whether, on the facts appearing in the record, the sureties are discharged from their obligations? The breaches assigned are: 1st. That Gerrit L. Dox failed to render accounts of his receipts and expenditures, as deputy-postmaster. 2d. That he had failed to pay over the moneys he had received, over and above his commissions, &c.

The defendant pleaded: 1st. *Non est factum:* 2d. That Gerrit L. Dox did render true accounts, &c.: and 3d. That he did pay over the moneys he received. The issues joined on these pleas, were found for the plaintiff.

The question arises on other pleas, the issues on which were found for the defendants; and which state, in substance, that, Gerrit L. Dox was removed from his office, on the 1st day of July 1816; that the postmaster-general did not open an account against him, and make any claim and demand on him for the moneys received by him, as postmaster, until the 1st day of July 1821; that at the time of his removal from office, he was solvent and able to pay his debts, and continued so until the 1st day of July 1819, after which he became insolvent, and continues to be so. These pleas also state, that the postmaster-general, well knowing that Gerrit L. Dox had neglected and refused to pay over the moneys due from him, as postmaster, at the end of every quarter, &c., did not commence a suit until August 1821. These facts, placed on the record, without explanation, must be admitted to show a gross neglect of duty on the part of the postmaster-general. Does this neglect discharge the sureties from their obligations? The condition of the bond is broken, and the obligation has became absolute. Is the claim of the United States upon them, released by the **laches* of the officer, to whom the assertion of that claim was intrusted? This question also [*325
has been settled in this court.

The case of the *United States* v. *Kirkpatrick and others*, 9 Wheat. 720, was a suit instituted on a bond, given by a collector of direct taxes and internal duties, under the act of 22d July 1813, ch. 16. The act required each collector to transmit his accounts to the treasury, monthly; to pay over the moneys collected, quarterly; and to complete his collection, pay over the moneys collected to the treasury, and render his final account, within six months from the day on which he shall have received the collection-list from the principal assessor. In case of failure, the act authorizes and requires the comptroller of the treasury, immediately, to issue his war-

rant of distress against such delinquent collector, and his sureties. The comptroller did not issue his warrant of distress, according to the mandate of the law; and this suit was instituted, four years after such warrant ought to have been issued. The court left it to the jury to decide, whether the government had not, by this omission, waived its resort to the sureties. A verdict was found for the defendants; the judgment on which was brought before this court by writ of error. The counsel for the defendant urged that *laches* might be imputed to the government, through the negligence of its officers; but this court reversed the judgment, declaring that the opinion that the charge of the court below, which supposes that *laches* will discharge the bond, cannot be maintained in law. "The utmost vigilance," it was said, "would not save the public from the most serious losses, if the doctrine of *laches* can be applied to its transactions. It would in effect, work a repeal of all its securities." It was further said, that the provisions of the law which require that settlements should be made at short and stated periods, are created by the government for its own security and protection; and to regulate the conduct of its own officers. They are merely directory to such officers, and constitute no part of the contract with the security. After a full discussion of the question, the court laid down the principle, "that the mere *laches* of the public officers, constituted no grounds of discharge in the present case."

The same question came on to be again considered, in the case of the *United States* v. *Vanzandt*, 11 Wheat. 184. This was an action of debt, brought upon a paymaster's official bond, against one of the sureties. The act of organizing the general staff, and making further provision for the army of the United States, "makes it the duty of the paymaster to render his vouchers to the paymaster-general, for the settlement of his accounts;" and if he fail to do so, for more than six *months after he shall have *326] received funds, the act imperatively enjoins "that he shall be recalled, and another appointed in his place." The paymaster had failed to comply with the requisites of the law; after which the paymaster-general, instead of obeying its mandate, by removing him, placed further funds in his hands. The circuit court instructed the jury, that the defendant, the surety, was not chargeable for any failure of the paymaster to account for such additional funds, so placed in his hands after his said default and neglect in respect of the funds previously received were known; and a verdict was found for the defendant. The judgment on this verdict, was also brought before the court by a writ of error, and was reversed. The counsel for the defendant contended, that this case differed from the *United States* v. *Kirkpatrick and others;* but the court said, "the provisions in both laws are merely directory to the officers, and intended for the security and protection of government, by insuring punctuality and responsibility; but they form no part of the contract with the surety." The placing further funds in the hands of the defaulting paymaster, was considered as the necessary consequence of his continuance in office. This is certainly a very strong case. These two cases seem to fix the principle, that the *laches* of the officers of the government, however gross, do not of themselves discharge the sureties in an official bond, from the obligation it creates, as firmly as the decisions of this court can fix it. We think, they decide the question now under consideration.

The third question is, whether the bond can, upon the facts of the case, be considered, in judgment of law, as paid and satisfied, or otherwise discharged. If this question was founded on the time which was permitted to elapse before the institution of the suit, the answer must be in the negative. The bond was executed on the 1st day of January 1816, the postmaster was removed from office, on the 1st day of July, in the same year; and this suit was instituted in August 1821. But little more than five years intervened, between the time when the sum due from the principal in the bond was ascertained, and the institution of the suit. The presumption of payment has never been supposed to arise from length of time, in such a case, even between individuals; much less, in the case of the United States, where all payments are placed on that record which must be kept by the officers of government. An additional reason exists against the presumption in this case. Length of time, is evidence to be laid before the jury, on the plea of payment. The pleas on which this presumption is supposed to arise, not only do not allege payment, but pre-suppose that payment has not been made, which failure they ascribe *to the *laches* [*327 of the postmaster-general. In such a case, there can be no ground for presuming payment and satisfaction.

That part of the question which is general, and which refers it to the court to decide, whether the bond has been "otherwise discharged;" is understood to be a repetition of the second question, and to be answered in the answer given to that question.

This court is of opinion, that it be certified to the circuit court of the United States for the southern district of New York—1. That the district court had jurisdiction of this cause. 2. That the sureties are not exonerated from their liability, upon the bond given by them, as set forth in the record. 3. That the said bond cannot be considered, in judgment of law, as paid and satisfied, or otherwise discharged.

This cause came on, &c.: On consideration whereof, this court is of opinion: 1. That the district court of the northern district of New York had jurisdiction of the said cause: 2. That the sureties to the bond on which the said suit was instituted, are not exonerated or discharged from their liability on the said bond, by the facts apppearing on the record, and admitted by the pleadings, or found by the jury: 3. That the said bond cannot, from the facts found or admitted by the pleadings, or appearing by the record, be considered, in judgment of law, as paid and satisfied, or otherwise discharged. All which is directed to be certified to the circuit court of the United States for the southern district of New York, in the second circuit.

*James Elliott, the younger, Benjamin Elliott, Anderson Taylor, Reuben Pater, Patsey Elliott and Wilford Lepell, *v.* Leesees of William Peirsol, Lydia Peirsol, Ann North, Jane North, Sophia North, Elizabeth F. P. North and William North, Defendants in error.

Evidence of pedigree.—Objection to evidence.—Deed of feme covert.—Acknowledgment.—Absence of jurisdiction.

A letter from a deceased member of a family, stating the pedigree of the family, and testified by the wife to have been written by her husband, who also swore, in her deposition, that the facts stated in the letter, had been frequently mentioned by her husband in his lifetime, is legal evidence; as is also the deposition of the witness, on a question of pedigree. p. 337.

The rule of evidence, that in questions of pedigree, the declarations of aged and deceased members of the family, may be proved, and given in evidence, has not been controverted.[1] p. 337.

In a case where a controversy had arisen, or was expected to arise, between parties, concerning the validity of a deed, against which one of the parties claimed, but no controversy was then expected to arise about the heirship; a letter, stating the pedigree of the claimants, was not considered as excluded, by the rule of law, which declares, that declarations relating to pedigree, made *post litem motam*, cannot be given in evidence. p. 337.

Where the defendant had reserved a right to move the court to exclude any part of the plaintiff's evidence, which he might choose to designate as incompetent, but it did not appear from the bill of exceptions, that he designated any particular piece or part of the evidence as objectionable, and moved the court to exclude the whole, or to instruct the jury, that it was insufficient to prove title in the lessors of the plaintiff; this could not be done on the ground of incompetency, unless the whole was incompetent. The court is not bound to do more than respond to the motion, in the terms in which it is made; courts of justice are not obliged to modify the propositions submitted by counsel, so as to make them fit the case; if they do not fit, that is enough to authorize their rejection. p. 338.

The privy examination and acknowledgment of a deed, by a *feme covert*, so as to pass her estate, cannot be legally proved by parol testimony. p. 338.

In Virginia and Kentucky, the modes of conveyance by fine and common recovery, have never been in common use; in those states, the capacity of a *feme covert* to convey her estate by deed, is the creature of the statute law; and to make her deed effectual, the forms and solemnities prescribed by the statutes, must be pursued. p. 338.

By the Virginia statute of 1748, "when any deed has been acknowledged by a *feme covert*, and no record made of her privy examination, such deed is not binding upon the *feme* and her heirs;" this law was adopted by Kentucky, at her separation from Virginia; and is understood never to have been repealed. p. 339.

The provisions of the laws of Kentucky, relative to the privy examination of a *feme covert*, in order to make a conveyance of her estate valid. p. 339.

*329] It is the construction of the act of 1810, that the clerks of the county *courts of Kentucky have authority to take acknowledgments and privy examinations of *femes covert*, in all cases of deeds made by them and their husbands. p. 339.

What the law requires to be done, and appear on record, can only be done, and made to appear by the record itself, or an exemplification of it; it is perfectly immaterial, whether there be an acknowledgment or privy examination in form, or not, if there be no record made of the privy examination; for, by the express provisions of the law, it is not the fact of privy examination only, but the recording of the fact, which make the deed effectual to pass the estate of a *feme covert*. p. 340.

A deed from *baron* and *feme*, of lands in the state of Kentucky, executed to a third person, by

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[1] Pedigree includes not only descent and relationship, but also the facts of birth, marriage and death, which may be established by general report in the family, proved by a surviving member. American Life Ins. Co. *v.* Rosenagle, 77 Penn. St. 507.

Elliott v. Peirsol.

which the land of the *feme* was intended to be conveyed, for the purpo e of a re-conveyance to the husband, and thus to vest in him the estate of the wife, was indorsed by the clerk of Woodford county court, "acknowledged by James Elliott, and Sarah G. Elliott, September 11th, 1816," and was certified as follows, "Attest—J. McKenney, jun., Clerk."

"Woodford County, ss. : September 11th, 1813.

"This deed from James Elliott and Sarah G. Elliott, his wife, to Benjamin Elliott, was this day produced before me, and acknowledged by said James and Sarah to be their act and deed, and the same is duly recorded. John McKenney, jun., C. C. C."

Held, that subsequent proceedings of the court of Woodford county, by which the defect of the certificate of the clerk to state the privy examination of the *feme* (which, by the law of Kentucky, is necessary to make a conveyance of the estate of a *feme covert* legal), were intended to be cured, upon evidence that the privy examination was made by the clerk, will not supply the defect, or give validity to the deed. p. 340.

If the court of a state had jurisdiction of a matter, its decision would be conclusive ; but this court cannot yield assent to the the proposition, that the jurisdiction of a state court cannot be questioned, where its proceedings were brought, collaterally, before the circuit court of the United States. p. 340.

Where a court has jurisdiction, it has a right to decide any question which occurs in the cause; and whether its decisions be correct, or otherwise, its judgments, until reversed, are regarded as binding in every other court. But if it act without authority, its judgments and orders are regarded as nullities ; they are not voidable, but simply void ; and form no bar to a remedy sought in opposition to them, even prior to a reversal ; they constitute no jurisdiction, and all persons concerned in executing such judgments, or sentences, are considered, in law, as trespassers. p. 340.

The jurisdiction of any court, exercising authority over a subject, may be inquired into in every other court, when the proceedings of the former are relied on, and brought before the latter by a party claiming the benefit of such proceedings.[2] p. 340.

The jurisdiction and authority of the courts of Kentucky, are derived wholly from the statute law of the state. p. 341.

The clerk of Woodford county court has no authority to alter the record of the acknowledgment of a deed, at any time after the record is made. p. 344.

Elliott *v.* Piersoll, 1 McLean 11, affirmed.

ERROR to the Circuit Court of Kentucky. William Peirsol and Lydia Peirsol, his wife, Ann North, Jane North, Sophia North, Elizabeth F. P. North and *William North, citizens of Pennsylvania, heirs of Sarah G. Elliott, commenced their action of ejectment against James Elliott, [*330 the younger, and others, the plaintiffs in error, in the circuit court for the district of Kentucky, to recover the possession of 1200 acres of land, part of 2000 acres patented to Griffin Peart.

The plaintiffs proved, that, upon the division of the whole body among the heirs of Griffin Peart, the 1200 acres in contest were allotted to Sarah G. Peart, one of the heirs, and that she was seised thereof in severalty. Sarah G. Elliott, formerly Peart, she having intermarried with James Elliott, died about 1822, without issue ; Francis Peart and Le Roy Peart, brothers of Sarah Elliott, died shortly before her, also without issue. The boundaries of the 1200 acres, and the possession by the defendants, were not controverted.

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[1] Thompson *v.* Tolmie, 2 Pet. 157 ; Wilcox *v.* Jackson, 13 Id. 499 ; Hickey *v.* Stewart, 3 How. 750 ; Williamson *v.* Berry, 8 Id. 495 ; Boswell *v.* Otis, 9 Id. 336. A party against whom a judgment is relied on, may attack it for want of jurisdiction and show the non-existence of jurisdictional facts, by evidence *dehors* the record ; and this though the record recite their existence. Roderigas *v.* East River Savings Institution, 11 J. & Sp. 217 ; s. c. 76 N. Y. 316. But see, s. c. 63 Id. 460 ; The Rio Grande, 1 Woods 279.

The plaintiffs below claimed the premises, as the heirs of Sarah G. Elliott, formerly Sarah G. Peart; and they sought to establish their heirship, by the deposition of Mrs. Braugh, widow of Robert Braugh; who testified that the letter annexed to her deposition, addressed to William Piersol, Philadelphia, was in the handwriting of her deceased husband. She also stated, that she frequently heard him speak of his family connections, and had always understood from him, that the late Mrs. Mary North, formerly Mary Peart, and the late Mrs. S. G. Elliott, were cousins, both on the side of the father and mother; and that the statements in the letter corresponded with the other statements she heard him make upon the subject of the pedigree of the two ladies; which letter, proved the present plaintiffs to be the only heirs of Mrs. Sarah G. Elliott, at the time of her death. Other depositions were read to the same effect.

On the 12th of June 1813, James Elliott and Sarah G. Elliott executed a deed, by which the premises in question were expressed to be conveyed to Benjamin Elliott, under whom the plaintiffs in error claimed to hold the same.

The defendants below moved the circuit court to instruct the jury, that the evidence adduced by the plaintiffs to establish their heirship to Sarah G. Elliott was insufficient, and that the same ought to excluded. The court refused so to do; but on the contrary, instructed the jury, that the said evidence, if believed by the jury; was *primâ facie* testimony, that the lessors of the plaintiffs were the legal heirs of the said Sarah Peart, *alias* Sarah G. Elliott.

In relation to the deed of 12th June 1813, to Benjamin Elliott, it was contended below, that Sarah G. Elliott never did execute the same, in the manner described and required by law, and that the fee-simple estate of Mrs. Elliott did not pass thereby. The provisions of the law relative to
*331] the privy *examination of a *feme covert*, by the officer, the clerk of the court, or in open court, and to the recording thereof, were alleged not to have been complied with; and consequently, the estate of Mrs. Elliott did not pass, by the conveyance, to Benjamin Elliott. It was also claimed, on the part of the plaintiffs in error, that if a privy examination and acknowledgment were made, it was not recorded; and unless recorded, no title passed to divest the title of the *feme covert*. The circuit court decided this point in favor of the defendants in error, and the case was brought up, upon a bill of exceptions.

Wirt, attorney-general, for the plaintiffs in error.—I. The letter of Mrs. Ann Braugh to William Piersol, is not evidence. Although the declarations of members of families are evidence on question of pedigree, yet this rule is not universal, and it does not apply, when higher evidence can be obtained. 3 Stark. Ev. 1099, 1111; 3 A. K. Marsh. 321. The letter was written with a view to, or under the influence of, the approach of this suit; *post litem motam;* and such evidence is not admissible. 3 Stark. 1102, 1104.

II. As to the admissibility of the deed to Benjamin Elliott, and the alleged defect of the acknowledgment of the *feme covert*, Sarah G. Elliott.

1. The circuit court of the United States was not competent to inquire into the acts of the court of the state of Kentucky; before which the proceedings relative to the acknowledgment were entertained. This is not done

by the court of king's bench, of England, in reference to the proceedings of ecclesiastical court, or courts of common pleas. The court circuit could look at nothing but the record from the state court, and could not inquire in what mode the certificate had been made.

But if this could be done, there were materials enough for that purpose. The examination of the *feme* was made according to the provisions of the law, but it was not, at the time, fully stated by the clerk so to have been made. He took the acknowledgment, and the court, subsequently, did no more than fill up the record of what had been actually done, from the testimony of the facts before them. This was done by virtue of the powers which courts have exercised, to correct their records at a subsequent period. 4 Madd. 371; 12 Mod. 384; 2 Stark. 1132, 1156, 1182; 3 Bulst. 114; 8 Co. 162; Palm. 509; 1 Roll. 272; 2 Saund. 289; Ld. Raym. 39. 209; Sid. 70; 1 Salk. 50; Plowd. 13; Ibid. 50; Ld. Raym. 695; Cro. Eliz. 435, 459, 677; 2 Roll. 471; Hob. 327; Roll. Abr. 209–10; 2 Jones 212; Gwil. Bac. 197, note; Pigot, Recov. 218; 1 Doug. 134; 1 H. Bl. 238; Barnes 216; 2 Caines 139; 4 Hen. & Munf. 498; 3 Call 221, 233; 3 Hen. & Munf. 449.

*2. The clerk of the court, who took the acknowledgment, acted as the ministerial agent of the court, and he acts as if he was in court. [*332 This act was, therefore, in the power of the court. But if the clerk had the powers of a court in reference to taking acknowledgments of deeds, the authorities cited, showing the rights of courts to correct errors, apply to his acts; and if such were his powers, the interference of the court, in this case, was surplusage.

Wickliffe, for the defendants in error.—1. The assumption of the power to correct his errors by the clerk of the court, was a nullity, in Kentucky, according to the established laws and decisions there. Hardin 171–2. The laws of Kentucky, relative to taking acknowledgments of deeds have undergone many modifications; but the law and practice now is, for the clerks to take the acknowledgment and the privy examination of a *feme covert;* and in this they act independent of the courts, and not under their authority; nor have the judges of the courts any power to interfere with their acts or proceedings, in relation to such acknowledgment.(*a*) The authorities cited

(*a*) By the kindness of Mr. Wickliffe, the reporter has been furnished with the following abstract of the present laws of Kentucky, relative to the execution of conveyances by non-residents, and by husband and wife; Laws of Kentucky, ch. 278, 1796.

If the party who shall sign and seal any such writing, reside not in this commonwealth, the acknowledgment by such party, or the proof by the number of witnesses requisite,[1] of the sealing and delivering of the writing before any court of law, or the mayor, or other chief magistrate of any city, town or corporation of the county in which the party shall dwell, certified by such court, or mayor, or chief magistrate, in the manner such acts are usually authenticated by them, and offered to the proper court, to be recorded within eight months after the sealing and delivering, shall be as effectual, as if it had been in the last mentioned court.

Conveyances by husband and wife, how to be executed, &c.

§ 4. When husband and wife shall have sealed and delivered a writing, purporting to be a conveyance of any estate or interest, if she appear in court, and being examined privily and apart from her husband, by one of the justices thereof, shall declare to

[1] Three witnesses, by a previous section of the law.

to show the right and practice of *courts to correct errors or omissions, do not apply. As to the laws of Kentucky, relative to this subject, there was cited the act of assembly of 1795. 1 Litt. 595. The circuit court did not, in this case, inquire how the acts or proceedings of the court of Kentucky had been performed, but whether the laws of the state, on the subject-matter, had been complied with.

2. The facts of the case, as stated in the record, show that the testimony of Mrs. Ann Braugh was not liable to the objection that is was given *post litem motam ;* as to the operation of evidence, *post litem motam,* he cited Cowp. 594 ; 14 East 331 ; 3 Stark. 1105.

Trimble, Justice, delivered the opinion of the court.—This is an action of ejectment, brought in the circuit court for the district of Kentucky, by the lessors of the defendant in error, and against the plaintiffs in error, who were defendants in the court below.

The lessors of the plaintiff, in that court, claimed the land in controversy as heirs-at-law of Sarah G. Elliott, formerly Sarah G. Peart, deceased ; who, in her lifetime, had intermarried with the defendant, James Elliott. The defendants claimed by virtue of a deed of conveyance, made by James Elliot and Sarah G. Elliot his wife, in her lifetime, to Benjamin Elliot, and a deed reconveying the land from Benjamin Elliot to James Elliot.

On the trial of the general issue between the parties, the defendants took a bill of exceptions to certain opinions of the court, in overruling motions made by the defendants for instructions, &c., and in granting instructions

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him, that she did freely and willingly seal and deliver the said writing, "to be then shown and explained to her," and wishes not to retract it, and shall, before the said court, acknowledge the said writing, again shown to her, to be her act; or, if before two justices of the peace of that county in which she dwelleth, if her dwelling be in the United States of America, who may be empowered by commission, to be issued by the clerk of the court wherein the writing ought to be recorded, to examine her privily, and take her acknowledgment; the wife being examined privily, and apart from her husband, by those commissioners, shall declare that she willingly signed and sealed the said writing, "to be then shown and explained to her by them," and consenteth that it may be recorded; and the said commissioners shall return with the said commission, and thereunto annexed, a certificate, under their hands and seals, of such privy examination by them, and of such declaration made, and consent yielded by her; in either case, the said writing, acknowledged also by the husband, or proved by witnesses, to be his act, and recorded, together with such privy examination and acknowledgment before the court, or together with such commission and certificate, shall not only be sufficient to convey or release any right of dower, thereby intended to be conveyed or released, but be as effectual for every other purpose, as if she were an unmarried woman.

If out of the United States.

§ 5. If the dwelling of the wife be not in the United States of America, the commission to examine her privily, and take her acknowledgment, shall be directed to any two judges or justices of the peace of any court of law, or to the mayor or other chief magistrate of any city, town or corporation of the county in which the said wife shall dwell, and may be executed by them in the same manner as a commission directed to two justices in the United States of America; and the certificate of the judges or justices of such court, or the certificate of such mayor or chief magistrate, authenticated in the form, and with the solemnity by them used in other acts, shall be as effectual as the like certificate of the justices in the United States of America.

to the jury, moved by the *plaintiff, in the progress of the trial; and a verdict and judgment having been rendered against the defendants, they have brought the case before this court by writ of error.

The bill of exceptions states, "that upon the trial of the case, the plaintiffs read as evidence, a patent from the commonwealth to Griffin Peart, dated the 1st of May 1781, covering the land in controversy (which patent is made part of the bill of exceptions), and sundry depositions, taken and filed in the cause (also made part of the bill of exceptions), and proved, that upon a division of the land granted to Griffin Peart by said patent, the part in contest was allotted to the late Sarah G. Elliott, formerly Sarah G. Peart, and that she was seised thereof in severalty; that the said Sarah G. Elliott died, before the institution of this suit, about the year 1822, without issue; and that the defendants were in possession of the land allotted to her as aforesaid. And after the plaintiffs had closed their evidence, touching their derivation of title, the defendants, as they had reserved the right to do, moved the court to instruct the jury, that the evidence adduced on the part of the plaintiffs was insufficient to prove title in the lessors of the plaintiffs, and that the same ought to be rejected; but the court refused so to instruct, or to exclude the evidence; and on the contrary, instructed the jury that the said evidence, if believed by them, was *primâ facie* evidence, that the lessors were the legal heirs of the patentee, Griffin Peart, &c. To which opinion of the court, in all its parts, the defendants excepted.

The defendants then gave in evidence, the deed of conveyance from Sarah G. Elliott and her husband, to Benjamin Elliott (dated the 12th day of June 1813), for the land in contest, and the deed from Benjamin Elliott, to the said James, together with all the indorsements upon, and authentications annexed to, the first-mentioned deed; which indorsements and authentications are in the following words and figures, to wit:

"Acknowleged by James Elliott and Sarah G. Elliott. September 11th, 1813. Attest—J. McKenney, jr., Clerk."

"Woodford County, sct. September 11th, 1813.

This deed from James Elliott and Sarah G. Elliott his wife, to Benjamin Elliott, was this day produced before me, and acknowledged by said James and Sarah to be their act and deed, and the same is duly recorded.

"John McKenney, jr., C. W. C. C."

"Woodford County, sct. November County Court, 1823.

On motion of Benjamin Elliott, by his attorney, and it appearing to the satisfaction of the court, by the indorsement of the deed from James Elliott and wife, to him under date of 12th June 1813, and by parol proof, that said deed was *acknowledged in due form of law, by Sarah G. Elliott, before the clerk of this court, on the 11th of September 1813; but that the certificate thereof was defectively made out: It is ordered, that the said certificate be amended to conform to the provisions of the law in such cases, and that said deed and certificate, as amended, be again recorded. Whereupon, said certificate was directed to be amended, as to read as follows, so to wit:— [*335

"Woodford County, sct. September 11th, 1813.

This day, the within-named James Elliot and Sarah G. Elliott, his wife,

appeared before me, the clerk of the court of the county aforesaid, and acknowledged the within indenture, to be their act and deed: and the said Sarah being first examined, privily and apart from her husband, did declare, that she freely and willingly sealed the said writing, which was then shown and explained to her by me, and wished not to retract it, but consented that it should be recorded. The said deed, order of court, and certificate, as directed to be amended, are all duly recorded in my office.

"Attest—JOHN MCKENNEY, jr., C. W. C. C."

It was proved by John McKenney, a witness examined on the part of the defendants, that the indorsement made on the back of the deed, from Elliott and wife, to Benjamin Elliott, in these words, to wit: "Acknowledged by James Elliott and Sarah G. Elliott, September 11th, 1813. Attest—J. MCKENNEY, Clerk," was in the handwriting of the said clerk of the Woodford county court, and was the minute made by him, at the time said deed was acknowledged; and it was also proved, that the certificate of the acknowledgment and recording of the said deed, indorsed on said deed, was, at some subsequent time, written and drawn out by a deputy of said clerk, from the said minute. And the clerk deposed, that although he had not a particular recollection of all the facts, that he remembered the circumstance of James Elliott and his wife coming to his office to acknowledge said deed; that he knew what his duty required in such cases, and that the acknowledgement and privy examination, and an explanation of the instrument to her, was requisite, in order to its being recorded as to her. And that he did not doubt, he had done his duty in this instance, and that said deed had been acknowledged by Mrs. Elliott, in all respects. Other parol evidence was given, conducing to prove, that in point of fact, the said deed from Elliott and his wife, was regularly acknowledged by the wife before the clerk, upon his privy examination of her.

The said McKenney, upon cross-examination, further proved, that after the said deed and certificate of the acknowledgment *thereof, had
*336] been recorded, and in the lifetime of Mrs. Elliott, he had, at the instance of her counsel, made out a true copy of the record of said deed, and certificate of the acknowledgment thereof, by Elliott and wife, as they were then upon the record; which copy, the plaintiff gave in evidence; that after the death of Mrs. Elliott, application was made to him, by the counsel of the defendants, to alter the certificate of the acknowledgment of the deed from Elliott and wife, to Benjamin Elliott, so as to state her privy examination; but which he declined. It was also proved, that the deed had remained in the possession of the clerk, from the time of its first acknowledgment, till after the certificate ordered by the county court was made upon it.

After the defendants had closed the evidence on their side, which was as above stated, the court, upon the motion of the plaintiffs' counsel, instructed the jury, that the parol evidence which had been given on the part of the defendants, conducing to show a privy examination of Mrs. Elliott, was incompetent for that purpose; that a privy examination and acknowledgment of a *feme covert*, so as to pass or convey her estate, could not, legally, be proved by parol testimony, but by record; and that although they might believe, from the parol evidence, that said deed had been acknowledged by Mrs. Elliott, in all due form of law, upon her privy examination, and all

proper explanations given to her; yet, it constituted no defence to the action, unless such privy examination had been duly certified and recorded. The court further instructed the jury, that the certificate of the acknowledgement of said deed, by Elliott and wife; and the after-certificate, by order of the county court, of her privy examination; were not sufficient, in law, to pass her estate; because, the first shows no privy examination, and the county court had no jurisdiction to order the second to be made. To all which opinions, and decisions of the court, the defendants excepted, &c.

It is argued, by the learned counsel in this court, that the motion of the defendants to exclude the evidence adduced on the part of the plaintiffs, or to instruct the jury that it was insufficient to prove title in the lessors of the plaintiff, ought to have been granted. The argument in this court has not put the question on the ground, that taking the whole of the plaintiff's evidence together, touching the derivation of the title of the lessors of the plaintiff, it is insufficient to deduce the title to them, down from the patentee, through Sarah S. Elliott, who was seised therefore in severalty. We have, however, reviewed the evidence, with a view to that question, and are satisfied it is sufficient for that purpose.

The ground of argument relied on here, is, that a part of the *evidence was incompetent and inadmissible. It is said, that so much of the [*337
depositions as detail Mrs. Elliott's conversations, concerning the manner of her acknowledgment of the deed, and so much of Mrs. Braugh's deposition, as speaks of the letter of her deceased husband, and the letter itself, made part of her deposition, were incompetent, and ought to have been rejected; and that the reservation of the right to move to reject the evidence, admitted in the bill of exceptions, shows that the defendants' counsel had the right to insist upon the rejection of any part of the evidence, as incompetent. The argument admits of several answers, deemed satisfactory. Mrs. Elliott's conversation, detailed in some of the depositions, in relation to the defendants' deed, can, by no fair construction, be brought within the motion. It related not to the title of the lessors of the plaintiff, but to supposed defects in the title of the defendants; and to use the language of the bill of exceptions, it was the plaintiffs' evidence "touching the derivation of the title of the lessors of the plaintiffs," which the defendants moved to exclude. Besides, at that stage of the case, the defendants had not introduced the deed; and when we come to consider the defendants' title, after the deed was introduced, it will appear, that Mrs. Elliott's declarations could in no manner have influenced the verdict, and were, therefore, harmless.

We are not prepared to admit, that Mrs. Braugh's letter, on the subject of the family pedigree, proved by her evidence, and made part of her deposition, was not competent evidence, to be left to the jury, upon a question of pedigree or heirship. She was an aged member of the family, and traces back the pedigree, and several branches of the family, for about seventy years. The rule of evidence, that in questions of pedigree, the declarations of aged and deceased members of the family may be proved, and given in evidence, has not been controverted. But it is argued, that this rule is qualified by this exception—that declarations, made *post litem motam*, cannot be given in evidence; and it is insisted, this case comes within the exception; for although no suit had been commenced, yet a controversy had arisen, or was expected to arise. We doubt the application of the

exception to this case. A controversy had arisen, or was expected to arise, between the heirs of Mrs. Elliott, and the defendants, concerning the validity of the deed of Mrs. Elliott, made while she was a *feme covert.* But it does not appear, that any controversy had arisen, or was expected to arise, about who were her heirs. The *lis mota,* if it existed, was not, who were heirs, but whether Mrs. Elliott's deed made a good title against the heirs, whoever they might be. It is not necessary, however, to give any *positive opinion on this point, as other grounds exist, upon which the motion was rightfully overruled. *338]

It is conceded, that the defendant's counsel had a right to move the court below to exclude any part of the plaintiff's evidence, which he might choose to designate as incompetent; but it is not admitted, that he exercised that right. It does not appear, from the bill of exceptions, that he designated any particular piece or part of the evidence, as objectionable, and moved the court to exclude it. But on the contrary, resting his case upon the assumption, that the whole evidence of the plaintiff, taken together, was either incompetent or insufficient, he moved the court either to exclude the whole, or to instruct the jury that the whole was insufficient to prove title in the lessors of the plaintiff. This could not be done, on the ground of incompetency, unless the whole was incompetent, which is not pretended; the court was not bound to do more, than respond to the motion, in the terms in which it was made. Courts of justice are not obliged to modify the propositions submitted by counsel, so as to make them fit the case. If they do not fit, that is enough to authorize their rejection. We have already said, the evidence, taken altogether, was sufficient to prove title in the lessors of the plaintiff. If any part of it was incompetent, the court might, on a general motion to exclude the whole, have excluded such parts; but the court was not obliged to do so. There is, therefore, no error in the decision of the circuit court, overruling the motion of the defendants; nor in the instructions given to the jury, upon that motion.

We now proceed to an examination of the questions arising out of the instruction given to the jury, on the motion of the plaintiffs, in relation to the deed of James Elliott and Sarah G. Elliott, his wife, to Benjamin Elliott; set up by the defendants in their defence. The general question involved in the first instruction, is, can the privy examination and acknowledgment of a deed, by a *feme covert,* so as to pass or convey her estate, be legally proved by parol testimony? We hold, that they cannot. By the principles of the common law, a married woman can, in general, do no act to bind her; she is said to be *sub potestate viri,* and subject to this will and control. Her acts are not like those of infants, and some other disabled persons, voidable only; but are, in general, absolutely void *ab initio.* In Virginia and Kentucky, the solemn modes of conveyance by fine and common recovery, have never been in common use; and in those states, the capacity of a *feme covert* to convey her estate by deed, is the creature of statute law; and to make her deed effectual, the forms and solemnities, prescribed by the statutes, must be pursued.

*The Virginia statute of 1748, ch. 1, after making provisions to enable *femes covert* to convey their estates by deed, upon acknowledgment and privy examination, according to prescribed forms, in the 7th section, has these words: "Whereas, it has always been adjudged, that *339]

where any deed has been acknowledged by a *feme covert*, and no record made of her privy examination, such deed is not binding upon the *feme* and her heirs." The 8th section enacts and declares, "that the law herein shall always be held according to the said judgments, and shall never hereafter be questioned, &c." This law was adopted by Kentucky, at her separation from Virginia, and is understood never to have been repealed.

The 4th section of the Kentucky statute of 1796 (see 1 Litt. Laws, p. 569) provides for the privy examination and acknowledgment of *femes covert* in open court; and where they cannot conveniently attend, authorizes a commission to issue to two justices, to take and certify the acknowledgment and privy examination; and declares, that "in either case, the said writing, acknowledged by the husband, and proved by witnesses to be his act, and recorded together with such privy examination and acknowledgment, &c., shall not only be sufficient to convey or release any right of dower, &c., but be as effectual for every other purpose, as if she were an unmarried woman."

The 1st section of this act authorizes clerks of the county courts, general court, and court of appeals, to take, in their offices, the acknowledgment or proof of the execution of deeds, and to record them, upon acknowledgments, or proofs so taken by themselves; but did not authorize them to take the acknowledgment and privy examination of *femes covert*. But by a subsequent statute, clerks are authorized to take, in their offices, the "acknowledgment of all deeds, according to law." And the act of 1810 (4 Litt. Ky. Laws 165) which authorizes the clerk of one county to take and certify the acknowledgment of a deed, to be recorded by the clerk of another county, where the land lies, &c., declares, that "if the due acknowledgment, or privy examination of the wife, &c., shall have been taken, &c., by the clerk receiving the acknowledgment of the deed, &c., and that being duly certified with the deed, and recorded, shall transfer such wife's estate, &c.," as fully as if the examination had been made by the court, or the clerk in whose office the deed shall be recorded. It is by construction of these last-recited laws, that the clerks are held, in Kentucky, to be authorized to take the acknowledgments and privy examinations of *femes covert*, in all cases of deeds made by them and their husbands.

The Kentucky statutes, above recited, show clearly, that the legislature of that state has never lost sight of the principle *declared by the Virginia statute of 1748, "that when any deed has been acknowledged by a *feme covert*, and no record made of her privy examination, such deed is not binding upon the *feme* and her heirs." What the law requires to be done, and appear of record, can only be done and made to appear by the record itself, or an exemplification of the record. It is perfectly immaterial, whether there be an acknowledgment, or privy examination, in fact, or not, if there be no record made of the privy examination; for, by the express provisions of the law, it is not the fact of privy examination merely, but the recording of the fact, which makes the deed effectual to pass the estate of a *feme covert*. [*340

It is now only necessary to state the second instruction given to the jury on the plaintiffs' motion, to manifest its entire correctness. It was, "that the first certificate of the acknowledgment and recording of the deed of

Elliott and wife, was not sufficient in law to pass her estate; because it showed no privy examination of the *feme.*"

The last instruction given by the court to the jury presents a question of more difficulty. It is, "that the after-certificate, made by order of the county court, of her privy examination, is insufficient, in law, to pass her estate; because the county court had no jurisdiction or authority to order the said second certificate to be made." It is argued, that the circuit court of the United States had no authority to question the jurisdiction of the county court of Woodford county; and that its proceedings were conclusive upon the matter, whether erroneous or not. We agree, that if the county court had jurisdiction, its decision would be conclusive. But we cannot yield an assent to the proposition, that the jurisdiction of the county court could not be questioned, when its proceedings were brought, collaterally, before the circuit court. We know nothing in the organization of the circuit courts of the Union, which can contradistinguish them from other courts, in this respect.

Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void; and form no bar to a recovery sought, even prior to a reversal in opposition to them. They constitute no justification; and all persons concerned in executing such judgments or sentences, are considered, in law, as trespassers. This distinction runs through all the cases on the subject; and it proves, that the jurisdic-
*341] tion of any court exercising *authority over a subject, may be inquired into in every court, when the proceedings of the former are relied on and brought before the latter, by the party claiming the benefit of such proceedings.

It is well known, that the jurisdiction and authority of the county courts of Kentucky are derived wholly from the statute law of the state. In argument, we were referred to no statute which was supposed, either in terms, or by fair construction, to confer upon the county court any supervising or controlling power over the acts of the clerk, in taking, in his office, the acknowledgment of a deed, or in recording it, upon an acknowledgment there taken by him. We have sought in vain for such a provision, and it is believed, none such exists. No such supervising and controlling power can result to the court, from the general relations which exist between a court and its clerk; for in this case, the statutes confer upon the clerk, in his office, a distinct, independent, personal authority, to be exercised by him, upon his own judgment and responsibility. We think, therefore, with the circuit court, that the county court had no jurisdiction or authority to order the after-certificate of Mrs. Elliott's privy examination to be made and recorded.

But the argument, which seemed to be relied on most confidently by the learned counsel, is, that the order of the county court may be disregarded; and the amendment considered as an amendment made by the clerk, of his own authority, and that the clerk was authorized to amend his own certificate and record, at any time. It would be difficult to maintain that the second certificate, or amendment as it is called, could rightfully

be regarded as the clerk's own act, independent of the order of the county court; it appearing, that he refused to do the act, until the order was made. But be it so. Had the clerk authority to alter the record of his certificate of the acknowledgment of the deed, at any time after the record was made? We are of opinion, he had not. We are of opinion, he acted ministerially, and not judicially, in the matter. Until his certificate of the acknowledgment of Elliott and wife was recorded, it was, in its nature, but an act *in pais*, and alterable at the pleasure of the officer. But the authority of the clerk to make and record a certificate of the acknowledgment of the deed, was *functus officio*, as soon as the record was made. By the exertion of his authority, the authority itself became exhausted. The act had become matter of record, fixed, permanent and unalterable; and the remaining powers and duty of the clerk were only to keep and preserve the record safely.

If a clerk may, after a deed, together with the acknowledgment *or probate thereof have been committed to record, under color of amendment, add anything to the record of the acknowledgment, we [*342 can see no just reason why he may not also substract from it. The doctrine that a clerk may, at any time, without limitation, alter the record of the acknowledgment of a deed, made in his office, would be, in practice, of very dangerous consequence to the land titles of the county, and cannot receive the sanction of this court.

It is the opinion of this court, that there is no error in the judgment and proceedings of the circuit court, and the same are affirmed, with costs.

Judgment affirmed.

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*Lessee of THOMAS SPRATT, ANDREW, WILLIAM, SARAH, JACOB, CATHARINE and PIERCE SPRATT, Plaintiffs in error, *v.* SARAH SPRATT, Defendant in error. [*343

Power of aliens to hold lands.

The act of the legislature of Maryland, passed 19th December 1791, entitled "an act concerning the territory of Columbia, and the city of Washington," which, by the 6th section, provides for the holding of lands by "foreigners," is an enabling act; and applies to those only who could not take lands without the provisions of that law. It enables a "foreigner" to take, in the same manner as if he were a citizen.[1] p. 349.

A foreigner who becomes a citizen, is no longer a foreigner, within the purview of the act. Thus, after-purchased lands vest in him as a citizen; not by virtue of the act of the legislature of Maryland, but because of his acquiring the rights of citizenship. p. 348.

Land in the county of Washington, and district of Columbia, purchased by a foreigner, before naturalization, was held by him, under the law of Maryland, and might be transmitted to the relations of the purchaser, who were foreigners; and the capacity so to transmit those lands, is given absolutely, by this act, and is not affected by his becoming a citizen; but passes to his heirs and relations, precisely as if he had remained a foreigner.[2] p. 349.

ERROR to the Circuit Court of the District of Columbia, for the county of Washington. This was an action of ejectment, brought by the plaintiff

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[1] Matthew *v.* Rae, 3 Cr. C. C. 699.

[2] But the act only extends to lands acquired by deed or will, and therefore, if an alien purchased lands, and before the execution of a deed, died, or became a citizen by naturalization, such lands did not descend to his alien heirs. Spratt *v.* Spratt, 4 Pet. 393.

in error, to recover several messuages, which he claimed by virtue of several demises made to him by Thomas Spratt and others (the messuages all lying and being in the county of Washington, in the district of Columbia), against Sarah Spratt, the defendant in error, who was the widow of James Spratt, and who was in possession of the premises.

The following facts were agreed in the court below: That James Spratt, before the time of the demise laid in the plaintiff's declaration, died seised, in fee-simple, of the premises mentioned in the said declaration; that the lessors of the plaintiff were the legitimate brothers and sisters, of the whole blood, of the said James Spratt; and that the defendant was the lawful wife of said James Spratt, at the time of his death, and, as his widow, was still living.(*a*) Also, that the lessors of the plaintiff made a peaceable entry into the said premises, and executed to the plaintiff the lease men-
*344] tioned in the said *declaration, upon the premises, and that the plaintiff, being in possession of said premises, by virtue of that lease, was therefrom ousted by the defendant. That the said James Spratt, and the defendant, his wife, were natives of Ireland, of the United Kingdom of Great Britain and Ireland, and came to the United States of America in the year 1812, and before the 18th day of June, in that year; and continued to reside therein, and to cohabit as man and wife, to the time of his death; which took place on the 4th day of March 1824. That the said James Spratt, on the 11th day of October, in the year 1821, was duly admitted and naturalized as a citizen of the United States, in the circuit court of the district of Columbia, and received a certificate of such naturalization in due form, according to the directions and conditions of the several acts of congress in such case provided; the said defendant then and there being his lawful wife, and as such cohabiting with him as aforesaid. That the defendant, Sarah Spratt, did not, in her own person, comply with any of the directions or conditions required by the said acts of congress, or any of them, or become in any manner admitted or naturalized as a citizen of the United States, otherwise than by the admission and naturalization of her said husband. That the lessors of the plaintiff were all natives of Ireland, and native-born subjects of the king of the United Kingdom of Great Britain and Ireland; that only two of them, to wit, Thomas Spratt and Pierce Spratt, ever came to the United States; both of whom came to the United States, and resided therein, some years before the death of James Spratt, and that none of them were admitted or naturalized citizens of the United States. That James Spratt was not in any manner seised of, or entitled to, any of the messuages or tenements in the declaration mentioned, at any time before his said naturalization, except of the lot No. ———, in square ———, which was duly bargained, sold and conveyed by one Isaac S. Middleton, to the said James Spratt, in fee-simple, on the 11th day of January 1821; and that all the rest and residue of the said messuages and tenements were purchased by the said James Spratt, and to him duly bargained, sold and conveyed, in fee-simple, at various times in the year 1822 and 1823, after his said naturalization.

(*a*) The act of assembly of Maryland, No. 1786, ch. 45, entitled "an act to direct descents," provides, "if there be no descendants or kindred of the intestate to take the estate, then the same shall go to the husband or wife, as the case may be."

Upon this statement of facts, the question of law which arose was, as to the true construction of a statute of the state of Maryland, entitled "an act concerning the territory of Columbia, and the city of Washington," passed the 19th of December 1791, by the 6th section of it is provided as follows, to wit: "That any foreigner may, by deed or will to be hereafter made, take and hold lands within that part of the *said territory which lies within this state, in the same manner as if he was a citizen of this [*345 state; and the same lands may be conveyed by him, and transmitted to, and be inherited by, his heirs or relations, as if he and they were citizens of this state: provided, that no foreigner shall, in virtue hereof, be entitled to any further or other privilege of a citizen."

It was contended, on the part of the plaintiff, that according to the true construction of that statute, his lessors, who were the heirs and relations of the deceased, James Spratt, inherited all the lands and tenements of which he died seised in fee; and that the circumstance of James Spratt, who was a foreigner, having been naturalized before his death, could not alter the state of their right of inheritance, whether the lands were acquired before or after his act of naturalization.

Coxe, for the plaintiff in error.—The term "foreigner," used in the law of Maryland, is not a technical word, nor has it received a technical definition; and in this respect, it differs from "alien." Its true signification must, therefore, be ascertained by its use, and by a reference to the statute by which it is introduced. It is probably derived from the Latin, *foris*, and *origo*, the Spanish *foranio*, or the French, *forain;* and always refers to birth or origin. Alien is obtained from the Latin, *alienus*, and always refers to the present time. One may cease to be an alien, but can never cease to be a foreigner. In this sense, it is employed in various acts of congress, in the most precise and formal writings, and in ordinary parlance. This is the proper mode of ascertaining its meaning. 6 Bac. Abr. 382, Stat. 3; Acts of Congress, April 10th, 1806 (2 U. S. Stat. 374); Act of 1793 (1 Ibid. 300); August 2d, 1813 (3 Ibid. 72); 23d December 1814 (Ibid. 159). It has also another signification, equally distinct from *alien*. Ministers from abroad are called "foreign ministers," in the act of congress relative to their compensation. The foreign trade and commerce of the United States, are, in such terms, the subject of legislation. When applied to persons, it is the correlative of *native*. Naturalized *foreigner* is also in use.

The policy of the act was to encourage persons from abroad to purchase and settle in the district, and an opposite construction of the act, from that claimed by the plaintiff, would be in opposition to the purposes of the statute. The right of every one from abroad, to purchase and transmit "to his heirs or relations," the real estate he may acquire, is conferred by positive statute; it is absolute and vested, and not to be taken away by implication and inference. As to the *construction of statutes: 6 Bac. Abr. 6, 380, 386, 388, 389. [*346

In reply to Messrs. Key and Jones, Mr. *Coxe* argued: In regard to the etymology, *alien* is derived directly from the Latin *alienus*, and has in common parlance the same signification—foreigner is a modern word, derived, either mediately or directly, from *fores* and *origo;* whenever properly used, it refers to the origin, and not to any present relation. One of the authori-

ties cited, employs the expression, "a foreigner who has been naturalized, and has become a denizen." It would be a solecism in language, to use the phrase "an alien who has been naturalized;" to be equalled only by the language employed in one of the Maryland statutes which has been referred to, which in express terms, calls foreigners who have been naturalized, "natural-born subjects."

It is admitted, as a general rule, that the naturalization refers back, and confirms a title previously acquired; but that is only when necessary to give validity to it. It can never relate back, so as to preclude the party from appealing to the statute, as conferring upon him, originally, a valid title. The conclusion which has been pressed, that the construction contended for would give to alien heirs, privileges superior to those of natural-born heirs, can derive no support from the law. They are only relieved from the disabilities incident to their alienage. A remote alien heir is not preferred to a nearer native heir.

It has been contended, that inasmuch as the party, by his naturalization, lost his privilege of inheriting from them, the disability should be reciprocal; such, however, is not the legal effect of becoming a citizen. An individual becoming naturalized under our laws, thereby loses no privilege of a foreign subject; he acquires privileges, but loses none formerly possessed. The law of Maryland merely preserves and legalizes inheritable blood, between a citizen and a foreigner; and enables the child or heir, not naturalized, to inherit as if he were. The construction contended for, makes it immaterial when the party became a citizen.

The policy of the two acts of the legislature, and the naturalization laws, are harmonious and consistent. That of the latter is to induce aliens to become citizens, that of the former is, to induce foreigners to purchase and reside in the district. The laws for naturalization ought not to be so construed, as, by remote inference, to involve as a consequence, the abrogation and annihilation of privileges, vested in the latter as the proprietor of the land. It is immaterial, whether the privilege be considered as one
*347] *annexed to the person, or attached to the land; the person can only have it as the proprietor of the land, and the land can only have it as being so held.

Key and *Jones*, for the defendant in error.—1st. The construction contended for cannot be given to the Maryland statute: and 2d, if it could, it does not affect the case.

1. There is no real distinction between the term "foreigner" and "alien." Their derivation is from words of the same import, and they are used synonymously, by writers of all descriptions. The rule of construction stated on the other side, is a correct one, viz., looking at other laws *in pari materia*, and seeing how the term in controversy is understood in them. This rule has been applied on the other side, by looking to the laws of the congress of the United States, where the words "alien" is generally used as opposed to "citizen." But this does not aid us in endeavoring to understand what the Maryland legislature meant by the expression. For this purpose, we must look to laws passed by the same legislature. Look, then, to the Maryland laws of naturalization. These are evidently meant only to apply to such persons, as the counsel for the appellant con-

tends, are properly called "aliens." Such persons as are not citizens, but are to be made so. Yet the word used in all these laws, is the same word we find in the statute we are now considering, it is "foreigner."

We come at the meaning of the expression, by considering the object of the law. It is to enable foreigners to take and hold and transmit lands, who were under disability to do so. Who were they? not "foreigners," as understood on the other side; who, though born in a foreign country, might have become citizens here, and be under no disability; but "foreigners," as understood by the legislature, who had not become citizens, and who were under the disibility. In the section in controversy, the word is used in plain opposition to "citizen." The persons it intended to provide for, are to take as if they were "citizens." By this construction of the word, the law is made to operate in cases where its operation is necessary. The contrary construction makes it operate where its operation is unnecessary.

2. What has this law to do with the case? James Spratt becomes naturalized, becomes to all intents and purposes an American citizen. He purchases lands; how is he entitled to hold them? By virtue of his citizenship. In the case before the court, it is true, he purchased one of the lots in question, before his naturalization; but it is well settled, that his naturalization relates back and protects his title. It is contended, he takes the land, not as a citizen, which he is, but as a foreigner, which he is not. That is, a law made for a man *who could not take without the law, is to give right to him who had it without the law. A citizen shall not [*348 take as a citizen, but under a law made for foreigners. If he could take by either (and that is all that can be asked), yet must he not be held to take by the higher and better right?—by the privilege acquired by his citizenship, as the heir-at-law takes by descent, where he is devisee? It is said, this is taking away a privilege from him; what privilege? it is said, that of transmitting to his alien heirs; that by the Maryland laws, he had the right of holding lands and so transmitting them; and that it is taking away this right, to make him take as a citizen. But it is plain, that if he takes and transmits the land, as a foreigner, under the Maryland law, notwithstanding his naturalization, that he must then transmit it to his foreign heirs, to the exclusion of his own children, born here. This must be the case, according to all decisions upon the subject, for a citizen cannot inherit to a foreigner, nor a foreigner to a citizen. If he holds as a foreigner; foreigners, by this Maryland law, will inherit. Citizens, though his own children, can by no law inherit, if he holds as a foreigner. Here, then, would be the case of a citizen; and his own children, though citizens, are not to inherit to him. Can a citizen hold, in any other way than as a citizen? If he is a citizen, how can he take, why should he take, as a foreigner? only for the sake of these foreign relations; surely, not for his own. They show this Maryland law, and want him to take by that, though he choose to take by citizenship. They show a law, saying a man may take and transmit as a foreigner; but he may also choose to take by a better right, by citizenship; and he becomes naturalized. They ought to show a law, saying he must take and transmit as a foreigner.

Marshall, Ch. J., delivered the opinion of the court.—This is an ejectment, brought in the circuit court for the district of Columbia, sitting in

the county of Washington, for the recovery of several lots, lying in the county of Washington, of which James Spratt died seised. The lessors of the plaintiff are aliens, the legitimate brothers and sisters of the said James; and the defendant, who is also an alien, is his widow; James died without issue.

James Spratt came into America in the year 1812, and became a citizen, on the 11th of October, in the year 1821. He purchased one of the lots, before he became a citizen, and the others afterwards. The title to the lots in controversy depends on the construction of an act of the state of Maryland, passed the 19th of December 1791, entitled "an act concerning the
*349] *territory of Columbia, and the city of Washington." The 6th section provides, "that any foreigner may, by deed or will, to be hereafter made, take and hold lands, within that part of the said territory which lies within this state, in the same manner as if he was a citizen of this state; and the same lands may be conveyed by him, and transmitted to, and be inherited by his heirs or relations, as if he and they were citizens of this state; provided, that no foreigner shall, in virtue hereof, be entitled to any further or other privilege of a citizen." The facts were stated in a case agreed, which was substituted for a special verdict. The circuit court gave judgment for the defendant, to which the plaintiff has sued out a writ of error.

The plaintiffs contend, that the word "foreigner," as used in the act, designates a person born in a foreign country, and that such person does not cease to be a foreigner, by becoming a citizen of the United States. The words of the act, therefore, apply to him, although he becomes a citizen, and enable him to take and transmit lands to his alien heirs or relations. The court is not of this opinion. The act is an enabling one, and applies to those only who could not take without it. It enables a *foreigner* to take "in the same manner as if he was a citizen." This language is entirely inapplicable to a *citizen*. An act to enable a citizen to take lands "as if he were a citizen," would be an absurdity too obvious to escape the notice of the legislature. We think, then, that a foreigner who becomes a citizen is no longer a foreigner, within the view of the act. His after-purchased lands vest in him as a citizen, not by virtue of the act of the legislature of Maryland.

The lot which he purchased while an alien, stands on different principles. This lot was acquired by a foreigner, under the act which was passed for the purpose of enabling him to acquire it. He took and held it under the law, and could transmit it as prescribed by the law. The act, after enabling him to take, adds, "and the same lands may be conveyed by him, and transmitted to, and be inherited by, his heirs or relations, as if he and they were citizens of this state." The capacity to transmit given by the act extends, in terms, to all lands acquired under the act. The lands taken, "may be conveyed by him," that is, by the taker, "and transmitted to his heirs or relations. This power of transmission is not restricted to his character as a foreigner, but belongs to him, as a person taking lands under the act. The power of transmitting is connected with the power of taking, and is co-extensive with it. This power is within the words of the law; and the words which confer it are not inoperative, since they give a capacity which citizenship does not give—the capacity of transmitting to relations.

who are *foreigners. This capacity is given, absolutely, by the act; and is not, we think, affected, by his becoming a citizen.

The objection urged by the defendant to this construction, is, that it would perpetuate the title in aliens to the remotest times, because it attaches the privilege to the land, and not to the person. We do not think the construction exposed to this objection. The land passes to the heirs or relations of the said James Spratt, precisely as it would have passed, had he remained a foreigner. The capacity is not in the land, but in the person, in relation to that land. It was in him, when the land was purchased, and did not pass out of him, under the words of the law, by his becoming a citizen.

It is the opinion of the majority of the court, that the circuit court erred, in deciding that judgment ought to be rendered for the defendant. It ought to be reversed, and the cause remanded to the circuit court, with directions to enter judgment for the plaintiff for the lot which was acquired by the said James Spratt, while an alien, saving the widow's dower; and that his declaration be dismissed as to the residue.

This cause came on, &c.: On consideration whereof, it is the opinion of this court, that the said circuit court erred, in deciding that judgment ought to be rendered for the defendant, and that the same ought to be reversed. Therefore, it is ordered and adjudged by this court, that the judgment of the said circuit court, in this cause, be and the same is hereby reversed, and that the cause be remanded to the said circuit court, with directions to enter judgment for the plaintiff for lot No. — which was acquired by the said James Spratt, while an alien, saving the widow's dower; and that his declaration be dismissed as to the residue.

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*Montgomery Bell, Plaintiff in error, *v.* James Morrison, Anthony Butler and Jonathan Taylor, Defendants in error. [*351

Depositions de bene esse.—Statute of limitations.—Acknowledgment by partner after dissolution.

The authority given by the act of congress of 24th September 1789, ch. 20, to take depositions of witnesses, in the absence of the opposite party, is in derogation of the rules of the common law, and has always been construed strictly; and therefore, it is necessary to establish, that all the requisites of the law have been complied with, before such testimony is admissible.[1] p. 355.

The certificate of the magistrate taking the deposition, is good evidence of the facts stated therein, so as to entitle the deposition to be read to the jury, if all the necessary facts are there sufficiently disclosed. p. 356

It should plainly appear, from the certificate of the magistrate, that all the requisites of the statute have been fully complied with; and no presumption will be admitted, to supply any defects in the taking the deposition.[2] p. 356.

The statute of limitations of Kentucky, is substantially the same with the statute of 21 James I.,

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[1] United States *v.* Smith, 4 Day 126; Jones *v.* Neale, Mart. (N. C.) 81; Carrington *v.* Stimson, 1 Curt. 437; Evans *v.* Hettich, 3 W. C. C. 409; Bleecker *v.* Bond, Id. 529; Merrill *v.* Dawson, Hempst. 563; Thorpe *v.* Simmons, 2 Cr. C. C. 195; The Merritt Hunt, Newb. 4. And see Harris *v.* Wall, 7 How. 693; as to the rules for taking a deposition *de bene esse*.

[2] The omission of the magistrate to certify that he reduced the testimony to writing himself, or that it was done by the witness in his presence, is fatal to the deposition. Cook *v.* Burnley, 11 Wall. 639.

c. 16, with the exception, that it substitutes the term of five years instead of six. The English decisions have, therefore, been resorted to in this case, upon the construction of the statute of Kentucky, and are entitled to great consideration. They cannot be considered as conclusive upon the construction of a statute passed by a state, upon a like subject, for this belongs to the local state tribunals, whose rules of interpretation, must be presumed to be founded upon a more just and accurate view of their own jurisprudence. p. 359.

If the doctrines of the Kentucky courts, in the construction of a statute of that state, are irreconcilable with the English decisions, upon a statute in similar terms; this court, in conformity with its general practice, will follow the local laws, and administer the same justice which the state court would administer between the same parties. p. 360.

The statute of limitations, instead of being viewed in an unfavorable light, as an unjust and discreditable defence, should have received such support from courts of justice, as would have made it, what it was intended emphatically to be, a statute of repose. It is a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt, from lapse of time; but to afford security against stale demands, after the true state of the transaction may have been forgotten, or be incapable of explanation, by reason of the death or removal of witnesses. p. 360.

An exposition of the statute of limitations, which is consistent with its true object and import, is that expressed by this court, in the case of Wetzell *v.* Bussard, 11 Wheat. 309, "an acknowledgment which will revive the original cause of action, must be unqualified and unconditional; it must show positively, that the debt is due, in whole or in part. If it be connected with circumstances which in any manner affect the claim, or if it be conditional, it may amount to a new *assumpsit*, for which the old debt is a sufficient consideration; or if it be construed to revive the original debt, that revival is conditional, and the performance of the condition, or a readiness to perform it, must be shown." p. 362.

If the bar of the statute is sought to be removed by the proof of a new promise, that promise, as a new cause of action, ought to be proved in a clear and explicit manner, and be, in its terms, unequivocal and determinate; and if any conditions are annexed, they ought to be shown to be performed. p. 362.

*352] *If there be no express promise, but a promise is to be raised by implication of law, from the acknowledgment of the party, such acknowledgment ought to contain an unqualified and direct admission, of a present subsisting debt, which the party is liable and willing to pay. If there be accompanying circumstances, which repel the presumption of a promise or intention to pay; if the expression be equivocal, vague or indeterminate, leading to no certain conclusion, but at best to probable inferences, which may affect different minds in different ways, they ought not to go to a jury, as evidence of a new promise, to revive the cause of action. p. 362.

The decisions of the courts of Kentucky, giving a construction to the statute of limitations of that state, are in accordance with the principles which have been sanctioned by this court. Those decisions evince a strong disposition of the courts of Kentucky to restrict, within very close limits, any attempt to revive debts, by implied promises, resulting from acknowledgments, or other confessions by parol. It is the duty of this court, in a case arising in Kentucky, to follow out the spirit of those decisions, so far as the court is enabled to gather the principles on which they are founded. p. 363.

In the construction of local statutes, this court has been in the habit of following the judgments of local tribunals. p. 363.

The admission of a party of the existence of an unliquidated account, on which something is due to the plaintiff, but no specific balance is admitted, and no document produced at the time, from which it can be ascertained, what the parties understood the balance to be, would not, by the court of Kentucky, be held sufficient to take the case out of the statute, and let in the plaintiff to prove, *aliunde*, any balance, however large it may be. It is indispensable for the party to prove, by independent evidence, the extent of the balance due to him, before there can arise any promise to pay it as a subsisting debt. p. 365.

The acknowledgment of a debt by one partner, after a dissolution of the copartnership, is not sufficient to take the case out of the statute, as to the other partners.[1] p. 365.

A dissolution of partnership puts an end to the authority of one partner to bind the other; it operates as a revocation of all power to create new contracts, and the right of partners as such,

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[1] Levy *v.* Cadet, 17 S. & R. 126; Searight *v.* Craighead, 1 P. & W. 135; Reppert *v.* Colvin, 48 Penn. St. 248; Bush *v.* Stowell, 71 Id. 208; Van Kuren *v.* Parmelle, 2 N. Y. 523.

can extend no further than to settle the partnership concerns already existing, and distribute the remaining funds; and this right may be restrained by the delegation of this authority to one partner. p. 370.

After a dissolution of a partnership, no partner can create a cause of action against the other partners, except by a new authority communicated to him for that purpose. p. 373.

When the statute of limitations has once run against a debt, the cause of action against the partnership is gone. p. 373.

ERROR to the Circuit Court of Kentucky. This was a writ of error to the seventh circuit court of the United States, for the district of Kentucky, sued out by the plaintiff below; and the case was presented for the consideration of this court, upon a bill of exceptions, taken by the plaintiff in error.

An action of *assumpsit* was instituted against Charles Wilkins, Jonathan Taylor, James Morrison, Anthony Butler and Isaac White, in 1823. The defendants, on the first of March 1810, by articles of agreement, under their respective hands and seals, entered into a partnership, for the purpose of manufacturing and vending salt, at Saline, near the Wabash, in the *then Illinois territory, under the firm of Jonathan Taylor & Co.; and the object of this suit was the recovery of about $20,000, claimed [*353 to be due on the sale and delivery of castings, to that value or amount. The evidence of the sale and delivery of the articles, and of their value, was complete; and the questions which were presented to the court, by the record, were: 1st. Upon the decision of the circuit court, against the admission of a deposition, which had been intended to be taken in conformity with the provisions of the act of congress of the 24th September 1789, ch. 20, and in reference to the taking of which there was in all respects a compliance with the directions of the act, with the exception, that the deposition was not certified to have been reduced to writing by the magistrate, or by the deponent, in his presence: and 2d. On the exclusion of certain testimony, and the validity of the plea of the statute of limitations, upon which plea the decision of the court having been in favor of the defendants, a verdict and judgment was rendered for them.

All the facts considered as proved in the case, and also the written and documentary testimony essential to a full understanding of the case are stated a length in the opinion of the court, delivered by Mr. Justice STORY.

The case for the plaintiff in error, was presented to the court by *Rowan* and *Benton;* and by *Jones*, for the defendants.

For the *plaintiff* in error, it was stated:—1st. The court erred in excluding the evidence offered by the plaintiff, to take the case out of the statute of limitations. 2d. In rejecting the deposition of John Mockbee.

1. The conversation, proved by the deposition of Patterson Baine, took place in 1818–19, and the writ was issued in August 1820; and the language of Morrison, one of the defendants, is sufficient to repel the plea of the statute. He expressed his willingness "to settle with the plaintiff," but the books and papers of the concern were in the hands of Taylor. He said, "he was anxious that the plaintiff's account should be settled." "I know we are owing you." "I am getting old, and I wish to have the business settled." He proposed to give the plaintiff $7000, in satisfaction of the claim. These acknowledgments are sufficient, on authority, to maintain this suit. The letters of Butler contain equivalent and similar expres-

sions. The letter of Morrison has the same operation : 2 Camp. 11 ; 5 Binr 573, 580, 582 ; 4 Johns. 468 ; *Lloyd* v. *Maund*, 2 T. R. 760 ; 2 Taunt. 66(, in which a new trial was granted, because the judge at *nisi prius* had not left to the jury for their construction, a letter which contained an admission that something was due. All the cases go to establish the principle,
*354] *that where an acknowledgment is proved, the jury are the proper judges of its effect. The court can only say, whether it is relevant to the subject-matter.

Where several are liable, the acknowledgment of one will take the demand out of the statute : 6 Johns. 267 ; 2 Bay 533 ; 2 H. Bl. 340 ; 2 Doug. 652 ; 3 Camp. 32 ; 2 Ibid. 11. Every partnership is *quasi* a corporation, and every individual in the firm a corporator, they having no power, by dissolution of the same, to affect the rights of creditors, and they continue a corporation until all their debts are paid. Every partner may maintain and give validity to the contract which was entered into during the partnerships. He does not make a new contract, by a promise after the dissolution of the firm ; but only continues the old one. The whole act, when one acts. There is no agency of one partner for another, but for the whole, where one acts.

2. The deposition of John Mockbee was taken according to all the essential requisites of the act of congress. It is certified to have been taken in the presence of the magistrate, "and that it is in the deponent's handwriting ;" and these circumstances show a conformity with the statute.

Jones, for the defendants in error.—The question in this case is, whether the statute of limitations shall be restored to its original meaning, or be reduced, as it formerly was in England, to a nullity. The cases erroneously suppose, that the statute proceeds on a presumption of a debt. The rule should be, that the acknowledgment should be such as, in itself, will support the claim, and thus render any evidence of the original debt unnecessary. The argument that the statute only prevents the remedy, is incorrect ; if there is no remedy, there is no debt. The evidence does not show an acknowledgment of a debt, but expressions of a wish to buy peace ; and if propositions were made for a settlement, they having been rejected, the transactions of the parties are still open. The original doctrine in England was, that there should be a new consideration, as well as an acknowledgment, but the more recent cases require an acknowledgement and an express promise to pay. *Clementson* v. *Williams*, 8 Cranch 72 ; *Wetzell* v. *Bussard*, 11 Wheat. 309. There are decisions upon this point in the state of Kentucky, whose statute is now to be construed. Hardin 302 ; *Harrison* v. *Handley*, 1 Bibb 445 ; 2 Ibid. 285 ; 3 Ibid. 271.

Whether the acknowledgment of a retired partner will bind the other partners ? The acts of a partner, bind the partnership, during its continuance, because each partner is the agent of the firm. *Whitcomb* v. *Whiting*,
*355] 2 Doug. 662. After *dissolution, payment to the out-going partner is invalid. Montagu on Partnership 127. The acknowledgment of a partner to take a case out of the statute, is a new contract, and therefore cannot operate, if made after dissolution : Montagu on Part. 125, 127 ; Watson on Part. 448 ; *Jackson* v. *Fairbanks*, 2 H. Bl. 340 ; 1 Barn. & Ald. 463 ; Norris' Peake's Evidence 423 ; *Wood* v. *Braddick*, 1 Taunt. 104.

2. The deposition of John Mockbee was properly rejected. Depositions

taken under the act of congress are *ex parte*, and the form established by law must be strictly complied with. The act requires that the deposition shall be written by the judge or justice taking it, or written by the witness in his presence. This cannot be inferred, and must be stated in the certificate.

Story, Justice, delivered the opinion of the court.—This cause comes before us, upon a writ of error to the circuit court of the district of Kentucky. The original action was brought by the plaintiffs in error, against the defendants, on the 16th of August 1820, to recover the value of certain iron castings, sold and delivered to them by the plaintiff. The defendants pleaded *non assumpserunt*, and *non assumpserunt* within five years (the latter being the time prescribed by the Kentucky statute of limitations, in cases of this nature); upon which pleas, the parties were at issue; and at the trial, a verdict was returned by the jury for the defendants, upon which, judgment passed in their favor. A bill of exceptions was taken to certain points, ruled by the circuit court at the trial; and the validity of these exceptions, has constituted the ground of the argument for the reversal, which has been insisted on in this court.

The first objection urged is the exclusion of the deposition of a Mr. Mockbee, which was offered by the plaintiff as testimony in the cause. The reason assigned for the exclusion is, that there was no proof by the certificate of the magistrate, or otherwise, that the deposition was reduced to writing, in the presence of the magistrate. This is a point altogether dependent upon the construction of the act of congress of the 24th of September 1789, ch. 20, under the authority of which, the deposition purports to be taken. The authority to take testimony in this manner, being in derogation of the rules of the common law, has always been construed strictly; and therefore, it is necessary to establish, that all the requisites of the law have been complied with, before such testimony is admissible. The act of congress provides, "that every person deposing as aforesaid, shall be carefully examined and cautioned, and sworn or affirmed, to testify the whole truth, and shall *subscribe the testimony by him or her given, after the same shall be reduced to writing; which shall be done only [*356 by the magistrate, taking the deposition, or by the deponent in his presence. And the deposition, so taken, shall be retained by such magistrate, until he deliver the same, with his own hand, into the court for which they are taken; or shall, together with a certificate of the reasons as aforesaid of their being taken, and of the notice, if any was given to the adverse party, be by him, the said magistrate, sealed up, and directed to such court; and remain under his seal, until opened in court." Without doubt, the certificate of the magistrate is good evidence of the facts stated therein, so as to entitle the deposition to be read to the jury, if all the necessary facts are there sufficiently disclosed. It is not denied, that the reducing of the deposition to writing, in the presence of the magistrate, is a fact made material by the statute, and that proof of it, is a necessary preliminary to the right of introducing it at the trial. But it is supposed, that sufficient may be gathered by intendment from the certificate of the magistrate, to justify the presumption that it was done. The certificate is in these words:

"State of Tennessee, Dickson County, ss. At Charlotte, in said county,

on the fourth day of July 1822, before me, James M. Ross, justice of the peace, and one of the judges of the county court of Dickson county, came, personally, John Mockbee, being about the age of fifty-one years, and after being carefully examined and cautioned, and sworn, to testify the whole truth, did subscribe the foregoing and annexed deposition, after the same was reduced to writing by him, in his own proper hand."

The certificate then proceeds to state the reason for taking the deposition, &c., in the usual form. It is remarkable, that the certificate follows throughout, with great exactness of terms, every requisition in the statute, with the exception as to the deposition being reduced to writing in the presence of the magistrate; and it is scarcely presumable, that this was accidentally omitted. At all events, every word in the certificate may be perfectly true, and yet, the deposition may not have been reduced to writing in the magistrate's presence. If this be so, then there can arise no just presumption in favor of it. And we think, in a case of this nature, where evidence is sought to be admitted, contrary to the rules of the common law, something more than a mere presumption should exist, that it was rightly taken. There ought to be direct proof, that the requisitions of the statute have been fully complied with. We are, therefore, of opinion, that the deposition was properly rejected.

The more important question in the cause is that relative to the evidence introduced to repel the plea of the statute of *limitations. In the course of the trial, the plaintiff read to the jury certain articles of copartnership, made between the defendants, in March 1810, whereby the defendants entered into a joint trade and partnership, in the manufacturing of salt, at a place known by the name of the United States Saline, near the Wabash river, within the Illinois territory, for the term of three years, then next ensuing, under the style of Taylor, Wilkins & Co. He also gave evidence, that large quantities of iron-castings had been sold and delivered by him to the company, during the term of the copartnership. He then introduced the testimony of one Patterson Baine, who stated, "that some time in the year 1818 or 1819, the plaintiff, Bell, came to his house, in Lexington, and stated, that he had again come up, to endeavor to get the amount of his account from the defendants. He requested the witness to go with the plaintiff to Col. Morrison's (one of the defendants) on that business. The witness went. The plaintiff and Morrison had a good deal of conversation on the subject of the plaintiff's account against the Saline company for metal furnished, which is not recollected by the witness. The witness recollects, that Morrison stated, that the books and papers relative to the plaintiff's claim were in the hands of Jonathan Taylor (one of the defendants), which put it out of his power to settle the account at that time, and expressed a willingness, but for that reason, to settle with the plaintiff. The plaintiff bade him good bye, and declared that that was the last time he should ever apply for a settlement of his account. The plaintiff then left the house of Morrison, and returned with witness to his house, where he remained until after breakfast on the next day; that shortly after breakfast, Morrison came to the house of the witness, and said to Bell (the plaintiff) that he was very anxious, that his (the plaintiff's) account, should be settled; adding, "I know we are owing you, and I am anxious it should be settled." He then mentioned to the plaintiff, that he (Morrison) was getting old, and

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did not like to have such things hanging over him, and wished to have the business settled, and to have done with it. He then proposed to give the plaintiff $7000, and close the business. The plaintiff refused to take it, and they parted. That no account, or papers of any kind, were shown or produced by Bell, at the time of these conversations with Morrison; but he understood the conversation related to the claim for castings, furnished by him to the company of Taylor, Wilkins and others. The witness observed to the plaintiff, after Morrison's departure, that he should have taken Morrison's offer; that "a half loaf was better than no bread."

The plaintiff also introduced certain letters written by Morrison and Butler (two of the defendants) to him. The first was *a letter from [*358
Morrison, dated 2d of October 1814; and it contains, among others, the following expressions: "I wish whatever is due to you should be paid; I have once more to ask you follow the advice I am about to offer, viz., to come up here, without delay (as Col. Butler may be soon ordered off), and I cannot believe your present suit will answer any purpose," &c. "It is not our wish to keep from you, whatever may be your just due. We have sent for the company books, some two or three weeks since; they will come to Louisville by water; and on your and Mr. Wheatly's being there, I have no doubt but your account can be adjusted; and that, more to your satisfaction, than it ever can be from the result of your suit," &c. "I wish your account settled; and I have no hesitation in saying, on your coming here, it will be done." The next was a letter from Butler, dated 26th October 1817, in which he informs the plaintiff, that on the 20th of November, Messrs. Morrison and Wilkins will be at Hopkinsville, "for the purpose of adjusting some of the affairs of the old Saline company," &c.; and desires that he "will be present, in order that a settlement may be effected, if possible, of the account which you (he) set up against the company." The next is from Butler, dated the 8th of November 1817, again mentioning the intended meeting on the 20th of November, "for the purpose of adjusting our old account to you;" and he adds, "I hope, therefore, you will be at Hopkinsville, for the purpose of enabling us to settle this old affair, to which, I am sure, all must be most anxious." The next is from Butler, dated 23d of October 1818, in which he alludes to a complaint made by the plaintiff, of Butler's absence from home, on the 5th of the same month, when the plaintiff called there, and reminds the plaintiff of a conversation they had at the Greenville Springs, "about a day of meeting to adjust the account between the former Saline company and yourself," and excuses himself for his absence. He adds, "I have now, Sir, attended at three places, upon three appointments made by yourself and myself, without being able to have a meeting, &c. If it would suit you to be at Frankfort, during the sitting of the legislature, we might possibly come to some understanding on the subject." The next is a letter from Jonathan Taylor (one of the defendants) to the plaintiff, dated 13th March 1818, in which he says, "I received a letter last Monday from Col. Butler, inviting me to attend an appointment with you at Hopkinsville, on the 26th of this month, for the purpose of adjusting the old company account. I shall endeavor to attend at that time, when, if we can make an arrangement, equally mutual, for the metal I may hereafter want, it can be done." Other letters *of Taylor were read in evi- [*45
dence, but they all bear date in the years 1811 and 1812.

It was further proved, that the plaintiff was present in 1814, when the Saline and improvements were delivered over to Bates, the succeeding lessee; and that the plaintiff was then apprised, that the term of the defendants, as lessees, had terminated. After the evidence on the part of the plaintiff was closed, the defendants' counsel moved the court to exclude the testimony of Patterson Baine, and all the letters bearing date within five years before the bringing of this suit, offered by the plaintiff, to show a promise on the part of the defendants, or any one of them, or any member of said firm or partnership, within five years next before the commencement of this suit; and the court so excluded from the jury the evidence of the said Baine, and all the letters dated within five years aforesaid, tending to prove a promise in five years next before the commencement of this suit, by the defendants, or either of them, or any member of said firm or partnership, as prayed by the defendants' counsel; and decided, that "there was no sufficient evidence of admissions by the defendants, or either of them, or any member of said firm or partnership, to prove such a promise in five years before the commencement of this suit, as would take the case out of the statute of limitations, or should be left to the jury, as conducing to that effect." To which opinion of the court, the plaintiff filed his bill of exceptions; and the correctness of this opinion has constituted the main ground of the elaborate argument at this bar.

Two points are necessarily involved in the discussion of this opinion. The first is, whether the evidence so excluded (supposing it to be, in all other respects, unobjectionable) was competent, in point of law, to have been left to the jury, to infer a promise sufficient to take the case out of the statute of limitations? The second is, whether, supposing it would be competent in ordinary cases, the fact that it was the acknowledgment or promise of one partner, after the dissolution of the partnership, did not justify its exclusion, as incompetent evidence to bind the other partners?

The statute of limitations of Kentucky, is substantially the same with the statute of 21 James I., c. 16, with the exception, that it substitutes the term of five years, instead of six. The English decisions have, therefore, been resorted to upon the present occasion, as illustrative of the true construction of the statute, and, in this view, are doubtless entitled to great consideration. They are not, however, and cannot be considered as conclusive authority, upon the construction of the statute, passed by a state upon the like subject; for this justly belongs to the local state tribunals, whose
*360] rules of *interpretation must be presumed to be founded upon a more just and accurate view of their own jurisprudence, than those of any foreign tribunal, however respectable. If, therefore, upon examination, it shall be found, that the doctrines of the Kentucky courts upon this subject are irreconcilable with those deduced from the statute of James, this court would, in conformity with its general practice, follow the local law, and administer the same justice, which the state court would administer between the same parties.

It has often been matter of regret, in modern times, that, in the construction of the statute of limitations, the decisions had not proceeded upon principles better adapted to carry into effect the real objects of the statute; that instead of being viewed in an unfavorable light, as an unjust and discreditable defence, it had received such support, as would have made it, what it

was intended to be, emphatically, a statute of repose. It is a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt, from lapse of time, but to afford security against stale demands, after the true state of the transactions may have been forgottten, or be incapable of explanation, by reason of the death or removal of witnesses. It has a manifest tendency to produce speedy settlements of accounts, and to suppress those perjuries which may rise up at a distance of time, and baffle every honest effort to counteract or overcome them. Parol evidence may be offered of confessions (a species of evidence which, it has been often observed, it is hard to disprove, and easy to fabricate), applicable to such remote times, as may leave no means to trace the nature, extent or origin of the claim, and thus open the way to the most oppressive charges. If we procced one step further, and admit that loose and general expressions, from which a probable or possible inference may be deduced of the acknowledgment of a debt, by a court or jury, that, as the language of some cases has been, any acknowledgment, however slight, or any statement not amounting to a denial of the debt, that any admission of the existence of an unsettled account, without any specification of amount or balance, and however indeterminate and casual, are yet sufficient to take the case out of the statute of limitations, and to let in evidence, *aliunde*, to establish any debt, however large, and at whatever distance of time; it is easy to perceive, that the wholesome objects of the statute, must be, in a great measure, defeated, and the statute virtually repealed.

The English decisions upon this subject, have gone great lengths; greater, indeed, in our judgment, than any sound interpretation of the statute will warrant; and in some instances, to an extent which is irreconcilable with any just *principle. There appears, at present, a disposition on the part of the English courts to retrace their steps; and, so far as [*361 they may, to bring back the doctrine to sober and rational limits. The American courts have evinced a like disposition. In the recent case of *Bangs* v. *Hall*, 2 Pick. 368, the principal cases were reviewed by the supreme court of Massachusetts; and it was held, that to take a case out of the statute, there must be an unqualified acknowledgment, not only of the debt as originally due, but that it continues so; and if there has been a conditional promise, that the condition has been performed. A doctrine, quite as comprehensive, has been asserted in the supreme court of New York. The subject was much considered in the case of *Sands* v. *Gelston*, 15 Johns. 511, where Mr. Chief Justice SPENCER, in delivering the opinion of the court, said, "that if at the time of the acknowledgment of the existence of the debt, such acknowledgment is qualified in a way to repel the presumption of a promise to pay, it will not be evidence of a promise, sufficient to revive the debt, and take it out of the statute." In consonance with this principle, the same court has held, that "if the acknowledgment be accompanied with a declaration, that the party intends to rely on the statute as a defence, such an acknowledgment is wholly insufficient."(*a*) In the case of *Clementson* v. *Williams*, 8 Cranch 72, this court expressed the opinion, that the decisions on this subject had gone full as far as they ought to be carried, and that

(*a*) See also, Brown *v.* Campbell, 1 Serg. & Rawle 176; Fries *v.* Boiselet, 9 Ibid. 128.

the court was not inclined to extend them; that the statute of limitations was entitled to the same respect with other statutes, and ought not to be explained away. In that case, an attempt was made to charge a partnership by an acknowledgment made, after its dissolution, by one of the partners, when an account was presented to him, that "the account was due, and he supposed it had been paid by the other partner, but he had not paid it himself, and did not know of its being ever paid." It was held, that this was not a sufficient acknowledgment to take the case out of the statute. The chief justice, in delivering the opinion of the court, said, "In this case there is no promise, conditional or unconditional, but a simple acknowledgment. This acknowledgment goes to the original justice of the account; but this is not enough. The statute of limitations was not enacted to protect persons from claims fictitious in their origin, but from ancient claims, whether well or ill founded, which may have been discharged, but the evidence of discharge may be lost. It is not sufficient, to take the case out of the act, that the claim should be proved, or be *acknowledged to have been originally just; the acknowledgment must go to the fact, that it is still due." In the case of *Wetzell* v. *Bussard*, 11 Wheat. 309, the subject again came before this court; and the English and American authorities were deliberately examined. The court there expressly held, that "an acknowledgment which will revive the original cause of action, must be unqualified and unconditional; it must show, positively, that the debt is due, in whole or in part. If it be connected with circumstances, which in any manner affect the claim, or if it be conditional, it may amount to a new *assumpsit*, for which the old debt is a sufficient consideration; or, if it be construed to revive the original debt, that revival is conditional, and the performance of the condition, or a readiness to perform it, must be shown."

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We adhere to the doctrine thus stated, and think it the only exposition of the statute, which is consistent with its true object and import. If the bar is sought to be removed by the proof of a new promise, that promise, as a new cause of action, ought to be proved in a clear and explicit manner, and be, in its terms, unequivocal and determinate; and if any conditions are annexed, they ought to be shown to be performed. If there be no express promise, but a promise is to be raised by implication of law, from the acknowledgment of the party, such acknowledgment ought to contain an unqualified and direct admission of a previous, subsisting debt, which the party is liable, and willing, to pay. If there be accompanying circumstances, which repel the presumption of a promise or intention to pay; if the expressions be equivocal, vague and indeterminate, leading to no certain conclusion, but at best to probable inferences, which may affect different minds in different ways; we think, they ought not to go to a jury as evidence of a new promise, to revive the cause of action. Any other course would open all the mischiefs against which the statute was intended to guard innocent persons, and expose them to the danger of being entrapped in careless conversations, and betrayed by perjuries.

It may be, that in this manner, an honest debt may sometimes be lost, but many unfounded recoveries will be prevented; and viewing the statute in the same light, in which it was viewed by English judges, at an early period, as a beneficial law, on which the security of all men depends, we think, its provisions ought not to be lightly overturned; and that no cred-

itor has a right to complain of a strict construction, since it is only by his own fault and *laches*, that it can be brought to bear injuriously upon him. And if the early interpretation had been adhered to, that nothing but an express promise should take *a case out of the statute, it is far from being certain, that it would not have generally been in promotion of justice. [*363

But the present case is not left to be determined solely upon general principles and authorities. There is a series of decisions of the Kentucky courts upon the construction of their own statute of limitations, which, if they differed from those of other courts, would, as matter of local law, govern this court upon the present occasion. In the construction of local statutes we have been in the habit of respecting and following the judgments of the local tribunals.

The first, and leading case, is *Bell* v. *Rowland's Administrators*, Hardin 301. In that case, the defendant made an acknowledgment, "that he had once owed the plaintiff, but he supposed his brother had paid it, in Virginia (the place where the original transaction took place, in the year 1785); and if his brother had not paid it, he owed it yet." The court held, that the acknowledgment was not sufficient to take the case out of the statute; that the defendant was not bound to prove that his brother had not paid the debt; that the law would imply a promise only where the party ought to promise; and that the defendant ought not to have promised, under the circumstances of that case, to pay a debt which he supposed to be paid. But the general reasoning of the court, which is drawn up with great clearness and force, goes much further. The court said, that the English decisions were not obligatory upon them in the construction of their own statute, although similar in its provisions to the English statute; and that so far as they had gone upon nice refinements, for the purpose of evading the statute, they must be disregarded. If the slightest acknowledgment, if strained constructive acknowledgments and promises, are held sufficient, it must multiply litigation, produce endless uncertainty, and it is to be feared, a fruitful crop of perjuries. Slight circumstances, and a man's loose expressions, would be construed into a full acknowledgment of the debt, when he himself neither intended to make, nor understood himself as making, any acknowledgment at all. Instances of this sort are frequent in the books; but the example is too dangerous to be countenanced. And the court further declared, "Upon the whole, we are of opinion, that the only safe rule that can be adopted, capable of any reasonable certainty, is, that in order to take the case out of the statute of limitations, an express acknowledgment of the debt, as a debt due at the time, coupled with the original consideration, or an express promise to pay it, must be proved to have been made, within the time prescribed by the statute. There was another point in the case, deserving of notice, *which was, whether the court ought to have instructed the jury as to the law of the case, and then have left it with them to determine, whether an acknowledgment of the debt, and a promise to pay it, had been proved to have been made within the five years; upon which it was held, that it was competent for the court, either to do so, or (as it did in that case) taking the whole of the evidence on the part of the plaintiff as true, and the facts sworn to by the witnesses as sufficiently proved, to instruct [*364

the jury as to the law arising upon those facts. This case has never been departed from in Kentucky, and has been frequently recognised.

In *Harrison* v. *Handley*, 1 Bibb 443, the plaintiff, to take the case out of the statute, produced a witness, who swore, "that some time in May or June 1796, he presented an account to W. H. (the defendant) amounting to 250*l.* or 260*l*; that H. objected to certain articles in the said account; and after the said articles were stricken out of the account; H. then acknowledged, it was all right." The court below ruled, that this was such an acknowledgment as took the case out of the statute, but the decision was reversed by the court of appeals. Mr. Chief Justice Bibb, in delivering the opinion of the court, adverted to the case of *Bell* v. *Rowland's Administrators*; and recognised its authority in the fullest terms. And after expressing a doubt, whether an implied promise would not be barred by the statute, he proceeded to say, "Be that as it may, mere loose expressions and vague acknowledgments will not suffice. The acknowledgment from which the law is to raise a promise, contrary to the provisions of the statute, must be clear and express, where the mind is brought directly to the point, debt or no debt, at the present time; not whether the debt was once an existing debt. That the law will argumentatively make a debt *in præsenti*, if the party does not in his acknowledgment say it is not, or prove payment, is a proposition, that cannot be granted, in opposition to the provisions of the statute. Where the limitation has run, to get clear of it, the whole burden of proof is thrown on the plaintiff, to prove a good and subsisting debt, and a promise to pay, within the period prescribed to his action. The acknowledgment of H. does not come up to this requisition; there was no express promise to pay; there was no express acknowledgment of a then existing debt; there was no assent to pay. 'H. then acknowledged the amount was all right,' is too loose, vague and indefinite an acknowledgment, to revive a transaction, and put it under investigation again, after the law had closed it. That the amount was right, could be true, and might well be acknowledged, if the articles had been truly noted, notwithstanding *the party might have paid it, or was unwilling to acknowledge it, as a debt then subsisting; and that is the point to which an express acknowledgment should have been proved." This is certainly a very strong case to illustrate the rule adopted in Kentucky.

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In *Gray* v. *Lawridge*, 2 Bibb 284, it was proved on the trial, that the party had admitted the justice of the account, within five years, and that it might go in discharge of the interest due on a bond of the defendant, on which the suit was brought by the plaintiff. The witness did not know the particular items of the account, nor the amount thus acknowledged by the plaintiff. The court held, that the acknowledgment did not go further, than that the demand should be allowed, in payment of the interest; and that so much as the party could show of a debt due to him, not exceeding the amount of the interest then due, was taken out of the statute, and not further. In *Ormsby* v. *Letcher*, 3 Bibb 269, it was decided, that an agreement of the defendant, within five years, that a settlement, made with the brother of the defendant, should be subject to the examination of either party, did not take the case out of the statute. It may be inferred, that it was a settlement of accounts between the parties, and that the action was brought for the balance due to the plaintiff, although the report does not so

state. The court said, "this agreement does not contain an acknowledgment of a subsisting demand, and a promise to pay in consideration thereof." The language of this case, as well as that in *Harrison* v. *Handley*, might lead to the impression, that the court thought that an acknowledgment of a subsisting debt was not alone sufficient; but that there must be also a promise to pay the debt. But, perhaps, it is more correct, to construe it as importing no more than that there must be such an acknowledgment, coupled with circumstances, from which a promise to pay would naturally and irresistibly be implied.

These are all the decisions, which we have met with in the Kentucky reports on this point. They evince a strong disposition, in the courts of that state, to restrict, within very close limits, every attempt to revive debts by implied promises, resulting from acknowledgments and other confessions by parol. It is our duty to follow out the spirit of these decisions, so far as we are enabled to gather the principles on which they are founded, and to apply them to the case at bar.

The evidence in the case at bar, resolves itself into two heads: 1. Whether the admission of a party, of the existence of an unliquidated account, on which something is due to the plaintiff, but no specific balance is admitted, and no document produced at the time, from which it can be ascertained, what the *parties understood the balance to be, is sufficient to take the case out of the statute, and let in the plaintiff to [*366 prove, *aliunde*, any balance, however large it may be? 2. If not, whether the admission, on the part of Morrison, of his willingness to pay $7000, and close the business, might (under all the circumstances) entitle the plaintiff to recover that amount, and thus to furnish a just objection to the ruling of the circuit court?

In both of these views, the case is not without its difficulties; and the Kentucky decisions present no authority directly in point. The evidence is clear, of the admission of an unsettled account, as well from the letters of Butler, as the conversation of Morrison. The latter acknowledged that the partnership "was owing" the plaintiff; but as he had not the books, he could not settle with him. If this evidence stood alone, it would be too loose to entitle the plaintiff to recover anything. The language might be equally true, whether the debt were one dollar or ten thousand dollars. It is indispensable for the plaintiff to go further, and to establish, by independent evidence, the extent of the balance due him, before there can arise any promise to pay it, as a subsisting debt. The acknowledgment of the party, then, does not constitute the sole ground of the new implied promise; but it requires other intrinsic aid, before it can possess legal certainty. Now, if this be so, does it not let in the whole mischief intended to be guarded against by the statute? Does it not enable the party to bring forward stale demands, after a lapse of time, when the proper evidence of the real state of the transaction cannot be produced? Does it not tend to encourage perjury, by removing the bar, upon slight acknowledgments of an indeterminate nature? Can an admission, that something is due or some balance owing, be justly construed into a promise to pay any debt or balance, which the party may assert or prove before a jury? If there be an express promise to such an effect, that might be pressed as a dispensation with the statute; but the question here is, whether the law will imply such a promise,

from language so doubtful and general. The language of the court, in *Harrison* v. *Handley*, was, that "mere loose expressions or vague acknowledgments, will not suffice." We think, that such a general admission of an unsettled account, and of an indeterminate debt, would, by the courts of Kentucky, be held as too vague an acknowledgment to take the case out of the statute. It would not establish any particular subsisting debt, and therefore, be destitute of reasonable certainty to raise an implied promise.

The other point is also not without its embarrassments. Was Morrison's offer of $7000, to close the business, the absolute admission of a debt to
*367] that amount, or a conditional *promise to pay that sum, if the party would accept it in discharge of his claims? We think, taking all the circumstances, it scarcely admits of the former interpretation. It appears from the testimony itself, that Morrison did not know the state of the partnership accounts, and had not the partnership books, to enable him to ascertain it. He also expressed a personal reason for his desire to settle the account, alleging that he was growing old, and was anxious for a settlement. His offer must, therefore, be deemed to be in the nature of a compromise, to pay the sum, if the plaintiff would give a complete discharge of his claims; or, to use his own words, "and close the business." It may, therefore, be fairly deemed a conditional offer to pay a conjectural, not a known balance; to buy peace, and not to acknowledge an absolute debt. If this be, as we think it is, a conditional offer, then, upon the clear text of the Kentucky, as well as the English, and of other American decisions, the case would not be taken out of the statute, unless the plaintiff had performed the condition.

But if this view of the case should be more doubtful than it seems to us to be, it still remains to consider, whether the acknowledgment of one partner, after the dissolution of the copartnership, is sufficient to take the case out of the statute, as to all the partners. How far it may bind the partner, making the acknowledgment, to pay the debt, need not be inquired into; to maintain the present action, it must be binding upon all.

In the case of *Bland* v. *Haselrig*, 2 Vent. 151, where the action was against four, upon a joint promise, and the plea of the statute of limitations was put in, and the jury found that one of the defendants did promise within six years, and that the others did not; three judges, against Ventris, J., held, that the plaintiff could not have judgment against the defendant, who had made the promise. This case has been explained, upon the ground that the verdict did not conform to the pleadings, and establish a joint promise. It is very doubtful, upon a critical examination of the report, whether the opinion of the court, or of any of the judges, proceeded solely upon such a ground.

In *Whitcomb* v. *Whiting*, 2 Doug. 652, decided in 1781, in an action on a joint and several note, brought against one of the makers, it was held, that proof of payment, by one of the others, of interest on the note, and of part of the principal, within six years, took the case out of the statute, as against the defendant who was sued. Lord Mansfield said, "payment by one, is payment for all, the one, acting virtually for all the rest; and in the same manner, an admission by one, is an admission by all, and the law raises the promise to pay, when the debt is admitted to be due." This is the

whole reasoning *reported in the case, and is certainly not very satisfactory. It assumes, that one party, who has authority to discharge, has, necessarily, also authority to charge the others ; that a virtual agency exists in each joint debtor to pay for the whole ; and that a virtual agency exists, by analogy, to charge the whole. Now, this very often constitutes the matter in controversy. It is true, that a payment by one does inure for the benefit of the whole ; but this arises not so much from any virtual agency for the whole, as by operation of law ; for the payment extinguishes the debt. If such payment were made, after a positive refusal or prohibition of the other joint debtors, it would still operate as an extinguishment of the debt, and the creditor would no longer sue them. In truth, he who pays a joint debt, pays to discharge himself ; and so far from binding the others conclusively by his act, as virtually theirs also, he cannot recover over against them, in contribution, without such payment has been rightfully made, and ought to charge them.

When the statute has run against a joint debt, the reasonable presumption is, that it is no longer a subsisting debt ; and therefore, there is no ground on which to raise a virtual agency to pay that which is not admitted to exist. But if this were not so, still there is a great difference between creating a virtual agency, which is for the benefit of all, and one which is onerous and prejudicial to all ; the one is not a natural or necessary consequence from the other. A person may well authorize the payment of a debt for which he is now liable ; and yet refuse to authorize a charge, where there at present exists no legal liability to pay. Yet, if the principle of Lord MANSFIELD be correct, the acknowledgment of one joint debtor will bind all the rest, even though they should have utterly denied the debt, at the time when such acknowledgment was made.

The doctrine of *Whitcomb* v. *Whiting* has been followed in England in subsequent cases, and was applied, in a strong manner, in *Jackson* v. *Fairbank*, 2 H. Bl. 340, where the admission of a creditor to prove a debt on a joint and several note, under a bankruptcy, and to receive a dividend, was held sufficient to charge a solvent joint debtor, in a several action against him, in which he pleaded the statute, as an acknowledgment of a subsisting debt. It has not, however, been received without hesitation. In *Clark* v. *Bradshaw*, 3 Esp. 155, Lord KENYON, at *nisi prius*, expressed some doubts upon it ; and the cause went off on another ground. And in *Brandram* v. *Wharton*, 1 Barn. & Ald. 463, the case was very much shaken, if not overturned. Lord ELLENBOROUGH, upon that occasion, used language, from which his dissatisfaction with the whole doctrine may be clearly inferred. "This doctrine," said he, "of rebutting the statute of limitations by an acknowledgment other *than that of the party himself, began with the case of *Whitcomb* v. *Whiting*. By that decision, where, however, there was an express acknowledgment, by an actual payment of a part of the debt by one of the parties, I am bound. But that case was full of hardship ; for this inconvenience may follow from it. Suppose, a person liable jointly with thirty or forty others, to a debt, he may have actually paid it, he may have had in his possession the document, by which that payment was proved, but may have lost his receipt. Then, though this was one of the very cases which this statute was passed to protect, he may still be bound, and his liability be renewed, by a random

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acknowledgment made by some one of the thirty or forty others, who may be careless of what mischief he is doing, and who may even not know of the payment which has been made. Beyond that case, therefore, I am not prepared to go, so as to deprive a party, of the advantage given him by the statute, by means of an implied acknowledgment." The English cases decided since the American revolution, are, by an express statute of Kentucky, declared not to be of authority in their courts; and consequently, *Whitcomb* v. *Whiting*, in Douglas, and the cases which have followed it, leave the question in Kentucky quite open to be decided upon principle.

In the American courts, so far as our researches have extended, few cases have been litigated upon this question.(*a*) In *Smith, Adm'r*, v. *D. & G. Ludlow*, 6 Johns. 267, the suit was brought against both partners, and one of them pleaded the statute. Upon the dissolution of the partnership, public notice was given, that the other partner was authorized to adjust all accounts; and an account signed by him, after such advertisement, and within six years, was introduced. It was also proved, that the plaintiff called on the partner who pleaded the statute, before the commencement of the suit, and requested a settlement, and that he then admitted an account, dated in 1797, to have been made out by him; that he thought the account had been settled by the other defendant, in whose hands the books of the partnership were; and that he would see the other defendant on the subject, and communicate the result to the plaintiff. The court held, that this was sufficient to take the case out of the statute; and said, that without any express authority, the confession of one partner, after the dissolution, will take a debt out of the statute. The acknowledgment will not, *of itself, be evidence of an original debt; for that would enable one party to bind the other in new contracts; but the original debt being proved or admitted, the confession of one will bind the other, so as to prevent him from availing himself of the statute. This is evident, from the cases of *Whitcomb* v. *Whiting*, and *Jackson* v. *Fairbank;* and it results necessarily from the power given to adjust accounts. The court also thought the acknowledgment of the partner, setting up the statute, was sufficient of itself to sustain the action. This case has the peculiarity of an acknowledgment made by both partners, and a formal acknowledgment by the partner who was authorized to adjust the accounts, after the dissolution of the partnership. There was not, therefore, a virtual, but an express and notorious agency, devolved on him, to settle the account. The correctness of the decision, cannot, upon the general view taken by the court, be questioned. In *Roosevelt* v. *Marks*, 6 Johns. Ch. 266, 291, Mr. Chancellor KENT admitted the authority of *Whitcomb* v. *Whiting;* but denied that of *Jackson* v. *Fairbank*, for reasons which appear to us solid and satisfactory. Upon some other cases in New York, we shall have occasion hereafter to comment. In *Hunt* v. *Bridgham*, 2 Pick. 581, the supreme court of Massachusetts, upon the authority of the cases in Douglas, H. Blackstone and Johnson,

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(*a*) The reporter has been informed, by Mr. Chief Justice GIBSON, that at the December term 1827, of the supreme court of Pennsylvania, the court decided, after full argument, that the acknowledgment by a partner, after the dissolution of the partnership, will not take the debt out of the statute, so as to make the other formal partners liable. (Levy *v.* Cadet, 17 S. & R. 126.)

held, that a partial payment by the principal debtor on a note, took the case out of the statute of limitations, as against a surety. The court do not proceed to any reasoning to establish the principle, considering it as the result of the authorities. *Shelton* v. *Cocke*, 3 Munf. 191, is to the same effect; and contains a mere annunciation of the rule, without any discussion of its principle. *Simpson* v. *Morrison*, 2 Bay 533, proceeded upon a broader ground, and assumes the doctrine of the case in 1 Taunt. 104, hereinafter noticed, to be correct. Whatever may be the just influence of such recognitions of the principles of the English cases in other states, as the doctrine is not so settled in Kentucky, we must resort to such recognition only as furnishing illustrations, to assist our reasoning, and decide the case now, as if it had never been decided before.

By the general law of partnership, the act of each partner, during the continuance of the partnership, and within the scope of its objects, binds all the others. It is considered the act of each and of all, resulting from a general and mutual delegation of authority. Each partner may, therefore, bind the partnership, by his contracts in the partnership business; but he cannot bind it, by any contracts, beyond those limits. A dissolution, however, puts an end to the authority. By the force of its terms, it operates as a revocation of all power to create new contracts; *and the right of [*371
partners, as such, can extend no further than to settle the partnership concerns already existing, and to distribute the remaining funds. Even this might be qualified and restrained, by the express delegation of the whole authority to one of the partners.

The question, is not, however, as to the authority of a partner, after the dissolution, to adjust an admitted and subsisting debt, we mean, admitted by the whole partnership or unbarred by the statute; but whether he can, by his sole act, after the action is barred by lapse of time, revive it against all the partners, without any new authority communicated to him for this purpose? We think, the proper resolution of this point depends upon another, that is, whether the acknowledgment or promise, is to be deemed a mere continuation of the original promise, or a new contract, springing out of and supported by the original consideration? We think it is the latter, both upon principle and authority; and if so, as, after the dissolution, no one partner can create a new contract, binding upon the others, his acknowledgment is inoperative and void as to them.

There is some confusion in the language of the books, resulting from a want of strict attention to the distinction here indicated. It is often said, that an acknowledgment revives the promise, when it is meant, that it revives the debt or cause of action. The revival of a debt supposes that it has been once extinct and gone; that there has been a period in which it had lost its legal use and validity. The act which revives it, is what essentially constitutes its new being, and is inseparable from it. It stands, not by its original force, but by the new promise, which imparts vitality to it. Proof of the latter is indispensable, to raise the *assumpsit* on which an action can be maintained. It was this view of the matter, which at first created the doubt, whether it was not necessary that a new consideration should be proved, to support the promise, since the old consideration was gone. That doubt has been overcome; and it is now held, that the original consideration is sufficient, if recognised, to uphold the new promise, although

the statute cuts it off, as a support for the old. What, indeed, would seem to be decisive on this subject, is, that the new promise, if qualified or conditional, restrains the rights of the party to its own terms ; and if he cannot recover by those terms, he cannot recover at all. If a person promise to pay, upon condition that the other do an act, performance must be shown, before any title accrues. If the declaration lays a promise by or to an intestate, proof of the acknowledgment of the debt, by or to his personal representative, will not maintain the writ. Why not? since it establishes the
*372] continued existence of the *debt. The plain reason is, that the promise is a new one, by or to the administrator himself, upon the original consideration, and not the revival of the original promise. So, if a man promises to pay a pre-existing debt, barred by the statute, when he is able, or at a future day, his ability must be shown ; or the time must be passed, before the action can be maintained. Why ? Because it rests on the new promise, and its terms must be complied with. We do not here speak of the form of alleging the promise in the declaration, upon which, perhaps, there has been a diversity of opinion and judgment ; but of the fact itself, whether the promise ought to be laid in one way or another, as an absolute, or as a conditional promise, which may depend upon the rules of pleading.

This very point came before the twelve judges, in the case of *Hylcing* v. *Hastings*, 1 Ld. Raym. 389, 421, in the time of Lord Holt. There, one of the points was, " whether the acknowledgment of a debt, within six years, would amount to a new promise, to bring it out of the statute ; and they were all of opinion, that it would not, but that it was evidence of a promise." Here, then, the judges manifestly contemplated the acknowledgment, not as a continuation of the old promise, but as evidence of a new promise ; and that it is the new promise, which takes the case out of the statute. Now, what is a new promise, but a new contract ? a contract to pay, upon a pre-existing consideration, which does not, of itself, bind the party to pay, independently of the contract ? So, in *Boydell* v. *Drummond*, 2 Camp. 157, Lord Ellenborough, with his characteristic precision, said, "if a man acknowledges the existence of a debt, barred by the statute, the law has been supposed to raise a new promise to pay it, and thus the remedy is revived." And it may be affirmed, that the general current of the English, as well as the American authorities, conforms to this view of the operation of an acknowledgment. In *Jones* v. *Moore*, 5 Binn. 573, Mr. Chief Justice Tilghman went into an elaborate examination of this very point, and came to the conclusion, from a review of all the cases, that an acknowledgment of the debt, can only be considered as evidence of a new promise ; and he added, "I cannot comprehend the meaning of reviving the old debt, in any other manner, than by a new promise."

There is a class of cases, not yet adverted to, which materially illustrates the right and powers of partners, after the dissolution of the partnership, and bears directly on the point under consideration. In *Hackley* v. *Patrick*, 3 Johns. 536, it was said by the court, that " after a dissolution of the partnership, the power of the one party to bind the others, wholly ceases.
*373] There is no reason, why his acknowledgment of an account *should bind his copartners, any more than his giving a promissory note, in the name of the firm, or any other act." And it was, therefore, held, that the plaintiff must produce further evidence of the existence of an antecedent

debt, before he could recover ; even though the acknowledgment was by a partner, authorized to settle all the accounts of the firm. This doctrine was again recognised by the same court, in *Walden* v. *Sherburne*, 15 Johns, 409, 424, although it was admitted, that in *Wood* v. *Braddick*, 1 Taunt. 104, a different decision had been had in England. If this doctrine be well founded, as we think it is, it furnishes a strong ground to question the efficacy of an acknowledgment, to bind the partnership, for any purpose. If it does not establish the existence of a debt against the partnership, why should it be evidence against it all? If evidence, *aliunde*, of facts within the reach of the statute, as the existence of a debt, be necessary, before the acknowledgment binds, is not this letting in all the mischiefs against which the statute intended to guard the parties, viz., the introduction of stale and dormant demands, of long standing, and of uncertain proof? If the acknowledgment, *per se*, does not bind the other partners, where is the propriety of admitting proof of an antecedent debt, extinguished by the statute as to them, to be revived, without their consent? It seems difficult to find a satisfactory reason, why an acknowledgment should raise a new promise, when the consideration upon which alone it rests, as a legal obligation, is not coupled with it, in such a shape as to bind the parties ; that the parties are not bound by the admission of the debt, as a debt, but are bound by the acknowledgment of the debt as a promise, upon extrinsic proof. The doctrine in 1 Taunt. 104, stands upon a clear, if it be a legal ground ; that as to the things past, the partnership continues and always must continue, notwithstanding the dissolution. That, however, is a matter which we are not prepared to admit, and constitutes the very ground now in controversy.

The light in which we are disposed to consider this question is, that after a dissolution of a partnership, no partner can create a cause of action against the other partners, except by a new authority communicated to him for that purpose. It is wholly immaterial, what is the consideration which is to raise such cause of action, whether it be a supposed pre-existing debt of the partnership, or any auxiliary consideration, which might prove beneficial to them. Unless adopted by them, they are not bound by it. When the statute of limitations has once run against a debt, the cause of action against the partnership is gone. The acknowledgment, if it is to operate at all, is to *create a new cause of action ; to revive a debt which is extinct ; and thus to give an action, which has its life from the new promise [*374 implied by law from such an acknowledgment, and operating and limited by its purport. It is then, in its essence, the creation of a new right, and not the enforcement of an old one. We think, that the power to create such a right does not exist, after a dissolution of the partnership, in any partner.

There is a case in the Kentucky reports, not cited at the bar, which coincides, as far as it goes, with our own views ; and if taken as a general exposition of the law, according to its terms, is conclusive on this point. It is the case of *Walker & Evans* v. *Duberry*, 1 A. K. Marsh. 189. It is very briefly reported, and the opinion of the court was as follows : "We are of opinion, that the court below improperly admitted as evidence against Walker, the certificate of J. T. Evans, made after the dissolution of the partnership, between Walker and Evans, acknowledging that the partnership firm was indebted to the defendant Duberry, in the sum demanded, in the action

brought by him, in the court below." It cites 3 Johns. 536; 3 Munf. 191. It does not appear, what was the state of facts in the court below, nor whether this was an action, in which the statute of limitations was pleaded, or only *non assumpsit* generally. But the position is generally asserted, that the acknowledgment of a debt by one partner, after a dissolution, is not evidence against the other. Whether the court meant to say, in no case whatever, or only when the debt itself was proved *aliunde*, does not appear. Its language is general and would seem to include all cases; and if any qualification were intended, it would have been natural for the court to express that qualification, and have confined it to the circumstances of the case. The only room for doubt, arises from the citations of 3 Johns. and 3 Munf. The former has been already adverted to; and the latter, *Shelton* v. *Cocke and others*, 3 Munf. 191, recognised the distinction asserted in 3 Johns. as sound. These citations may, however, have been referred to as mere illustrations, going to establish the proposition of the court to a certain extent, and not as limitations of its extent. In any view, it leads us to the most serious doubts, whether the state courts of Kentucky would ever adopt the doctrine of *Whitcomb* v. *Whiting*, in Douglas, especially so, as the early case in 2 Vent. 151, carries an almost irresistible presumption, that the courts, at that time, held a doctrine entirely inconsistent with the case in Douglas.

Upon the whole, it is our judgment, that there is no error in the decision of the circuit court, and it ought to be affirmed. *It is, however, to be understood, that this opinion thus expressed, is not unanimous, but of the majority of the court; and as it is apparent, from the preceding reasoning, it has been, principally, although not exclusively, influenced by the course of decisions in Kentucky upon this subject.

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Judgment affirmed, with costs.

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*376] *Mechanics' Bank of Alexandria, Appellants, *v.* Adam Lynn.

Specific performance.—Answer in chancery.—Relief.

A court of equity ought not to decree specific performance of a contract to the letter, where, from change of circumstances, mistake or misapprehension, it would be unconscientious so to do; the court may so modify the agreement, as to do justice so far as circumstances will permit, and refuse specific execution, unless the party seeking it, will comply with such modifications as justice requires. p. 382.

If a bill charges a defendant with notice of a particular fact, an answer must be given, without a special interrogatory to the matter; but a defendant is not bound to answer an interrogatory, not warranted by some matter contained in a former part of the bill. p. 383.

When a judgment-debtor comes into the court, asking protection on the ground that he has satisfied the judgment, the door is fully opened for the court to modify or grant the prayer, upon such conditions as justice demands.[1] p. 384.

Appeal from the Circuit Court of the District of Columbia, for the county of Alexandria. The appellee filed his bill on the chancery side of the circuit court for the county of Alexandria, against the Mechanics' Bank of Alexandria, to enjoin the bank from proceeding upon a judgment at law, which had it obtained against him, and upon which an execution had issued, and he had been taken and confined.

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[1] See Virginia *v.* Williams, 8 How. 161.

The bill stated, that the judgment which had been obtained against the complainant was for what is called, according to the bank phrase, "an overdraw," amounting to $1573.85; that after this judgment had been obtained, he had made a deed of trust to Thomas F. Mason, to secure the payment of his debts; that this judgment against him was among the first to be paid; and that the security provided in the deed was ample for that object. The bill then stated, that the complainant, after this deed had been made, entered into a settlement with the bank of the various claims which they had against him, and agreed with them upon certain modes of payment of his debts, and among others of the judgment of $1573.85, for the overdraw. That this $1573.85 was to be paid out of the trust fund conveyed to Mr. Mason; and as an evidence of it, the bill referred to the account stated in the written settlement, in which the defendant Lynn was charged with the judgment for the overdraw, and credited by "the security in deed to Mason for overdraw." The bill alleged also, that in pursuance of this settlement, the complainant carried into effect the terms of the said settlement, and that everything due from him to the bank was satisfied, *except the sum of $3700, which was to be secured to the satisfaction of the bank; and [*377 that, so far as respected this $3700, he had offered security, such as the committee of the bank had considered ample, and such as the bank ought to have accepted, but which they refused to accept. The bill then alleged, that notwithstanding this settlement and the fulfilment of it, on the part of the complainant, the bank had issued an execution against him upon the judgment for "the overdraw," and had confined him in the bounds of the jail, under the execution, and prayed he might be relieved from his imprisonment, and that the bank should look to the security provided in the deed of trust to Mason, and to that fund only. Upon this bill, an injunction was granted, and the complainant was released from his confinement under the execution.

The appellants filed an answer to this bill, and, among other things, stated, that they had agreed upon a settlement with the complainant, of various claims which the bank had upon him; that they were very desirous of securing the payment of these claims, and in order to effect the said settlement, they had given up to the complainant $784.04; and had agreed to take his bank-stock and property at prices above their value: and had also agreed to take their payment for "the overdraw" out of the trust fund in Mason's hands, provided they could have had the full benefit thereof. They admitted, that, in pursuance of this agreement, the defendant Lynn did transfer to the bank his stock and lands, leaving nothing unpaid, but the judgment for "the overdraw," and the sum of $3700, which was to have been secured to the satisfaction of the bank. They referred to the articles of agreement to show, that the security to be given for this $3700 was to be such as was satisfactory to the board of directors; and the answer stated, that it never was secured to their satisfaction, and that no tender of offer of security was ever made, that ought to have been acceded to by the bank; and that the bank was right in refusing the security offered. The answer also stated, that as to the judgment for the overdraw, it never was satisfied, and that the deed of trust to Mason was entirely inoperative, as to this debt, and was made upon such terms that the bank could not accede to them. That their cashier, immediately after the agreement had been entered into between Lynn and the

bank, had called upon the trustee, Mr. Mason, to know whether the bank might expect payment from that fund; and was informed by him, that one of the conditions of the deed was, that the creditors accepting the benefit of the deed, should, within six months of the date of it, release to Lynn all claims and demands which they had upon him; that this deed had been executed on the
*378] 16th November 1820, and *that the agreement of Lynn with the bank had been executed on the 19th May 1821, so that the six months had, in fact, expired before the said agreement had been made. The trustee, therefore, informed the cashier, that the bank was not entitled to any benefit under that deed, and that they could not reckon upon that fund for the payment of their said judgment. The answer then stated, that the bank, finding they were not entitled to any benefit from the trust funds, and seeing no other means of payment from Lynn, had resorted to an execution upon their judgment, and he was accordingly taken in execution, and remained in excution nearly a year, until it became necessary for him to take the oath of insolvency, and under these circumstances, he obtained the injunction; and they prayed that it might be dissolved.

The deed of trust to Mason, bearing date the 16th of November 1820, was filed as an exhibit with the bill of Lynn, the complainant. This deed contained the following proviso, viz: "Provided always, however, and it is hereby expressly required, that each and every of the aforesaid creditors, before they receive the benefit of this deed, shall sign and execute a full and complete discharge from all claims and demands whatsoever against the said Adam Lynn; and the period of six months shall be, and is hereby, allowed them, from the date of this instrument, to come in, and elect and sign such discharge; and the dividend or share to which each and all of those who may refuse or neglect for the space of six months as above allowed, for that purpose, to sign and execute such discharge as aforesaid, shall go and be disposed of for the benefit of such of the aforesaid creditors as shall accept of the terms of this deed, and in the order above directed."

The agreement entered into between the defendant Lynn and the bank, was also made an exhibit with the bill. It bore date on the 29th of May 1821, and so far as respects the matter in dispute was as follows, viz:—

Article 1st. That the account of A. Lynn, with the Mechanics' Bank be stated as follows—

To A. Lynn's stock-note,	$15,360 00	By A. Lynn's stock,	$21,114 50
Mrs. Buckland and Mrs. Coryton's,	125 00	Discount 10 per cent.	2,101 45
A. Lynn's note, indorsed R. Young,	11,100 00		18,913 05
Interest on do. to 4th May 1821,	1,356 00	By Mrs. B. & Mrs. C. do.	357 50
A. Lynn's note, indorsed J. Gird,	320 00	Discount 10 per cent.	35 75
Interest on do.	36 54		321 75
Overdraw,	1,573 85	Interest on $3553, difference between stock and stock note,	434 00
Five protests	8 75	123 acres of land at $25,	3,087 50
		House and lot,	1,500 00
		Security in deed to Mason for overdraw,	1,573 85
		Balance,	4,049 98
	$29,880 19		$29,880 19

*Article 2d. The above balance, except $349.98, say $3700, to be secured by A. Lynn to the satisfaction of the board, and to be paid in one, two or three years.

Depositions were taken on the part of the bank, to prove that the committee of the bank, who entered into the settlement with the defendant Lynn, were not authorized to decide upon the security which he had offered for the balance of $3700; and that they did not, in fact, agree to accept the security.

Upon the final hearing of the case in the circuit court, on the bill, answer, exhibits and depositions, the court ordered a perpetual injunction; and to this decretal order, an appeal was entered to this court, by the Mechanics' Bank.

The case was argued by *Wirt*, attorney-general, and *Swan*, district-attorney, for the appellants; and by *Jones* and *Taylor*, for the appellees.

For the *appellants*, it was contended:—The deed from Adam Lynn to J. F. Mason does not appear to be recorded; no notice of its contents was given to the bank, nor does it appear that the bank knew of its terms, at the time of settlement. As soon as the settlement informed the bank of the deed, application was made for the benefit of its provisions; and it was found, that by its terms, the bank was excluded therefrom. 1. Because the period of executing a release had passed; and 2. Because the bank could not give a general release, as the debt of $3700 had not been secured. Equity will not enforce an agreement, when, from circumstances subsequently discovered, it appears, that the party who made the agreement was misled, or cannot receive under it, what according to its terms he expected to receive. 2 Sch. & Lef. 341. If the appellee meant to make use of the deed to Mason, he should have shown in his bill, that the bank agreed to abide by it. This is not done, nor is it said by the appellee, that the bank was knowing of its nature.

The debt of the appellee for "the overdraw," has never been paid; although the judgment for $3700 may, by the result of the proceeding upon the judgment, be satisfied; the overdraw remains due, unless the statement in the agreement as to it, shall release the claim of the bank on Adam Lynn, and oblige them to look to the deed of Mason for payment. The bank cannot place itself within the terms of the provisions of that deed. There is no evidence before the court, that none of the creditors of Adam Lynn came in under the deed, and thus the fund to arise from that deed is closed against the bank for ever. The effect of the perpetual injunction will be, to prevent any of the debt for the overdraw being collected, and give to the *appellee the benefit of the concealment he practised towards the appellants. [*380

Upon the nature, effects and power, of interrogatories in courts of chancery, cited, Mitford's Pleadings 44; Cooper's Equity 12; The decisions of the courts of Virginia, 4 Munf. 273, &c.

Jones and *Taylor*, for the appellee.—The contract of the bank is not one between a creditor and a solvent debtor, having for its object, on the one hand, the security of the debt, and on the other, an extension of time for payment. But it is a compromise with an insolvent, of a debt, in part

at least, disputed. It may, therefore, be well supposed, that the bank was willing to have sacrificed a part of its claim, or to have taken, as to part, an inadequate security, to save the rest. The contract with Mason, approved by the board on the 29th of May, is, in all its articles, executory, except as to the provision for the overdraw, the only one now in dispute. As to that, if the bank is to be considered as having agreed to receive the deed to Mason, as a payment of this claim, nothing further on the part of Lynn remained to be done; the deed was beyond his control.

The appellee has carried into effect all the executory part of the contract, he has transferred his stock, conveyed his land, and moreover executed his deed of trust from Young. The bank has obtained payment of the balance of the account of $3700, so that everything required of him by the bank has been done; they now reject the only stipulation which was particularly favorable to Lynn and onerous to them. In deciding on the security to be offered for the $3700, the bank did not possess an arbitrary power; it was bound to act with good faith. If the security offered was sufficient, they were bound to have received it as satisfactory. Sufficient security was offered, and was approved of by the committee of the bank, and by the committee recommended to the board of directors of the bank. This affords, at least, *primâ facie* evidence that the security was adequate, and ought to have been received; it has been opposed by no evidence to negative this presumption. But this inquiry is now unnecessary; the bank has, by execution, not only enforced payment of the $3700; but they have enforced it with interest, with which, by the contract, Lynn was not chargeable.

The deed was received as an absolute payment. This may be inferred, from the suspension of proceedings on their judgment from the 29th of May 1821, the date of compromise, to July 1823, and from other circumstances.

*381] And more especially *from the terms of the deed, which annex the condition of a release to Lynn. If the bank accepted "the security in the deed to Mason," it must be in the terms of the deed. No fraud or concealment is charged on the complainant in the answer; the defendant must be presumed to be informed of the subject on which they were treating; they nowhere pretend, that they were ignorant of the contents of the deed to Mason; and it may be fairly presumed, that to secure nearly $29,000, they would be willing to take a doubtful or even inadequate security for $1500. It does not appear, that any creditors had accepted of the terms of the deed of trust to Mason, and if so, it was open to all, particularly, by the very contract of 29th of May, to the bank. Their own admissions in their answer, show that they considered the arrangement still open; they say, they require nothing but the complainant's order to his trustee. This order, so far as the complainant could give it, is given by the contract of 29th of May; so far as he is concerned, the prosecution of this suit, affirms the right of the bank, under the deed of trust. But although the release may be a condition precedent, the time is not a part of the condition, but a qualification of it, from which the court of chancery, with the consent of the debtor for whose benefit it was introduced, may relieve. Francis's Maxims, p. 61, Max. xxii. (Richmond ed.); 1 Vern. 260, 319.

Thompson, Justice, delivered the opinion of the court.—Adam Lynn, the complainant in the court below, filed his bill for an injunction to restrain the

Mechanics' Bank of Alexandria from proceeding upon a judgment which it had recovered against him at law for $1573.85. A perpetual injunction was decreed, to reverse which, the present appeal is brought.

The bill and answer contain many matters not necessary now to be noticed. The grounds upon which the application for an injunction was placed, were, that on the 29th of May 1821, a settlement was made between the parties, of various matters which had been for a long time in dispute between them, among which was the judgment now in question. In the account stated, which formed the basis of that settlement, Lynn is charged with that judgment, which is there called "the overdraw," and credited by security in deed to Mason for the same. Upon this statement of the account, there was a balance of $3700 found in favor of the bank, for which security was to be given. This may, however, be now laid out of view ; for although it appears, that some difficulty arose with respect to the security for this balance, yet it is alleged in the bill, that *it was afterwards paid to the bank ; and this is not denied, but substantially admitted in the answer. And the whole arrangement upon that settlement was carried into execution, except that which related to the judgment now in question. [*382

It is contended on the part of Lynn, that the security in the deed to Mason was a complete discharge by the bank of this debt. And whether it is so to be considered, is the only question necessary now to be noticed. The deed of trust given by Lynn to Mason, bears date the 16th of November 1820 ; and provides, in the first place, for the payment of judgment-creditors ; then, for certain enumerated creditors ; and finally, the surplus to be paid to the Mechanics' Bank of Alexandria in discharge of notes discounted for Lynn. This deed contains the following proviso : "Provided always, and it is hereby expressly required, that each and every of the aforesaid creditors, before they receive the benefit of this deed, shall sign and execute a full and complete discharge from all claims and demands whatever, against the said Adam Lynn : and the period of six months shall be, and is hereby allowed them, from the date of this instrument, to come in, and elect and sign such discharge."

It will be seen, from comparing the dates of this deed, and the settlement made between the parties, that the six months limited for the creditors to come in, and accept of the provision thereby made, had expired when the settlement took place ; and the bank, therefore, according to the terms of the deed was precluded from taking any benefit under it. The bill alleges that the provision made by the trust deed for the payment of this debt, was amply sufficient. The bank denies that the judgment has ever been satisfied, and alleges, that on application to the trustee, Mason, for the benefit of the provision thereby made, it was refused, because the time had expired within which the creditors were to come in and accept of the benefit of it. Was it then such a settlement and discharge of this judgment, as, under the circumstances, will conclusively bind the bank ; and turn it over to this trust fund alone for satisfaction of the debt ?

The complainant in the court below, asks the aid of a court of chancery to restrain the bank from enforcing a judgment at law ; and if this is an unconscientious request, it would be inconsistent with the course of a court of equity to grant it. The complainant may be considered as asking the specific execution of an agreement, by which the bank stipulated to accept

in satisfaction of this judgment, the provisions made by Lynn for his creditors in the deed of trust. *But the court ought not to decree performance, according to the letter, when, from change of circumstances, mistake or misapprehension, it would be unconscientious so to do. The court may so modify the agreement, as to do justice so far as circumstances will permit; and refuse specific execution, unless the party seeking it will comply with such modifications as justice requires.

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It cannot be presumed, that the bank, in point of fact, knew that the time had expired within which creditors were allowed to come in and accept of the trust fund. Nor ought it to be presumed, that this circumstance was adverted to by Lynn; as it would be charging him with a fraudulent design of imposing upon the bank an unavailable security. Whether it was available or not, is a proper subject of inquiry, under the pleadings. The bill alleges, that the provision made by the deed for payment of this debt, was abundantly sufficient. This, the answer denies; because the complainant, by the limitation of the time within which the creditors were to come in, had debarred the bank of availing itself of that security, and that the trustee had excluded this debt on that account. And all that the bank requires is, that the complainant should order his trustee, Mason, to pay this debt out of the trust fund.

It is said, however, that the bank is chargeable with notice of this deed, and all its provisions; and has, therefore, accepted the fund, at its own risk; and particularly, as notice is not denied in the answer. There is nothing in the pleadings or proofs showing notice in fact, and the deed was not recorded, so as to charge the bank with constructive notice. There may be reasonable grounds to conclude, that the bank had information with respect to the trust fund, before it agreed to accept it as a substitute for the judgment. But actual knowledge of this limitation cannot reasonably be presumed, as it was a fund from which no benefit could be derived; and the bill contains no charge calling upon the bank for an admission or denial of notice. This was not required, by reason of the special interrogatory put in the bill. If the bill had charged the bank with notice, an answer must have been given, without such interrogatory. But a defendant is not bound to answer an interrogatory, not warranted by some matter contained in a former part of the bill (Mitford 44); and if the bank was called upon by this interrogatory to admit or deny notice, no answer having been given, exception should have been taken to the answer for insufficiency.

Nothing, therefore, appears, which would have precluded the *bank from the aid of a court of chancery; even was it complainant, seeking relief against the conclusive operation of this settlement, when the consideration for which the judgment was to be discharged has entirely failed, and that by the act of Lynn himself. But when the judgment-debtor comes into the court, asking protection, on the ground that he has satisfied the judgment, the door is fully open for the court to modify or grant his prayer, upon such conditions as justice demands. The arrangement between the parties was executory; no release or discharge of the judgment was given. The account stated was the basis only on which the settlement was made, and to be carried into execution. And it must have been the intention of both parties, that the bank should be let in to take the benefit of the trust fund. And justice requires that this should still be done, so far

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forth as it can be, consistently with the safety of the trustee, and the rights of other creditors entitled to the benefit of that fund.

The situation of that fund, however, and what has been done under the trust deed, could not be properly inquired into, under the pleadings in this cause; and without other parties before the court. The proper course for the bank would have been, to have filed a cross-bill against the complainants, and such other parties, as were necessary to bring that subject completely before the court and enable it to make a final determination of the matter in dispute. If the assent of Lynn is all that is necessary to enable the bank to avail itself of the trust fund, justice requires that this should be given, before the bank is entirely restrained from proceeding on its judgment at law. And it is, no doubt, within the legitimate powers of a court of chancery, under circumstances like the present, to require such assent, and modification of the settlement, before granting a perpetual injunction. But the rights of other creditors, which may have attached upon this fund, must not be lost sight of; with respect to which, however, we have not before us the means of judging.

We are, accordingly, of opinion, that the decree of the court below granting a perpetual injunction be reversed. And that the cause be sent back, with directions to the court to continue the injunction, until the bank has a reasonable time to file a cross-bill. And that the continuance of the injunction be subject to such further order of the court, as equity and justice may require.

This cause came on, &c.: On consideration whereof, it is decreed and ordered by this court, that the decree of said circuit *court in this [*385
cause, granting a perpetual injunction, be and the same is hereby reversed and annulled; and it is further ordered by this court, that the cause be remanded to the said circuit court, with directions to continue the injunction, until the bank has a reasonable time to file a cross-bill, and that the continuance of such injunction be subject to such further orders of the court, as equity and justice may require.

*John Conard *v.* Atlantic Insurance Company of New York.

Respondentia bond.—Priority of the United States.—Consignees.—Mortgages to secure future advances.—Fraud.—Exceptions.—Joint and several bond.

It is not necessary, that a *respondentia* loan should be made, before the departure of the ship on the voyage; nor that the money loaned should be employed in the outfit of the vessel, or invested in the goods on which the risk is run. p. 436.

It matters not, at what time the loan is made, nor upon what goods the risk is taken; if the risk of the voyage be substantially and really taken; if the transaction be not a device to cover usury, gaming or fraud; if the advance be in good faith, for a maritime premium; it is no objection to it, that it was made after the voyage was commenced, nor that the money was appropriated to purposes wholly unconnected with the voyage. p. 437.

The lender on *respondentia* is not presumed to lend on the faith of any particular appropriation of the money, and if were otherwise, his security could not be avoided by any misapplication of the fund, where the risk was *bonâ fide* run, upon other goods; and it was not a mere contract of wager and hazard. p. 437.

It seems, that the common and usual form of a *respondentia* bond, is that which was used in this case.[1] p. 437.

What is the nature and effect of the priority of the United States, under the statute of 1799, ch. 128, § 65. p. 438.

It is obvious, that the latter clause of the 65th section of the act of 1799, is merely an explanation of the term "insolvency," used in the first clause, and embraces three classes of cases, all of which relate to living debtors; the case of deceased debtors, stands wholly upon the alternative in the former part of the enactment. p. 439.

Insolvency, in the sense of the statute, relates to such a general divestment of property, as would, in fact, be equivalent to insolvency in its technical sense; it supposes, that all the debtor's property has passed from him. This was the language of the decision in the case of the United States *v.* Hooe, 3 Cranch 73; and it was consequently held, that an assignment of part of the debtor's property, did not fall within the provision of the statute.[2] p. 439.

Mere inability of the debtor to pay all his debts, is not an insolvency, within the statute; but it must be manifested in one of the three modes pointed out in the explanatory clause of the section. p. 439.

The priority, as limited and established in favor of the United States, is not a right which supersedes and overrules the assignment of the debtor, as to any property which the United States may afterward elect to take in execution, so as to prevent its passing, by virtue of such assignment, to the assignees; but it is a mere right of prior payment out of the general funds of the debtor, in the hands of the assignees; and the assignees are rendered personally liable, if they omit to discharge the debt due to the United States. p. 439.

It is true, that in discussions in courts of equity, a mortgage is sometimes called a lien for a debt; and so it certainly is, and something more; it is a transfer of the property itself, as security for the debt. This must be admitted to be true at law, and it is equally true in equity; for in this respect equity follows the law; the estate is considered as a trust, and * according to the
*387] intention of the parties, as a qualified estate and security; when the debt is discharged, there is a resulting trust for the mortgagor. It is, therefore, only in a loose and general sense, that it is sometimes called a lien; and then only by way of contrast, to an estate absolute and indefeasible. p. 441.

It has never yet been decided by this court, that the priority of the United States will divest a specific lien, attached to anything, whether it be accompanied by possession or not. p. 441.

The case of Thelusson *v.* Smith, 2 Wheat. 396, turned upon its own particular circumstances, and did not establish any principles different from those which are recognized in this case; and it establishes no such proposition, as that a specific and perfected lien can be displaced by the mere priority of the United States. p. 444.

It is not understood, that a general lien, by judgment, on lands, constitutes *per se* a property or

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[1] See Insurance Co. of Pennsylvania *v.* Duval, 8 S. & R. 138; Delaware Ins. Co. *v.* Archer, 3 Rawle 216; Niagara Ins. Co. *v.* Searle, 2 Hall 22.

[2] See note to United States *v.* Fisher, 2 Cranch 358.

right in the land itself; it only confers a right to levy on the same, to the exclusion of other adverse interests, subsequent to the judgment; and when the levy is actually made on the same, the title of the creditor relates back to the time of the judgment, so as to cut out intermediate incumbrances; but subject to this, the debtor has full power to sell or otherwise dispose of the land. p. 443.

By the well-settled principles of commercial law, the consignee is the authorized agent of the owner, whoever he may be, to receive the goods; and by his indorsement of the bill of lading to a *bonâ fide* purchaser, for a valuable consideration, without notice of any adverse interests, the latter becomes, as against all the world, the owner of the goods; this is the result of the principle, that bills of lading are transferrible by indorsement, and thus may pass the property, p. 445.

Strictly speaking, no person but the consignee can, by any indorsement on the bill of lading, pass the legal title to the goods; but if the shipper be the owner, and the shipment be on his own account and risk, although he may not pass the title, by virtue of a mere indorsement of the bill of lading, unless he be the consignee, or the goods be deliverable to his order; yet, by an assignment on the bill of lading, or by a separate instrument, he can pass the legal title to the same; and it will be good against all persons, except purchasers for a valuable consideration, without notice, by indorsement on the bill of lading itself. Such an assignment by the owner, passes the legal title against his agents or factors, and creditors, in favor of the assignee. p. 445.

Mortgages may as well be given to secure future advances, and contingent debts, as those which are certain and due; the only question that properly arises in such cases, is the *bona fides* of the transaction.[1] p. 448.

Without undertaking to suggest, whether, in any case, the want of possession of the thing sold, constitutes, *per se*, a badge of fraud, or is only *primâ facie* a presumption of fraud; it is sufficient to say, that in case even of an absolute sale of personal property, the want of such possession is not presumption of fraud, if possession cannot, from the circumstances of the property, be within the power of the parties. p. 449.

In cases where the sale is not absolute, but conditional, the want of possession, if consistent with the stipulations of the parties, and *à fortiori*, if flowing directly from them, has never been held to be, *per se*, a badge of fraud. p. 449.

On a trial upon the merits, it is too late to take exception to the corporate capacity of the plaintiffs to sue; this should have been done by a plea in abatement, before the trial; and the omission to do this is a waiver of the objection. p. 450.

*A joint and several bond, where it was not understood to be offered as general evidence as to all the parties to it, but only as to one of the obligors, and was connected with a title derived from that obligor; was properly permitted to go to the jury, upon proof of the execution of the bond by that obligor alone; as, under the circumstances, it was *primâ facie* evidence of his execution of the instrument. p. 451. [*388

Atlantic Insurance Co. *v.* Conard, 4 W. C. C. 664, affirmed.

ERROR to the Circuit Court for the Eastern District of Pennsylvania. This was an action of trespass, brought in the circuit court, by the Atlantic Insurance Company of New York, against John Conard, the marshal of the district of Pennsylvania, for taking and carrying away certain teas, imported from Canton into the port of Philadelphia, on board the ships Addison and Superior. Pleas, the general issue, and a special justification under a *fi. fa.*

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[1] See note to Shirras *v.* Caig, 7 Cranch 34. In Brinkerhoff *v.* Marvin, 5 Johns. Ch. 320, it was ruled, that a mortgage given to secure future advances was only a lien as against intervening incumbrances, from the time of making its advances, not from its date. But this case has lately been practically overruled by the court of appeals of New York, in Ackerman *v.* Hunsicker, 85 N. Y. 45, where it was determined, that a mortgage, duly recorded, given to secure future indorsements or advances, is entitled to a preference over subsequent judgments against the mortgagor, as well as to indorsements or advances made upon the faith thereof, subsequently to the rendition of such judgment, without notice thereof, as to those previously made; and this, without regard to the question, whether the indorsements or advances were optional or obligatory. Under such circumstances, the docketing of the judgment is not constructive notice to the mortgagee.

against the goods as the property of Edward Thomson. The suit was instituted and tried, under an agreement, which is recited in the following bond:

Know all men, by these presents, that we, the Atlantic Insurance Company of New York, are held and firmly bound unto the United States of America, in the sum of $42,000, lawful money of the United States of America, to be paid to the said United States of America, their certain attorneys, successors or assigns, to which payment, well and truly to be made and done, we bind ourselves and our successors, firmly by these presents: Sealed with our seal of incorporation, and dated this 9th day of October, in the year of our Lord 1826.

Whereas, the goods and merchandise described in an invoice, a copy of which is annexed, imported in the ship Addison, from Canton, safely arrived at the port of Philadelphia, have been levied on by the marshal of the eastern district of Pennsylvania, by virtue of an execution on a judgment in favor of the United States against Edward Thomson, of Philadelphia, as the property of the said Edward Thomson; and whereas, the Atlantic Insurance Company of New York claim to be the owners, in law or equity, of the said goods, and actually hold the bills of lading and invoice thereof, under which the said goods have been duly entered at the custom-house, and the duties thereon, secured to be paid according to law. And whereas, it has been agreed by and between the secretary of the treasury, in behalf of the United States, and the said Atlantic Insurance Company, that a suit shall be instituted by the said named company, against the said marshal, in which the sole question to be tried and decided shall be, whether the United States, or the said Atlantic Insurance Company are entitled to said goods, and the proceeds thereof; and whereas, it has been further agreed, that the said goods shall be delivered to the said Atlantic Insurance Company, without *389] prejudice to the rights of the United States, under the said *execution or otherwise; and that they shall sell and dispose of the same, in the best manner, and for the best price they can obtain therefor, and for cash, or upon credit, as they may judge expedient; and that the moneys arising from the sales thereof, deducting the duties and all customary charges and commissions on such sales, shall be deposited by the said Atlantic Insurance Company, as soon as received, from and after the sale, in the Bank of the United States, to the credit of the president of said bank, in trust, to be invested by the said president of the said bank, in the stock of the United States, in the name of the said president, in trust, so to remain, until it shall judicially and finally be decided, to whom the said goods or the proceeds thereof, do in right, and according to law belong; and on the further trust, that whenever such decision shall be made, the said president of the said bank, shall deliver the said moneys, or transfer the said stock, to the party in whose favor such decision shall be made. And whereas, in pursuance of the said agreement, the said goods have been this day delivered to the said Atlantic Insurance Company of New York, it being understood and agreed, that such delivery of the goods shall not prejudice any existing right of the said company.

Now, the condition of this obligation is such, if the said Atlantic Insurance Company of New York shall comply with the said arrangements, and well and truly sell and dispose of the said goods, and cause the moneys

arising from the sales thereof, deducting therefrom the duties, charges and commissions as aforesaid, to be deposited in the bank, in trust, according to the true intent and meaning of the above recited agreement, and for the purposes therein set forth, this obligation to be void, otherwise, to be and remain in full force and virtue.

(Signed) ARCH. GRACIE, Prest. [L. S.]

Attest—GEO. B. RAPELYE, Secretary of the Atlantic Insurance Company of New York.

The facts as they appeared by the record were as follows: On the 21st June 1825, the plaintiffs below lent to Edward Thomson the sum of $21,000, upon *respondentia*, by the Addison, for which the following bond was executed and delivered to the company:

Know all men, by these presents, that we, Edward Thomson, of the city of Philadelphia, Edward H. Nicoll, Francis H. Nicoll and Floyd S. Bailey, of the city of New York, are held and firmly bound unto the Atlantic Insurance Company of New York, in the sum of $42,000, lawful money of the United States of America, to be paid to the said the Atlantic Insurance Company of New York, their certain attorney, successors or assigns, to which payment, well and truly to be made, we do bind ourselves and each of us, our and each of our *heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and [*390 dated this 21st day of June, in the year of our Lord 1825.

Whereas, the said the Atlantic Insurance Company of New York have this day lent and advanced to the above-named Edward Thomson, Edward H. Nicoll, Francis H. Nicoll and Floyd S. Bailey, the sum of $21,000, lawful money of the United States of America, upon the goods, wares and merchandise and specie, to that amount, laden or to be laden, on board the American ship, called the Addison, of Philadelphia, whereof Hidelius is master, or which may be laden on account of the said Edward Thomson, Edward H. Nicoll, Francis H. Nicoll and Floyd S. Bailey, on board the said vessel, at any time during her intended voyage hereinafter mentioned. And whereas, the said vessel is now bound on the voyage at and from Philadelphia to Canton, and at and from thence, back to Philadelphia, with the usual privileges for trade and refreshments. And whereas, the said the Atlantic Insurance Company of New York are content to stand and bear the risks against which the said company usually insure by their cargo policies, on the said sum so lent and advanced on the said goods, wares, merchandise and specie, laden or to be laden on board of the said vessel as aforesaid, during the said voyage, so as the same do not exceed the term of twelve calendar months, to be computed from the day of the date of the bill of lading, viz., the 21st day of April 1825.

Now, the condition of this obligation is such, that if the said ship, laden with the said goods, wares, merchandise and specie, do and shall, with all convenient speed, proceed and sail on the said voyage from Philadelphia to Canton, and at and from thence, back to Philadelphia, and return and come to Philadelphia, having on board the above stipulated amount in value, in specie or merchandise, as the case may be, on the respective passages, both outward and homeward, to end her voyage there, by or before the end or expiration of twelve calendar months, to be computed from the date aforesaid, and that, without deviation (the dangers and casualties of the seas

excepted; and if the above-bounden Edward Thomson, Edward H. Nicoll, Francis H. Nicoll and Floyd S. Bailey, or either of them, or either of their heirs, executors or administrators, shall and do well and truly pay, or cause to be paid, at the city of New York, to the above-named the Atlantic Insurance Company of New York, their attorney, successors or assigns, the full sum of $21,000, lawful money as aforesaid, immediately upon the first and next return and arrival of the said *ship, at the port of Phila- *391] delphia, or at and upon the end and expiration of twelve calendar months, to be computed as aforesaid, whichever shall first happen, together with the sum of $2205, lawful money as aforesaid, that being the stipulated marine interest and premium on the said loan: or if the said Edward Thomson, Edward H. Nicoll, Francis H. Nicoll and Floyd S. Bailey, or either of them, their, or either of their heirs, executors or administrators, shall and do, immediately upon the first and next return and arrival of the said vessel, at the port of Philadelphia as aforesaid, provided such return and arrival happen within the space of twelve calendar months, to be computed as aforesaid, give security satisfactory to the said the Atlantic Insurance Company of New York, to pay, at the city of New York, to the said the Atlantic Insurance Company of New York, their successors or assigns, the said sum of $21,000, together with the said sum of $2205, within three months from the time of such return and arrival, with lawful interest thereupon, from the time of such return and arrival, and shall and do well and truly pay the same accordingly, at the expiration of the said three months; or if, in the said voyage, and before the end of the said twelve months, to be computed as aforesaid, a total loss of the said goods, wares, merchandise and specie, by the risks against which said company usually insure by their cargo policies, shall unavoidably happen, and the said Edward Thomson, Edward H. Nicoll and Floyd S. Bailey, their heirs, executors or administrators, shall and do well and sufficiently abandon, transfer and assign to the said the Atlantic Insurance Company of New York, their successors or assigns, all the said goods, wares, merchandise and specie of the said Edward Thomson, Edward H. Nicoll, Francis H. Nicoll and Floyd S. Bailey, so laden, and to be carried from the said port of Philadelphia, on board the said ship, and all other goods, wares, merchandise and specie, which shall be acquired during the said voyage, by reason of, or from the proceeds of, the said last-mentioned goods, wares, merchandise and specie, and the net proceeds thereof, and well and truly do account for and pay, upon oath or affirmation, within four calendar months, to be computed from the time of such loss, to the said the Atlantic Insurance Company of New York, or their successors, a just and proportionable average on all the said specie, goods, wares and merchandise, and proceeds, if any salvage, average or allowance shall be obtained by reason of, or upon the same, notwithstanding such loss; then this obligation to be void; otherwise, to remain in full force and virtue.

It being first declared to be the mutual understanding and *agree- *392] ment of the parties to this contract, that the lenders shall not be liable for any charge, damage or loss that may arise, in consequence of a seizure or detention, for or on account of any illicit or prohibited trade, or any trade in articles contraband of war; but that the lenders shall be liable to losses and averages, and entitled to the benefit of salvage, in the same manner, to all intents and purposes, as underwriters on a policy of insurance, according

to the usages and practices in the city of New York; and that in like manner, the borrowers shall be subject to all the duties imposed on the assured, by the usual policies of insurance, and the customs and practices of the said city.

Sealed and delivered in the presence of us,

PETER MACKIE, EDWARD THOMSON, [L. S.]
CHARLES MACKIE, EDW. H. NICOLL, *per* [L. S.]
To the signature of Edward Thomson. ROBERT SMITH, att'y,
J. H. CLINCH, FRANCIS H. NICOLL, [L. S.]
H. W. NICOLL, FLOYD S. BAILEY, [L. S.]
To the three last named.

At the same time the following memorandum, bill of lading, and assignment thereon, were also executed and delivered to the company:

Whereas, it hath been agreed, that the bills of lading for the goods, specie, wares and merchandise, mentioned in the within obligation, shall be indorsed to "The Atlantic Insurance Company of New York," as a collateral security for the loan within mentioned: And whereas, it has been further agreed, that the property to be shipped homeward as aforesaid, being the proceeds of the said loan, shall be for the account and risk of us the said borrowers, or some of us; that the bills of lading therefor shall express the same, and shall also express that the said property shall be deliverable to the order of the shippers, and that the same shall be indorsed in blank, and shall be placed in the hands of the said Atlantic Insurance Company of New York, either before or on the arrival of the said ship at Philadelphia, to be held by them as a continuation of such collateral security, to the performance of which, we do bind ourselves: Now, by this instrument, it is expressly declared, that such indorsement or consignment shall not be held to exonerate the persons of the obligors, nor compel the said the Atlantic Insurance Company of New York to accept the goods and merchandise which may arrive under such bill of lading and *consign- [*393
ment, in discharge of such debt; but it shall be lawful for the said the Atlantic Insurance Company of New York, to receive and hold the said goods, specie, wares and merchandise, for the space of ninety days after their arrival at the port of Philadelphia. And in case the principal, interest and premium, in the within obligation mentioned, shall not be paid or satisfied, within the said time, to dispose of the same, at public auction, and to charge the obligors with the balance that may remain due, after deducting from the amount of said sales, the freight, duties, commissions and all other just and proper charges.

Sealed and delivered in presence of us,

PETER MACKIE, EDWARD THOMSON, [L. S.]
CHARLES MACKIE, EDW. H. NICOLL, *per* [L. S.]
To the signature of Edward Thomson. ROBERT SMITH, att'y,
J. H. CLINCH, F. H. NICOLL, [L. S.]
H. W. NICOLL, FLOYD S. BAILEY, [L. S.]
To the three last named.

Shipped in good order and condition, by Edward Thomson, in and upon the ship called the Addison, whereof Hidelius is master for this voyage, now lying in the port of Philadelphia, and bound for Canton, seven kegs containing three thousand Spanish dollars, for account and risk of the shipper, a

native citizen of the United States of America, being marked and numbered as in the margin, and are to be delivered, in the like good order and well conditioned, at the aforesaid port of Canton (the dangers of the seas only excepted), unto John R. Thomson, Esq., or to his assigns, he or they paying freight for the said goods, at the rate of nothing, with primage and average accustomed. In witness whereof, the master or purser of the said ship hath affirmed to the three bills of lading, all of this tenor and date; one of which being accomplished, the other to stand void. Dated at Philadelphia, the 21st day of April, 1825. ANDREW HIDELIUS, jr.

No. 5. [E. T.] 38 @ 44, 7 kegs, containing 3000 each.

An assignment indorsed thereon, dated the 21st June 1825, as follows:

(COPY.)

For value received, I do hereby, assign and transfer to the Atlantic Insurance Company of New York, the within bill of lading, and the specie, goods, wares and merchandise, to be procured thereon or thereby; and any
*394] return-cargo to be *obtained by the within-mentioned outward cargo and specie, or the proceeds thereof, and all the return-cargo to be taken on board the within-named ship, by or for my account, as collateral security, according to an agreement, duly executed and adjoined to a *respondentia* bond given by myself, Edward H. Nicoll, Francis H. Nicoll and Floyd S. Bailey, dated this 21st day of June, in the year of our Lord 1825, for the sum of $21,000. Witness my hand and seal, this 21st day of June 1825. EDW'D THOMSON.

PETER MACKIE, } Witnesses.
BARCLAY ARNY, }

The Addison sailed from Philadelphia for Canton, on or about the 21st April 1825.

On the 14th July 1825, the plaintiffs also lent to Edward Thomson the sum of $13,950, upon *respondentia* by the Superior, for which a similar bond, and memorandum, and a corresponding bill of lading and assignment, were executed to the lenders. The Superior sailed from Philadelphia for Canton, on or about the 6th June 1825.

There was no difference between these two operations, except this, that the entire loan of $21,000 by the Addison was paid by the company to the agents of Thomson, whereas, the loan by the Superior, was applied, with his consent, to pay a previous loan on *respondentia* by another ship of Thomson's, which had fallen due.

On the 19th November 1825, Edward Thomson, being very largely indebted to the United States upon duty bonds, and for duties on teas, not bonded, made a general assignment of all his estate and effects to Richard Renshaw and Peter Mackie, in trust for his creditors; and on the 13th March 1826, he confessed a judgment to the United States for $500,000, upon which a *fi. fa.* was issued on the same day.

In the month of March 1826, and a few days before the arrival of the Addison, the assignees of Thomson received, under a blank envelope addressed to him, a duplicate bill of lading and invoice of a shipment homeward by that vessel, for the teas in question in this suit, and delivered them to the agents of the insurance company. They were respectively dated the 22d November 1825, deliverable to the order of the shipper, at Canton, R. Fisher,

attorney for John R. Thomson, and by him indorsed in blank. The invoice stated the account and risk to be for Edward Thomson. That the teas in this invoice were the returns of the outward specie in the bill of lading assigned to the company, was proved by means of the words and figure No. 5, on the homeward invoice, and the same number and figure on the outward bill of lading; which were the means *concerted between [*395 Edward Thomson and his supercargo in Canton, to fix the identity. The original bill of lading and invoice were received by the assignees, on the arrival of the Addison, and in like manner delivered to the company. In the same month Peter Mackie, one of the assignees, received from Canton, the homeward bill of lading and invoice of a shipment of teas, &c., by the Superior, dated the 2d December 1828, deliverable to his own order; and Barclay Arny, a clerk in the service of Thomson, received a bill of lading and invoice of another shipment by the Superior, bearing the same date, and deliverable to his order. These returns, being, as was proved at the trial, purchased with the specie in the outward bill of lading by the Superior, assigned to the company, the consignees, Mackie and Arny, on the 22d March 1826, indorsed the papers to the plaintiffs; the rest of the shipment of $13,960 was expended for ship's disbursements in Canton.

Both shipments by the Addison and Superior were levied upon by the marshal, under the *fi. fa.* before mentioned, on the 15th March 1826, while the ships were below in the river, and taken into his custody, where they remained until the arrangement recited in the bond of the 9th October 1826; in consequence of which they were given up.

It further appeared upon the trial, that the Addison brought with her, addressed to Thomson, a general bill of lading for her entire cargo, deliverable to Edward Thomson or assigns, but not signed by the master; and also a general invoice, stating the cargo to be for his account and risk, and deliverable to his order. The manifest which had been made out in Canton by the agent of Thomson, stated the cargo to be consigned to Thomson, and not to order; and when the agent delivered it to the master, he told him that it was done to save him the necessity of overhauling his papers at sea, and that he might rely on it, as being correct. The master however, on receiving a letter from the assignees, upon his arriving on the American coast, examined his bills of lading, and finding that they were deliverable to order, altered his manifest in conformity. The object of these double papers, it was alleged, was to enable Thomson, after settling with the lenders on *respondentia*, as he had done upon former occasions, to cancel the particular bills and invoices; and after procuring the signature of the master to the general bill of lading, to enter the cargo as consigned to him.

The preceding statement is all that is necessary to introduce the points of evidence and law that were raised upon the record, and which came up for revision in this court.

The plaintiffs' counsel having offered, at the trial, to give evidence of the *respondentia* bond by the Addison, it was *objected to, until they [*396 had proved that the company were duly incorporated according to law. The plaintiffs' counsel then gave notice to the defendant's counsel, the district-attorney of the United States, to produce the bond of 9th October 1826; and gave in evidence the agreement of counsel for entering the action, wherein it was stated, that the question to be tried was, whether the

plaintiffs or the United States were entitled to the goods mentioned in the declaration or the proceeds thereof, and that the merits should be determined, without further form. The bond not being produced, the plaintiffs' counsel called Austin L. Sands, to prove the delivery of that bond to the district-attorney, and also its contents ; and began by asking him, if he was an agent of the Atlantic Insurance Company. To this question, the counsel for the defendant objected, and the court overruled the objection. To this opinion of the court, a bill of exceptions was tendered and sealed.

The bond of 9th October 1826, being then proved, the counsel for the plaintiffs contended, that they were authorized, without further proof, to give evidence of the *respondentia* bond, of which opinion was the court ; and to this opinion also, the defendant's counsel tendered an exception.

Mackie, the subscribing witness to E. Thomson's signature to the *respondentia* bond, memorandum, and assignment of the bill of lading, proved the handwriting of Thomson, his own attestation, and that of Charles Mackie ; and also the handwriting of Clinch and Nicoll, the other witnesses to the bond and memorandum ; who resided in New York and were not produced. The counsel for the plaintiffs then offered to read that bond in evidence, to which the counsel for the defendant objected, but the court suffered it to be read, as the several bond of Thomson ; to which opinion, an exception was also tendered.

Upon the examination of A. Hidelius, the master of the Addison, a witness produced on behalf of the defendant, the counsel proposed to ask him the following question—Did Mr. Mackie and Mr. Nicoll make out a new manifest, altering the destination of the Addison, and ask you to enter it as a true manifest at the custom-house? The question was objected to by the plaintiffs' counsel, and overruled by the court ; to whose opinion, the defendant again excepted.

The defendant's counsel proposed then to ask the same witness the following question—Did you see Mr. Mackie pay money to the pilot, for being first on board the Addison ? Which question was objected to, overruled, and the rejection excepted to in like manner.

The defendant's counsel having then produced an original letter from Thomson to Captain Hidelius, with a postscript by the assignee, giving the master a caution in regard to his *manifest, proposed to ask Peter Mackie the following question—Was the greater part of the letter now produced, signed by Edward Thomson, and countersigned by his assignees, drafted by the district-attorney ? This question was in like manner objected to, and overruled, and an exception taken.

*397]

The same counsel proposed to ask of Barclay Arny, another witness, the following question—Do you know how the money was applied, that was borrowed on the Addison and Superior, of the plaintiffs ? This question was objected to, unless the application was with the plaintiffs' knowledge, and was overruled. To this opinion, a bill of exceptions was also tendered by the defendant.

At the close of the argument to the court and jury on the law and fact of the case, WASHINGTON, Justice, delivered the following points in charge to the jury.

1. That the bonds given by Edward Thomson to the plaintiffs, for

securing the loans of $21,000 on the cargo of the Addison, and of $13,960 on that of the Superior, are not invalid as marine contracts, for the reason alleged by the counsel for the defendant; that is to say, because in respect to the former, the loan was made after the Addison had sailed upon her voyage, and in respect to the latter, for the same reason; and because the bond was given by the said Thomson for securing a balance due by him to the plaintiffs, on account of preceding loans made to him, and not for money lent at the time the said security was given.

2. That it is no objection to the validity of the bond given for securing the loan, on the cargo of the Addison, upon the ground of usury, that such cargo was known, by the parties, at the time the said bond was given, to have been in safety at and upon the departure of the said vessel from Philadelphia; since the real question for the jury to decide in relation to that subject was, whether, upon the whole of the evidence given in the cause, the loan was bottomed upon a fair marine contract, the repayment of which was to depend upon the perils which the plaintiffs assumed to bear, or whether the contract was merely a device to cover an usurious loan. If the risk be inconsiderable, or for a part of the voyage only, and the marine interest be disproportioned thereto, these circumstances may warrant the presumption of unfair conduct, sufficient to avoid the contract. But the mere circumstance of the known safety of the cargo, at any particular period of the voyage, or of the assumed risk, is not, *per se*, an objection to the contract, on the ground of usury. If Edward Thomson was to pay interest from a period antecedent to the loan, there can be no question, but that the contract was usurious, and it would be so, although *no more than the legal rate of interest was reserved. How that fact is, the jury must decide from [*398 the evidence before them.

3. That the loan upon the cargo of the Addison, was, by the terms of the aforesaid bond, given to secure it, at the risk of the plaintiffs, during the whole voyage, notwithstanding the omission of the words "lost or not lost" in the said bond; there being other and equivalent expressions in the said instrument.

4. That the above bond, given for securing the loan made upon the cargo of the Addison, together with the memorandum indorsed on it, the bill of lading outward, and the indorsement thereon, are all to be considered as forming parts of one entire contract; and as such, they do, upon a fair and legal construction of them, cover that part of the homeward cargo, which was the investment of the outward cargo on which the loan was secured; and that the same principles are applicable to the contract in relation to the Superior. That the above instruments, taken and construed together as forming one contract, vested in the plaintiffs an equitable title to the return-cargoes of those vessels; if, upon the evidence given in the cause, the jury should be of opinion, that those return-cargoes were, in point of fact, the investment of the outward-cargoes of the Addison and Superior, respectively. And that nothing remained to be done to vest in the plaintiffs the legal right to the said property, respectively, but the delivery to them of the homeward bills of lading of the Addison's cargo, indorsed in blank, and an assignment to the plaintiffs, by Mackie and Arny, of the homeward bills of lading of the cargo of the Superior.

5. That the equitable title of the plaintiffs, so vested in them on the 19th

day of November 1825, when Edward Thomson made an assignment of all his property for the benefit of his creditors, was not defeated or affected by the right of preference, which that act gave to the United States to be first paid what was due to them by the said Thomson, and that this equitable title was converted into a legal one, by the subsequent delivery to the plaintiffs of the bills of lading, indorsed in blank, of the Addison's homeward cargo, and of the assignment by Mackie and Arny, of those of the cargo of the Superior.

6. That the actual possession of the above return-cargoes, by the masters of the Addison and Superior, until they were levied upon under executions at the suit of the United States against Thompson, is not, *per se*, in law, a badge of fraud, which ought to invalidate or effect the title of the plaintiffs to those cargoes.

7. That as to the charge of fraud, which it is insisted by the counsel for the defendants taints this transaction *throughout, that is a subject exclusively for the consideration and determination of the jury, upon the evidence laid before them; in deciding upon which, they are to observe: 1st. That actual fraud must be proved, and ought not to be presumed: and 2d, That no fraud which may have been practised, or attempted, by Edward Thomson, his masters or agents, ought to effect the validity of these contracts; unless they should be satisfied, from the evidence, that the plaintiffs in some way or other participated in the same.

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8. That if the jury should be of opinion, upon the whole of the evidence, that the transactions between the plaintiffs and E. Thomson, which constitute the basis of this action, were fair, so far as the plaintiffs were concerned in them; and that they stand clear of the imputation of usury, on the ground that interest was reserved from a period antecedent to the loan; and if further they are satisfied, that the homeward-cargoes were the proceeds of the outward-cargoes on which the securities were given; then, their verdict ought to be for the plaintiff, otherwise, not. It was further stated by the judge, that he had declined giving a construction of the 62d section of the act imposing duties, or an opinion on the question, whether, under that section, the consignee of imported goods is liable for the duties on them; considering it to be unnecessary, from the view which he had taken of the case. And in explanation of the charge, the following questions were propounded by the counsel, and answered by the court.

1. The defendant's counsel requested the court to charge the jury, that if the agreement of the plaintiffs with Edward Thomson was made with a view to deprive the United States of their duties, it was fraudulent, and the plaintiffs could not recover. To which the judge answered, that if the agreement was made with that view, such would be the legal consequence; but that he had heard no evidence to warrant that conclusion in point of fact; but that was a subject exclusively for the jury.

2. The court was asked by the same counsel, to charge, that if the contract of Edward Thomson with the defendant, was to pay more then lawful interest, during a period when there was no marine risk, the contract was usurious and void. To which the judge answered, that if the contract was a cover to charge more than lawful interest, when there was no marine risk, it was usurious and void. That he did not himself understand the entries from the plaintiffs' book, which had been given in evidence, but that the

fact upon which the question is predicated, was proper for the decision of the jury.

3. The court was then asked by the plaintiffs' counsel to charge, that the parties were at liberty to agree for a marine interest, greater than the legal rate for the time that the money *was exposed to marine risks, or the loan was at hazard, by the marine risk of the goods, on which it was made. To which the judge answered, that they certainly were. To all which the defendant's counsel excepted, and the judges sealed a bill of exceptions. [*400

Ingersoll, for the plaintiff in error, stated, that after several years of actual but concealed insolvency, Thomson owned it, on the 19th of November 1825, by the public assignment of all his property. He then was the debtor of the United States $979,102.63 for duties on his importations in the 1823-4-5, which duties were due at the importations, though bonded with credits for future payments. Such is the doctrine of the case of the *United States* v. *Lyman*, 1 Mason 482. Thus, the contest arose between the United States, who loaned these credits, and the defendant in error, who also claimed reimbursement for loans; but the fund in dispute is the only resource of the United States, while the insurance company have the other obligors, besides Thomson, on the *respondentia* bond, to look to. The United States are privileged creditors; not, as is often reputed, by prerogative, but by a lawful priority, which belongs to every sovereignty or government. Their credits on importation are loans, for which the consideration and equivalent are priority of payment, before any other creditors; and the fund in dispute proceeds from loans thus privileged. It is as just and equitable, as it is established by law, that for such loans, the government should be paid before any other creditor, no matter what security he has for his debt. This principle is the privilege of every government, and as consonant with republican as with regal sovereignty; it belongs to all codes, in all ages and countries. Thus, in England, before the statute of Acton Burnell, the crown had execution against the person and the lands of its debtors, which was not allowed to any subject at that time. Plowd. 441; 3 Co. 11; 2 Bac. Abr. 686. Government is not bound by certificate of bankruptcy, by act of limitations, or to pay costs; principles common to the American as to the English law. The crown may assign a *chose in action*, and its assignee may sue in his own name. *Rex* v. *Trine*, Cro. Jac. 179. Such was the ancient Roman law. Wood's Inst. of the Civ. Law, book 3, ch. 1, p. 141. The state was preferred for all debts, and had a lien on the property of all receivers of public funds, with the right of execution from the treasury, without any suit; which are provisions similar to those of the acts of congress. The modern civil law is the same: *fiscus semper habet jus pignoris.* Poth. *de l'hypotheque*, ch. 1, art. 3, p. 116. All are bound to pay the state before private creditors. Grotius, *de Jure Belli ac Pacis*, lib. 2, c. 1, § 6. These principles are indispensable to good government. It is neither politic, nor *permitted for the judiciary, to enfeeble by construction, what the legislature has done to establish them. Neither property nor lien is asserted for the United States, but privileges to be first paid out of the insolvent debtor's effects, before any other debtor. [*401

To the privilege, however, the United States superadd the advantage,

which the law always allows to vigilance in the pursuit of debts. On the 11th of March 1826, they obtained judgment against Thomson; on the 13th of that month and year, issued their *fi. fa.*, and on the 15th, levied it on the ships and cargoes, whose proceeds are in question. Such legal and equitable positions are immovable by any mere debtor: the defendants in error must show that Thomson had no property in the goods levied upon as his, but that it was transferred beforehand to them. This burden of proof they undertake, and to dislodge the public priority and possession, by proving property out of Thomson, and in the insurance company. They claim to be, if not owners, at least, creditors with qualified property by specific lien; having loaned money on *respondentia* bonds, secured by assignments, indorsed on the outward bills of lading.

Use, disposition, risk, profit and loss, in short, all ownership, real and ostensible, remained in Thomson, throughout. The vessels were far at sea, when the loans were made, so that it was physically impossible to appropriate the parts effected to the several loans. All the homeward documents were addressed, under seal, to Thomson, and nothing but a secret mark on one set of the double papers, enabled the assignees to deliver the respective parcels, which were levied upon by the executions of the United States, when thus symbolically and conjecturally appropriated. The contract between the insurance company and Thomson is to be gathered from the bond, the annexed memorandum, and the assignment on the outward bill of lading, all considered together as one instrument. The bond does not contain a single word or indication of transfer of property or specific lien, but the contrary; and it is well settled, that a *respondentia* bond creates no lien, but only gives personal security. *Busk* v. *Fearon*, 4 East 319; *United States* v. *Delaware Insurance Company* (4 W. C. C. 418). The memorandum annexed to the bond, is a *caveat* against the idea of property, which the lenders repel. The assignment of the bill of lading is cautiously qualified and referential, relying upon the memorandum for the meaning of the parties. By all these instruments, taken either together or separately, there is no unqualified transfer of property; no possession changed, the account and risk are kept in the borrower; no consignment to the lenders who lend their money on the promise of the borrower to place a blank bill of lading in their hands, after the voyage ends, and that and then, expressly, as no more than collateral security for the loan.

*402] *The lenders trust the borrower's covenant, throughout—no more. Usually, in case of *respondentia* loans, there is an unqualified assignment at home, and an unqualified consignment from abroad, with separate letters of advice, orders, and and an entire documentary possession in the lenders: whereas, here, the lenders shun every indication of ownership or possession, which are left with Thomson, to enable him, by false appearances of property, to get credits for duties, which the insurance company thus evade liability for. The 62d section of the act of congress (1 U. S. Stat. 675), holds the consignee liable for the duties, notwithstanding any transfers. By clandestine transfers, the lenders have a secret lien on these effects, without notice and registry, contravening all appearances, and inevitably tempting to frauds. Can an equitable right spring from so polluted a source? Can the public priority be annulled by such an equity? By mortgage, the legal title is transferred and so registered; by pawn, the thing is deposited and thus

possession changed. But in this case, all but a secret hold remained with the borrower, as the very means with which to defraud the revenue. Would chancery compel performance of such a contract? Would trover lie, at common law, for the property? Could the insurance company have taken possession of it, at any time? Could not Thomson have ordered and sent it to Europe or Australia, instead of Philadelphia? His obligation was nothing but a mere executory promise to place a blank bill of lading in the lenders' hands, which promise they had no means of compelling him to keep. Indeed, the consideration for that promise was a mere contingency, inasmuch as no debt was due, till the voyage ended: and then, by the bond, the lenders stipulate to accept satisfactory security for payment; which security, according to Arny's testimony, was always a mere negotiable note from Thomson. Such was the course of dealing uniformly. No instance ever occurred of his placing the blank bill of lading in their hands. Contracting that the returns should be consigned by Thomson's foreign agent, to his order, was contracting that the property should remain in him. Such is the universal and familiar effect of such consignments, by which most of the large British shipments to this country are regulated. Abb. by Story 240; 1 H. Bl. 359; *The St. Joze Indiano*, 1 Wheat. 208; *The Venus*, 8 Cranch 253, 275; *The Merrimack*, Ibid. 328; *The Frances*, 9 Ibid. 183. To which it may be added, that by act of congress, every manifest must designate ownership, by fixing the consignee. Section 23d of the duty act (1 U. S. Stat. 644). All bills of lading must conform to the manifest, section 30th of the same act (Ibid 649); and the property, as fixed in the consignee, remains in him notwithstanding any transfer; section *62d of the same act (Ibid. 675). Indeed, it is a principle of universal law, that possession of chattels must [*403 accompany property. *Ryall* v. *Rolle*, 1 Wils. 260; *Edwards* v. *Harben*, 2 T. R. 587; *Hamilton* v. *Russell*, 1 Cranch 316. Secret liens and clandestine titles are destructive of that free mutation of property which is vital to commerce. It is not denied, that property at sea may be transferred by the documents. But the question here is, whether a secret title, which disowns property, until third persons are involved, may be construed into force, in order to frustrate fair claims. In *Cox* v. *Harden*, 4 East 241; *The Frances*, 8 Cranch 335, and *Potter* v. *Lansing*, 1 Johns. 215, it is said, that even the account and risk, are strongly indicative of the property. In the case of the *United States* v. *Delaware Insurance Company* (4 W. C. C. 418), it was adjudged, that a bill of lading does not transfer the property, but merely gives a right to demand it; and that a bill to order, or in blank, continues the property in the shipper, till a consignee takes lawful possession of it. The argument for the United States, far from any encroachment on the settled doctrines of commercial law, or the common law, labors, on the contrary, to uphold them against a perilous innovation by construction. Furthermore, was not the question of property for the jury to determine? The written instruments on which the court determined the question, are no more than evidental of the parties' intentions, which was a matter of fact. Such was the use made of similar written instruments in the analogous cases of *Hibbert* v. *Carter*, 1 T. R. 748; *Haille* v. *Smith*, 1 Bos. & Pul. 563; *Barrow* v. *Coles*, 3 Camp. 92; *Dyer* v. *Pearson*, 3 B. & Cr. 38; *Maryland Insurance Company* v. *Ruden*, 6 Cranch 338, and *Blagg* v. *Phœnix Insur-*

ance Company, 3 W. C. C. 5. In all these cases, the court left the property as a fact for the jury to ascertain.

But conceding, for argument's sake, that this is a case of equitable lien or special property, that does not supplant the public priority. The lien of a judgment certainly does not. *Thelusson* v. *Smith*, 2 Wheat. 396. What more, in this inquiry, is a special than a general lien? Either claim is but a debt secured by a pledge; and all debts are postponed to the public privilege. The instruments relied upon, all mention collateral security, which is only title to the property, not in it; not like a mortgage, which transfers the legal right, and leaves but an equity of redemption. There was no right to take possession, much less any possession given, by these documents. The general lien of a judgment gives the right of taking possession, by means of execution: but the right in question was no more than a right of action, which the creditor had as much without it. The three exceptions stated by the court to the *general rule laid down in *Thelusson* v. *Smith*, are all possessory, viz., sale with delivery, executions executed, and mortgage. All liens are possessory—enforceable without suit. Liens for freight, general balance of factors, auctioneers, attorneys, carriers, tradesmen, material-men, for purchase-money; all depend in having hold of the thing liable to the lien; but none of them give a property in it. Indeed, the legal understanding of lien and of property, are inconsistent with each other. Loss or gain do not affect the lien-holder, but the owner of the property; to whom also, any surplus belongs, after satisfying the lien debt. In *Blaine* v. *The Charles Carter*, 4 Cranch 328, the court says, that a bottomry-bond gives no interest in the ship, but a claim upon her, which may be enforced with the dispatch of admiralty process. In *Seaman* v. *Loring*, 1 Mason 139. Judge STORY considers it of the very essence of the lien on goods, that possession accompany it. In *Hailie* v. *Smith*, 1 Bos. & Pul. 563, Ch. J. EYRE says, the goods were set apart, to remain in deposit, from which moment the property was changed. *Hibbert* v. *Carter*, 1 T. R. 745, and *Lempriere* v. *Pasley*, 2 Ibid. 485, turned on the right of possession. But a *respondentia* bond gives no lien. *Busk* v. *Fearon*, 4 East 319. There is no lien for demurrage. *Binley* v. *Gladstone*, 3 M. & S. 205; *Philips* v. *Rodie*, 15 East 547; *Ex parte Heywood*, 2 Rose 355. In *Hammonds* v. *Barclay*, 2 East 235, lien is defined to be a right to detain for debt, property placed in the creditor's possession. In *Lickbarrow* v. *Mason*, 6 East 25, it is called a qualified right, to be exercised over another's property. In *Wilson* v. *Balfour*, 2 Camp. 579, it is defined a right to hold. In *Hallet* v. *Bausfield*, 18 Ves. 188, it is called the right of a party having possession to retain it. In *Heywood* v. *Waring*, 4 Camp. 291, a right to hold. In *Wilson* v. *Heathen*, 4 Taunt. 642, lien, or the right to hold, is contradistinguished from pledge, which is said to be matter of special contract. Lien is no more than a right of set-off, being the same in equity as in law. *Lempriere* v. *Pasley*, 2 T. R. 492. It is a claim with possession, either personal, as by bond, covenant or contract; or real, as by judgment, statute or recognisance. Termes de la Ley 427. It is a right *in rem*, but not *ad rem*: a claim, with hold, but without property, in the thing held.

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Justice and necessity originated liens. Policy and convenience have increased them. But of late, courts lean against them, and will not add to their number or extent. *Rushford* v. *Hadfield*, 7 East 229. No court in

England has acknowledged a new instance of lien for the last twenty years, 9 Ibid. 426. The civil law abounds with liens, therein termed privileges; that is, prior rights of payment; such as the lien of the state for its debts, the lien of mechanics and workmen, and of lenders of money. Wood's Inst. *220. The common law, the admiralty law, and the statute law, are [*405 familiar with various liens. The right of landlords to distrain, may be considered a lien. But these privileged claims, though all specific, and affecting the property (with notice) in all hands, wherever transmitted, were never held to give or change property. Its risk, diminution, enhancement and disposition, are all the debtor's, not the creditor's; at the debtor's death, it is his assets. If Thomson had died, when he became insolvent, his administrators would have taken the fund in dispute, and must have paid the proceeds to the United States. *Fisher* v. *Blight*, 2 Cranch 390.

The whole question turns on the possession; for without possession there can be no lien. *Jones* v. *Pearle*, 1 Str. 556. *Ex parte Shank*, 1 Atk. 234; *Kruger* v. *Wilcox*, Ambl. 252; 1 Doug. 97; *McCombie* v. *Davis*, 7 East 5. Now, possession once parted with, puts an end to lien. *Sweet* v. *Pym*, 1 Ibid. 4. Indeed, actual possession, without the assertion of legal right to it, is of no avail. *The General Smith*, 4 Wheat. 438. And slight circumstances will be laid hold of, to show that the creditor does not rely on lien. *Ramsay* v. *Allegre*, 12 Wheat. 611. No possession was ever taken or asserted by the Atlantic Insurance Company. They repudiated it, together with every sign of ownership, lest they should be called on for the duties. They were content to be creditors, with mere hypothecation, without deposit or pawn. 2 Bl. Com. 159. Whether even pawn gives property, is doubtful: but it is unquestionable, that hypothecation does not. The latter gives but right of action. Wood's Inst. 219, ch. 2, b. 3. Poth. *de Bienf.* vol. 2, p. 355; *Nantissement*, ch. 1, art. 1, § 2. True, ships at sea may be delivered by bill of sale *ex necessitate* (*Atkinson* v. *Maling*, 2 T. R. 462), and cargoes may change hands by the documents; but without delivery of some kind, the whole is fraudulent and void. *Ryall* v. *Rolle*, 1 Wils. 260, and 1 Atk. 167; *Brown* v. *Heathcothe*, Ibid. 168; *Falkener* v. *Case*, 1 Bro. C. C. 125. In this case, KENYON gave up the ships, because not delivered. See his argument in *Lempriere* v. *Pasley*, 2 T. R. 485, 496. By the civil law, a chattel cannot be hypothecated or mortgaged. And as between the state and a creditor by hypothecation, the public privilege prevails. Domat, lib. 3, tit. 1, § 2, p. 356–7. In the case of *The Frances*, 8 Cranch 418, it was settled, that liens for loans, advances, general balance, or anything but freight, yield to the pre-eminent law of prize; which is, as near as may be, the principle in question. It has also been adjudged, that the lien of a foreign attachment, by which the thing attached is taken into possession, is superseded by the public priority. *Harrison* v. *Sterry*, 5 Cranch 289; *Willing* v. *Bleeker*, 2 S. & R. 221. In *Thelusson* v. *Smith*, the court, though they *mentioned mortgage as an exception to the general rule, yet do so only *obiter;* nor has it ever been adjudged, that even a mortgage [*406 will dislodge the public priority. No lien is pretended for it. But an equitable title to these funds, much better founded in justice than that of the insurance company, whose asserted lien, without possession of property, is a mischievous taint secretly affecting the right to the fund, and most disastrous in its influence on the free and fair circulation. To sustain it, judicial

legislation must add to the catalogue and character of liens, and abrogate the act of congress providing for the public priority.

The first three divisions of the charge, affirm the bonds in question, whose validity is denied, either as *respondentia* bonds, or *bonâ fide* obligations. They were executed long after the ships and cargoes were at sea, not predicated of any maritime necessity, to make provisions for foreign voyages ; but were part of a general scheme of gambling and usurious speculation. In form, character and substance, they differ from all *respondentia* bonds heretofore known. 2 Marsh on Ins. 827 ; *Pennsylvania Insurance Company* v. *Duval*, 8 S. & R. 138. It is said, in the *Consolato del Mare*, that Demosthenes gives us the form of a *respondentia* bond, precisely as used ever since. Boucher's Transl. vol. 1, ch. 6. And the principles and regulations of the Roman *pecunia trajectitia*, are familiarized by abundant publications. From no source of legitimate information, can such a contract as the present derive support. All the English authorities, Molloy, Beawes, Weskett, Postlewaite and Park, like the Roman law, concur in considering *respondentia* loans, as to begin before the voyage begins, and to be warranted only by its necessities. Roccus is explicit to the same point. (Ingersoll's Transl. note 75, p. 136.) Pothier does notice the distinction. Emerigon and Valin may perhaps be quoted as contrary, and Marshall inclines to their opinion. 2 Marsh. on Ins. 747. Bynkershoek's well-known chapter on this subject, also leaves his opinion in doubt. Quæst. Jur. Priv. lib. 3, ch. 16. But the origin and reason of the contract, argue conclusively the necessity of confining it to loans before the voyage begins, and to make it begin. Otherwise, as in this instance, the loan never was at risk, nor at sea at all, nor were any purchases made abroad with the proceeds of it. Though the terms of the bond are *at* and from Philadelphia, yet the money was not loaned, till the vessels were half way to China : and it will be as lawful to borrow money on *respondentia*, after the vessel's return, as before her departure, if such devices are sanctioned. They are mere wagers, without interest. The vessels, cargoes, voyages and risks, together with the ocean, and the foreign destination, are mere dramatic suppositions. No risk was run, to justify marine *interest. By the original doctrine, the lender at
*407] marine interest accompanied the loan in the vessel and superintended its returns : and so he must now ; not, perhaps, in person, the improvements in modern navigation have rendered his actual presence unnecessary ; but by correspondence, documents, foreign agents, supercargoes, self-appropriated consignments, and all the securities which have attended every *respondentia* loan, till these innovations were attempted. Without such precaution, it is mere trust, without other than personal security. In France, every *respondentia* contract, must be registered within ten days, on pain of nullity. The whole ground of *respondentia* is encroached on the common law ; and courts of justice should look well to the land-marks, which none but legislators should change ; and they cautiously, if at all. Otherwise, all the gambling adventures of profligate speculation will be legalized, all the wholesome restraints on usury abated. There can be no marine interest without, first, absolute need ; secondly, a want of all other means of supply ; thirdly, it must clearly appear, that the loan was applied to the very voyage created by it ; and lastly, there must be a sea voyage in which that very loan is risked. It is all *strictissimi juris*. Now, there was no consideration

for this loan, till the voyage ended, till when, the lenders insured the borrowers against all sea-risks: and those risks were half run, before the loan was made. By the law of New York, which governs this contract, the slightest infusion of usury vitiates and annuls the whole contract. *Wilkie* v. *Roosevelt*, 3 Johns. Cas. 66; *N. Y. Firemen Ins. Co.* v. *Ely*, 2 Cow. 678; *Bank of Utica* v. *Wager*, Ibid. 712; *Same* v. *Smalley*, Ibid. 770. It will be said, that this was left as a question which the jury have settled. The reply is, that though that may be so, yet the court should have also left it to the jury, to determine whether the whole transaction was not a gambling and fraudulent speculation; of which the loan, bond, supposed sea-risk, and marine interest, were but parts of the contrivance and collusion.

Of the points of evidence ruled, the 1st and 2d concern the corporate existence of the company, which not having been proved as usual, was allowed to be inferred from the circumstance of the collector's having accepted their bond, with the approbation of the district-attorney. But those officers cannot give away the rights of the government; nor should their courtesy, at all events, be construed into such concession. The 4th, 5th, 6th and 7th points respect evidence of fraud, overruled, because it was not first brought home to the insurance company. The plaintiff in error strove to prove the whole scheme, the double papers, falsified manifests, altered letters—in short, all the fraudulent manœuvres; conceiving it competent to connect the company with these acts, either afterwards or inferentially, *of which the jury were to determine. Lastly, the attempt to prove what became of the money loaned, after proof that none of it went to Thomson's pocket, was also deemed proper, as part of the whole *rerum gestarum*, for the consideration of the jury. [*408

Binney, for the defendants in error.—The record presents questions of very different degrees of importance, some of them being without the least influence on the final decision of the cause, while others must decisively rule this controversy, as they will also rule other suits now depending, and an immense amount of property. The same time and attention are not to be given to these unequal questions; but some attention is due to the least, since the counsel for the United States have raised them for discussion. It is proper first to dispose of those which have no connection with the merits of this controversy—the exceptions to evidence admitted and rejected.

1. Overruling an exception by the defendants' counsel, to a question by the plaintiffs to their witness, Mr. Sands, as to his agency in their behalf. The question was merely introductory to the inquiry, whether he had not delivered the bond of 9th October 1826 to the district-attorney. But had his agency been a material fact, he was competent to prove it. There was nothing to show that this power was conferred by writing, nor was it necessary that it should have been so conferred. A corporation may create an agent by parol, and the agent may prove it. *Nicholson* v. *Mifflin*, 2 Yeates 38; *Bank of Columbia* v. *Patterson's Administrators*, 7 Cranch 308; *Bank of United States* v. *Dandridge*, 12 Wheat. 69.

2. The objection to evidence of the *respondentia* bond, because the corporate capacity was not proved, was contrary to the agreement on which the suit was brought. The United States were precluded from questioning the plaintiff's right to sue as a corporation. They compelled the plaintiffs so

to sue, and took their bond, under their corporate name and seal, to insure the suit. The cases of *Henriques* v. *Dutch W. I. Co.*, Ld. Raym. 1535, and *Dutchess Cotton Manufactory* v. *Davis*, 14 Johns. 238, are analogous. The arrangement was at least *primâ facie* evidence of charter, upon this trial, between these parties. The objection, under any circumstances, would have been without weight; for it was a mere question of the order of proof, which the court was competent to regulate at its pleasure. The bond might as well be proved before the charter, as the charter before the bond.

3. That the bond was well proved, as the several bond of Thomson, admits of no doubt, unless it is meant to question the proof, because the witness swore to the signing, and not to the sealing. But as the bond pur-
*409] ported to be sealed and delivered, *proof of signing was sufficient to go to the jury. *Talbot* v. *Hodson*, 7 Taunt. 251; *Curtis* v. *Hall*, 1 South. 148; *Long* v. *Ramsay*, 1 Serg. & Rawle 72; Phil. on Ev. 413.

4. Overruling the question in regard to the application of the money loaned upon the Addison, was in conformity with settled law. The question of application by the borrower, did not concern the lender, by the principles of either the common or the maritime law. By the common law, the borrower was competent to dispose of it, at his pleasure. The application of a loan does not affect either the debt, or the security given for it. The maritime law, as to this species of loan, is the same. The doctrine of application arises only where the master hypothecates, not where the owner bottomries, or borrows on *respondentia*. Even in the former case, though a necessity for the advance must be shown, the application does not concern the lender, unless there be a misapplication, by collusion with him, or with his privity. 2 Emerig. 440, 502, 562; 1 Valin 454; 2 Ibid. 9, art. 7; Pothier 257; *Canizares* v. *The Santissima Trinidad*, Hopk. Adm. Dec. 35; *The Jane*, 1 Dods. 465.

The remaining exceptions to the rejection of evidence, may be dismissed with the remark, that the offered testimony concerned the acts and declarations of persons, between whom and the plaintiffs there was no privity, and after the plaintiffs' title had accrued.

The more material exceptions concern the charge of the court, in which are to be found the principles of law, by which the title of the plaintiffs to the property in question is to be maintained. The cause turns upon the decision of the court, that a contract of insurance loan, made with the owner of merchandise, after it has departed on a voyage, and reserving a marine interest, is not invalid, for that cause, as a marine contract; neither is it so, if it be a renewal of a previous loan of the same nature; and that if there was neither gambling, usury nor fraud, but the transaction was fair, and there was a real risk, the papers in question created a trust in the specie outward, and in the proceeds homeward, for payment of the loan, which gave the plaintiffs a title superior to the priority asserted for the United States. Under the facts submitted to the jury, who by their verdict have negatived all actual fraud, gambling and usury, and have affirmed the reality of the risk, and the fairness of the entire transaction, it is contended, that these contracts were valid, and passed an effectual title to the property: 1. By the common law: 2. By the maritime law.

*410] I. By the common law. Without at present giving a name to these contracts, it may be safely asserted, that all their *elements are

sanctioned by well-settled principles. The contracts involve an advance of money, at a premium beyond the rate of the statute, dependent for its return, on the result of a real risk; a risk in which the borrower had an interest to the whole extent of the loan; an assignment of the goods at risk, to secure the payment of principal and interest, on the happening of a contingency; and a continuance of the actual possession of the goods assigned, with the agents of the borrowers, until the purposes of their employment were answered, and they returned within the reach of the lender. All these features of the contract, are of indisputable legality and efficacy.

The excess of the premium, beyond the rate of the statute, has the sanction of the law, as the return of the principal, and not that of the interest only, depended upon a real and not a colorable contingency. Notwithstanding the dispositions of the courts of Westminster Hall to enforce the statute of usury, it has been settled, with the most harmonious consent, that if the principal and interest of the loan be at hazard, upon a real contingency, it is not a case for the imputation of usury. *Martin* v. *Abdee*, 1 Show. 8; *Sharpley* v. *Hurrel*, Cro. Jac. 209; *Roberts* v. *Trenayne*, Ibid. 507; *Bedingfield* v. *Ashley*, Cro. Eliz. 741; *Sayer* v. *Glean*, 1 Lev. 54; *Appleton* v. *Brian*, 1 Keble 711; *Murray* v. *Harding*, W. Bl. 859; s. c. 3 Wils. 390. It is on this principle, that contracts of *post obit* and annuity are allowed. *Batty* v. *Lloyd*, 1 Vern. 141; 2 Eq. Cas. Abr. 275; *Chesterfield* v. *Jansen*, 1 Atk. 301. Such cases are not contracts of loan, but of insurance on hazard. They are placed by the civil law in the class of aleatory contracts. They may be gambling, but cannot be usurious. In this case, they were not gambling, because the borrower had an interest in the risk, to the whole extent of the loan. This relieves the court from the embarrassment that would attend a gambling insurance. In New York, where the contract was made, such a wager is lawful. *Clendining* v. *Church*, 3 Caines 141. They follow the English doctrine, prior to the 19 Geo. II., c. 37. *Crauford* v. *Hunter*, 8 T. R. 23. Massachusetts is the other way; *Amory* v. *Gilman*, 2 Mass. 1; and Pennsylvania agrees with her. *Pritchet* v. *Ins. Co. N. A.*, 3 Yeates 461.

The assignment of a security for the repayment of the advance and interest, on the happening of the contingency, has been seriously questioned, on the very ground of the contingency. There is no authority for this. Security may be given, as well for a contingent, as for a certain debt. It does not change the nature of the hazard, or of the loan. The assignment transfers the title to a chattel, as a collateral security for the performance of the borrower's duty, if the goods escape the hazard; *and this has the sanction of law in analogous cases. It is of the very nature of bot- [*411
tomry or hypothecation, to give a mortgage upon the vessel; yet it is upon the contingency of her safety, that the loan is made returnable. The same is true of *respondentia*, by the law of France. Analogous securities have been given in England, without question. *Bedingfield* v. *Ashley*, Cro. Eliz. 741; *Batty* v. *Lloyd*, 1 Vern. 141. The lender is not obliged to run the risk of the borrower's insolvency, as well as of the seas.

The property in the goods was transferred by the assignments on the bills of lading, without delivery of actual possession, which was neither according to the agreement, nor within the power of the parties, before the

arrival in Philadelphia. They are assignments in trust, on their face, according to their agreement, and are, therefore, honest assignments, as they tell the whole truth. The counsel for the United States think they should have been unqualified or absolute, and that they are vitiated by the account and risk continuing for Thomson. Had the assignment been absolute, on its face, there must have been a purchase, or a secret trust. The lenders did not mean to be the absolute owners, nor to conceal their interest. The account and risk were to continue in Thomson, for his was to be the profit and loss; and the property was to be in the company in trust, for securing the debt. This was precisely *Haille* v. *Smith*, 1 Bos. & Pul. 570. It is perfectly immaterial, whether the assignments passed an equitable or a legal title. The circuit court thought it an equitable title only; and it certainly was a title, that *an* indorsement of the bills of lading, by the supercargo, to a *bonâ fide* purchaser, would have defeated. This, however, is owing to the confidence which the law, for the sake of commerce, authorizes a purchaser to place in this document, and not because the assignment passes the equitable title. The weight of authority and principle are in favor of its passing a legal title to the specie outward, and to the returns. 2 Holt on Ship. 72; *Meyer* v. *Sharpe*, 5 Taunt. 80; *Giles* v. *Nathan*, Ibid. 558. Beyond doubt, no substantial property was left in Thomson, that any creditor could obtain by administration, assignment or execution, except the resulting or remaining interest, after satisfaction of the bond. Whether this was legal or equitable, it is neeedless further to inquire.

The non-delivery of possession was, under the circumstances, of no effect. It was not intended to be taken by the borrower, until the voyage was at an end. This appears by the memorandum of the agreement, and answers the objection. The possession of chattels, by the assignor or his agents, after an assignment which provides for such a possession, is *per se* no objection; the possession is according to the deed. If the deed *be absolute, and
*412] purport to transfer the possession, the impossibility of taking it, by its absence at sea, for any other cause, is answer to the presumption of fraud, that might otherwise arise. *Cole* v. *Davies*, 1 Ld. Raym. 724; *Meggot* v. *Mills*, Ibid. 286; *Brown* v. *Heathcott*, 1 Atk. 160; *Flyn* v. *Mathews*, 1 Atk. 185; *Atkinson* v. *Maling*, 2 T. R. 462; *Ex parte Batson*, 3 Bro. C. C. 362; Coote on Mortgages 263–4. In this case, there was both a provision for possession by the agents of Thomson, until the return of the adventure to the United States, and an impossibility of taking possession, had the agreement called for it. It is in all respects the same case as *Bucknall* v. *Roston*, Prec. Ch. 285, in which the title of a lender, on a similar assignment for security, was traced through successive voyages, sales and shipments, during several years, and enforced against the personal representative of the borrower.

It was not for the court to let the jury decide the question of property, as inferrible from the fact of possession. The fact of possession did not stand alone, but was governed by written instruments which legally made that fact of no importance. The jury were not prevented from deciding the question of fraud, as connected with the fact of possession, but they were deprived of the right of inferring it from mere want of possession, because it was a question of law, that under such circumstances of inability, agreement and contingent debt, possession by the assignor, was not *per se* a badge of fraud.

The property then being passed to us, and passed as openly as transfers of chattels at sea are ever made, it is submitted, that the priority acts do not affect us. The case is not placed by the circuit court on the ground of lien; it need not be so placed in this court. It is of no importance, whether a general, or even specific lien, will prevail against the priority of the United States. *Thelusson* v. *Smith*, 2 Wheat. 396, is a difficult case—the case of a master, with the possession of goods, and his lien for their freight; the possession and lien of a factor for his advances and commissions, would be more difficult, if it be true, that the priority of the United States is to defeat these securities. This, it is apprehended, will never be decided. The United States have no rights but as a creditor. They derive nothing from their execution and levy on these teas. If they were not ours, by the assignment on the bill of lading, they passed to Thomson's general assignees, by his assignment of the 19th November 1825. The United States can claim only as a creditor, against the assignees, who are trustees for all the creditors, and for the government first before all; but what the assignees cannot overthrow, be it specific, or be it general lien, is secure against the government. For the present cause, this discussion is, *however, unnecessary; for here is more than lien of the highest kind; a transfer and conveyance of property, by terms of grant of the most decisive import; a mortgage or deed of trust, upon the efficacy of which to exclude the priority of the United States, this court have already passed their judgment in *United States* v. *Hooe*, 3 Cranch 73. It is a security saved also by *Thelusson* v. *Smith*. There can be no difference between a mortgage of chattels and one of land. [*413

Thus stands the case on the principles of the common law. But the point mainly and almost exclusively pressed below, was, that although this might be so, according to the rules of the common law, yet that these were loans at marine interest, a technical contract, which the maritime or universal law did not permit under the circumstances of this case. On the contrary, it is submitted that—

II. These contracts are equally effectual by the maritime and universal law. The objections urged against them are two: 1. That both the loans were made upon goods already at risk, by the departure of the ships: 2. That the loan by the Superior was applied to pay a former loan, or was, in other words, a renewed loan.

1. The first objection is supposed to be derived from the Roman law, which, it is suggested, limited this contract under the name of *pecunia trajectitia*, to such loans as were themselves to be transported, or were applied to purchase goods for transportation. The language of the digest is, "*Trajectitia ea pecunia est quæ trans mare vehitur. Cæterum si eodem loci consumatur, non erit trajectitia. Sed videndum, an merces ex ea pecunia comparatæ, in ea causa habeantur; et interest, utrum etiam ipsæ periculo creditoris navigent, tunc enim trajectitir pecunia fit.*" Digest, lib. 22, tit. 2. The Roman law upon this subject is misapprehended. Whatever is said upon this subject in the code, the foundation of that law, is as a regulation of the rate of interest, without any definition of the contract, or any limitation of it. Any contract, attended by the risk of transportation by sea, was within its principle. That which the Digest contains in regard to it, is not a limitation, but an illustration of the contract; and both in the Digest

and Novels, the illustrations given, show that the asserted limitation was unknown to the Roman law, and that any loan dependent for repayment upon the safety of goods at risk, was within the rule of *pecunia trajectitia.*

The Code, under the title *de Usuris*, does not define the contract, but limits the parties in *trajectitiis contracibus*, to twelve per cent. as the maximum interest. Under the title *de nautico fœnore*, it does not describe what shall not be a *contractus trajectitius*, but it defines the events in which maritime interest shall cease, *or shall not accrue, and in what event the creditor shall lose his money, or shall receive it though the goods be lost. The subject is left here by the Code. The description of the contract is first given in the Digest, from the works of the civil lawyers. The passage above cited is taken from Modestinus, who was of opinion, that the principle of the Code in regard to *pecunia trajectitia*, was applicable to a case in which the merchandise bought with the loan, was transported by sea at the risk of the lender. But the distinction, in the view of the Digest, was not between goods bought, and goods not bought, with the loan, but between a loan on goods transported at the risk of the lender, and a loan without any risk whatever: for this is the only sensible distinction in a title of the law which had reference to the rate of interest. It is accordingly made plain by the opinion of Scævola, Digest, lib. 22, tit. 2, § 5: *Periculi pretium est, et si conditione quamvis pœnali non existente recepturus sis quod dederis, et insuper aliquid præter pecuniam, si modo in aleæ speciem non cadat: veluti ea, ex quibus conditiones nasci solent, ut si manumittas, si non illud facias, si non convaluero, et cætera. Nec dubitabis, si, piscatori erogaturo in apparatum, plurimum pecuniæ dederim, ut si cepisset, redderet; et athletæ, unde se exhiberet, exerceretque, ut si vicisset, redderet.* If a contract by an athlete to return a loan with its interest, upon his gaining the prize, was within the rule of a *contractus trajectitius*, as is here asserted, it is obvious, that this rule comprehended a loan on goods already exposed to the risk of the sea. The same is equally obvious from the language of Paulus, Dig. lib. 22, tit. 2, § 6: *Fœnerator, pecuniam usuris maritimis mutuam dando, quasdam merces in nave pignori accepit; ex quibus, si non potuisset totum debitum exsolvi, aliarum mercium aliis navibus impositarum, propriisque fœneratoribus obligatorum, si quid superfuisset, pignori accepit.* The question he asks, and answers in the negative, is, whether the goods being lost, on which the creditor loaned specifically, and being of value equal to the loan, he could resort to the surplus of the other loans, for repayment; and nothing can show more decisively the practice of loaning on goods generally, after the modern practice, than such a question. The custom of merchants, in the time of Justinian, without doubt, embraced *respondentia* loans for successive voyages, where the goods were repeatedly changed. Novel 106. In this Constitution of the Emperor, the practice is detailed at length, and confirmed. Such a practice shows that the transportation of the specific loan, or of the specific goods bought with it, was no necessary part of the Roman law of *respondentia.* The just inference is, that it is only the element of the contract that is stated in the Digest, and not its limitation, *namely, that the goods, on the security of which, or for which, the loan is made, shall be at the risk of the lender; but not that they should be the specific loan, or its investment.

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The practice of modern nations is free from all obscurity on this head.

They sanction, with great harmony, *respondentia* loans, made after the goods are at risk. Upon this point the two distinguished commentators, Valin and Emerigon, agree. The difference between them is upon an independent point, whether a loan made after the departure of the goods, is attended by a right to participate with prior loans, as if all the lenders were co-mortgagees—a question of no application in this cause. 2 Emerig. 382, 385, 386, 484 ; 1 Valin 366 ; 2 Marsh. 747 *a ;* 2 Emerig. 401.

2. That a renewed loan, like that by the Superior, is free from objection, is clear from many authorities precisely to the point. 2 Emerig. 573 ; Pothier 259 ; 2 Valin 11, 12 ; Le Guidon 87, ch. 19 ; Ordenanzas de Bilboa, cap. 23 ; Code de Commerce, Art. 323. A shorter answer to both these objections, is, that the law of *respondentia* loans is not a universal law. The contract is not one of universal nature and form, but depending upon the pleasure of the parties, and varying in different countries, according to the prevalent sense of expediency, and the principles of the code of particular law there in force. *Rush* v. *Fearon*, 4 East 319 ; *Appleton* v. *Crowninshield*, 8 Mass. 348. No statute in this country restrains it ; it is a beneficial contract ; and all its provisions being sanctioned by the common law, that law alone is the standard of the contract in this court. Mr. Binney concluded his argument, by applying the principles contended for to the specific points of the court's charge.

Webster, also for the defendants.—The question in this case is important, but perhaps not difficult. The transaction out of which it arises, is one of a commercial character. The United States are large creditors of Edward Thomson, and they have no other hope of attaining payment but from success in this case. But the character of the case is not altered by this circumstance ; as the defendants are not answerable for the frauds of the debtor to the United States, nor for the neglect of the officers of the customs. They had no connection with the custom-house, in the course of the transaction now before the court. Nor is there anything in the argument, that the defendants have other security for the debt due to them, by a resort to the co-obligors on the *respondentia* bond ; all those persons are insolvent ; and if they were not, the defendants assert, as they of right may do, their claim to their own property.

*The United States are said to be privileged creditors. They are so, as far as the law goes, but no further. In this case, they have [*416 no privileges, and they stand in relation to the property in controversy, like any other execution-creditors of their debtor. Thomson assigned in November 1825. Alll he had passed to his assignees, and the priority of the United States exists only to payment out of the fund which passed to the assignees. The law of the United States gives an action against the assignees, but it does not prevent the property from passing under the assignment.

What is the priority which the statute gives to the United States? It is not a prerogative, superseding the titles of others to property. It does not extend the rights of creditors on property. It is, what it purports to be, a priority among creditors, a right of first payment out of the common fund. The United States are creditors, and at the head of the list ; they are *prima inter pares ;* and no more. Two propositions may be obtained :

I. The priority does not affect the transfer of property at all. It never attaches on lands or goods, as lands or goods of this debtor. It arises only: 1st. In bankruptcy; 2d. In cases of conveyances to assignees; 3d. Against executors and administrators; and in all those three cases, it attaches on the fund, and not on the specific property. It does not operate to prevent the passing of the property either to assignees in bankruptcy; or to assignees under a conveyance; or to executors and administrators. It amounts only to a right to previous payment out of the fund then in the hands of others.

The language of the statute (§ 65) fully establishes those positions—assignees in bankruptcy, assignees in insolvency, and executors and administrators, are all ranked together. What is law for the one, is law for all. The words are "the United States shall be first satisfied," obviously, out of the estate. The provision, making the persons holding the estate personally liable, is then introduced, to operate in the event of their not satisfying the debt of the United States, out of the estate of the debtor.

Now, will it be contended, that in regular bankruptcy, the United States could levy on property which had passed to the assignees, or that this could be done on the estates of insolvents, or of deceased persons in the hands of trustees or executors? The correlative words of the statute, in which priority is given to the surety who pays the debt due to the United States are, that he is to be paid "out of the estate and effects of such *insol-
*417] vent or deceased person." These words confirm the construction assumed for the defendants. The 63d section of the bankrupt act of 1799, ch. 4, also confirms this construction. It makes no new provision; but declares the payment shall be made out of the fund, and refers to the previously-existing act. It is plain, upon the fair construction of the statute, that it is priority on the fund. It says, the right shall exist, when the debtor has assigned his property. This is a different thing from saying, that his property has vested in the United States, and shall not be deemed to have passed by the assignment. It may also be well observed, that connecting the priority of the United States, with executors or administrators, who can only be responsible for the property which may come into their hands; and giving a personal action against assignees, in case of default in paying over the funds in their hands, are conclusive evidence to show that the understanding of law is, that all the property of the debtor passes by the assignment.

There is no decided case in opposition to these principles, unless that of *Thelusson* v. *Smith* may be so construed. Few cases have been presented to the consideration of courts of the United States, upon this subject. They are—

1. *Fisher* v. *Blight*, 2 Cranch 358, which decides two points. 1st. That the priority extends to debtors, generally, under the act of March 3d, 1797: 2d. That it is not in the nature of a lien on the property.

2. The *United States* v. *Hooe*, 3 Cranch 73, which decides, 1st. That priority is not a lien, a principle always to be recollected: 2d. That to create a case, where, in case of insolvency, the priority will attach, there must be an assignment of all the property of the debtor.

3. *Prince* v. *Bartlett*, 8 Cranch 431, which decides that the insolvency is not a mere inability to pay, but must be some notorious act.

4. The *United States* v. *Bryan & Woodcock*, 9 Cranch 377, which only says, the priority given by the act of 1797, does not apply to debts due before the passing of the law.

The case of *Thelusson* v. *Smith*, 2 Wheat. 396, does not apply to the present case. The sale which was made by the marshal of the United States, under the judgment against Mr. Cramond, was not objected to by the assignees. The point was not made, and the assignees suffered the estate to be turned into money, and let the parties contend afterwards for their respective rights. It is obvious, that if the assignees had objected to the sale of the estate of Mr. Cramond, by the marshal, the sale could not have been made. Suppose, the assignees had sold the land? They had the *power to sell it, and it might have been their duty to sell it. [*418 They might have been compelled to execute their trust; and they had, therefore, a right to the fund. The execution, therefore, could only, in that case, have been levied on the land with the assignees' consent.

II. The second proposition is, that notwithstanding the decision of the court in *Thelusson* v. *Smith*, it may be argued, that the provisions of the law, which gives the priority, were not intended to extend the general rights of creditors. It will scarcely be claimed, that the United States can dislodge all liens. The case of freight, the advances of a factor, insurance brokers' accounts, cannot be supposed to be affected by the law.

The argument on the other side, is, that the assignees cannot, under the injunctions of the law, pay any debt, until the United States are fully paid. This evidently is, that they are to pay out of the estate, in their hands. Now, what is the estate of the debtor in the hands of the assignees? Not the land unembarrassed; but the land subject to the liens upon it. Again, assignees do not pay prior judgments in favor of creditors. The judgment-creditor proceeds against the land, not against the assignees; and he obtains payment, not from the assignees, but from the fund raised by a sale of the land, under the execution. How is any other construction of the law practicable? The assignees take the property, subject to the lien. Does it pass free of the lien, or not, just as it may appear the United States are or are not creditors? They may not be named in the assignment at all. Again, if the United States are creditors, does the property pass free of all liens; and after paying the United States, go to the other creditors? It is true, the case of *Thelusson* v. *Smith* is sufficient for the defendants. It expressly saves the case of a mortgage.

Do the documents, or either of them, exhibited by the defendants, vest any interest in the outward cargoes of the vessels named in them, in the defendants? It is contended, that they vest a clear legal interest in the outward cargo, mentioned in the bill of lading. It should not be called the creation of a lien, but the transfer of a legal interest in the cargo. The bond creates no *lien*, it contains no words of positive conveyance. The assignment does; and by it the owner transfers the property. This might have been done by other writings. Property at sea may be legally sold, without indorsement of the bill of lading. Strictly speaking, the evidence in this case does not show an assignment of a bill of lading, such an assignment being properly by the consignee; but it shows a transfer of the goods, written on the bill of lading by the shipper, *and the admitted owner. It passes the property; nor could the consignee, by an assignment of [*419

the bill of lading, give the property to any other, because the bill carries notice of another ownership. *Barrow* v. *Coles*, 3 Camp. 92.

A bill of lading is no more effectual to pass property than any other instrument, except that it is negotiable. A buyer under it, for value, without notice, may hold against all other or intermediate rights. 2 Holt 72. Property in goods, shipped under a bill of lading, may be transferred by delivery, to a third person, without indorsement of the bill of lading; and such transfer will be good, against all the world, except the indorser of a bill of lading, for a valuable consideration. 5 Taunt. 558; Ibid. 79; 1 Marsh. 233; 4 East 211. And the property in goods, shipped under a bill of lading, may be vested in another, without either delivery or indorsement of the bill of lading; as, by an agreement between the owners of the goods and third persons, either in the character of creditors or purchasers, accompanied by acts vesting the property in the goods in such persons. 3 East 585; 4 Camp. 31; 4 East 211; 3 Chit. 40; Ibid. 350–1. This last case is thus: "Vendor did not send the bill of sale, but agreed to deliver goods; vendee accepted bills for the purchase, and before the arrival, sold the goods, and became bankrupt: *held*, that the purchaser could hold against the vendee."

Here, then, was a transfer of the interest of Thomson in the specie, and, strictly speaking, it was not a qualified, but a positive, direct and absolute transfer, as is shown by the words employed for the purpose. Its only limitation was the specification of the object for which it was made. It is a collateral security, and is just what it should be; for if it had appeared to be an absolute sale, when only security was intended, it would have worn a badge of fraud. The conveyance is made to carry a lawful agreement into effect, and the words of the assignment are full and clear, and are restrained only by the designation of the purpose.

It is hinted, that it is not to be taken as conceded, that a mortgage of of personal chattels can stand against the United States priority. The general principle is, that a mortgage of goods is like a mortgage of lands. Where there is good faith, and the thing is actually delivered, this position cannot be questioned. The 13 Eliz., ch. 5, applies both to goods and lands, and saves both, if "made upon good consideration, and *bonâ fide*." It may obstruct creditors, or delay them, and yet be good. *Meux* v. *Howell*, 4 East 1; 5 Johns. 258. It is a strong proposition, that the priority of the United States
*420] is to override mortgages of personal chattels. It may be *said to be an *ultra* principle. Goods are mortgaged, and ships are mortgaged, every day. The rule, if it exist at all, must be made general. It cannot apply only to those mortgages where possession follows, for some mortgages do not allow possession, and are good without it. Such a doctrine is alarming.

Was there a good consideration for the assignment of the specie made by Thomson to the defendants? Thomson was a borrower of the defendants' money. He had given a bond for it. Events might discharge him, but until they did, he was their debtor, and at the proper time, he must pay. This was sufficient. *United States* v. *Hooe*, 3 Cranch 73. A similiar transfer of any other goods would have been equally available to secure the bond.

There being a legal conveyance by the owners of the property to the defendants, it must be assailable on other grounds. The first objection is, that the instrument was not a *respondentia* bond, because the goods were

already on board, and the ship had sailed two months before the loan. 1. To this it is answered, that there is no law requiring the very goods and money to be put on board. The mode of transacting business of this kind has changed ; and when the money or goods may be on board, is now of no consequence. In the very form of a *respondentia* bond (2 Holt 433), the consideration is the acceptance of a bill of exchange at four months. 2. No matter whether this be a *respondentia* bond or not ; there was a transfer of all the goods, for a sufficient consideration. 3. The contract, it is said, was illegal, and therefore, everything done to carry it into effect was void. It was illegal, because it was usurious ; and usurious, because the vessel had sailed before the loan, and part of the risk and time was, therefore, gone. The vessel, it is true, had sailed, but no information had been received from her, since her sailing ; and the defendants, therefore, bore all the risk from the wharf. There is no limit, by law, to marine interest. If this was intended to be a *bonâ fide* marine risk, it is not usurious, whether the premium be high or low.

The next objection is, that the possession and appearance of property remained in Thomson. The answer to this is, that the possession of the property was in the master of the vessel. Property in the defendants was shown by the papers. But, if this had not been the fact, the consequence claimed by the United States would not follow. As between the defendants and Thomson, the property had passed to the defendants, and no change was made by the re-shipment ; John R. Thomson, at Canton, being only an agent ; the rights of the defendant could not be divested by any *act of the consignees, as he received the property for the use of the assignees of Edward Thomson ; and when the shipment was made in [*421 Canton, by the agent, the rights of the defendants were perfect against Thomson, against creditors, and all others, but a *bonâ fide* purchaser. The result of this reasoning is : the transfer and assignment of goods at sea, by a proper written instrument, for an adequate consideration, and in execution of a valid contract, gave the defendants a legal interest in the goods ; and as this transfer was on the bill of lading, so that no title by indorsement of the bill could be attained against the defendants, their title was indefeasible.

The title of the defendants was a legal title, the equitable interest remaining in Thomson. He was entitled to a proper application of the proceeds, to an account, and to profits, because the shipment was for his account and risk. When the vessel returned to the United States, the legal title was in the defendants, before as well as after the delivery of the bills of lading. Their title was not derived from the bills of lading, but from an earlier source, and the delivery of the bill of lading had no other effect but to identify the property, and to prevent any other title being acquired by purchase, under those bills. No one claims the property under the bill of lading, as purchaser. On the 19th of November, the bill of lading had not changed the property, and it still was in the defendants. It had not, and could not, have got back to Thomson, and therefore, could not pass to his assignees.

The defendants had a right to claim this property against the assignees. The United States could not, as has been shown, levy upon it ; and if the United States could, for their priority, disregard the assignment, they are

only prior creditors, and as such had no right to the property. As, if there had not been a general assignment, the general creditors could not levy upon this property; so, disregarding the assignment, if the United States claim so to do, they as creditors could not levy on it. It is contended, that goods may be mortgaged, and if the transaction is *bonâ fide*, possession need not follow, if the bargain be otherwise. Coke 264, 4th class of his cases; Prec. Ch. 285; 1 Pick. 389; 2 Ibid. 607; 5 Johns. 258; 3 Caines 166; 2 T. R. 389; 10 Ves. 139; 4 Binn. 258; *Barrow* v. *Paxton*, 5 Johns. 258; 9 Ibid. 446; *Craig* v. *Ward*, Ibid. 197; 15 Mass. 244.

Wirt, for the plaintiff, in conclusion.—On the 19th November 1825, Edward Thomson made a general assignment of all his property for the benefit of his creditors. It is, therefore, one of the cases of established insolvency, on which the priority of the United States arises. *The *422] debt to the United States was due for duties on foreign goods imported. The case then depends on the operation of the act of 2d March 1799 (1 U. S. Stat. 676), which provides, that in all cases of such insolvency, the debt due to the United States shall be first paid before any other debt.

Was there a debt due on that day to the Atlantic Insurance Company? Is it of this debt, they claim satisfaction? The statute answers, that the debt of the United States is first to be paid. By this statute, it is manifest, that the United States are preferred to all other creditors. Were the Atlantic Insurance Company creditors? If so, they are postponed to the United States.

Is a creditor by mortgage a postponed creditor within this statute? This question has never been solemnly decided by this court—either as to a real or personal mortgage. In *Fisher* v. *Blight*, 2 Cranch 358, the question did not arise. The question there was, whether the preference given to the United States extended to all persons, or was confined to a particular class of debtors, public officers and agents of the United States. In the *United States* v. *Hooe and others*, 3 Cranch 73, the question did not arise; the only point, then decided, being that a mortgage of part of a man's effects, did not establish an insolvency, within the statutes, on which the preference of the United States arose. In *Harrison* v. *Sterry*, 5 Cranch 289, the case went off on the ground that the prior assignment was a fraud upon the bankrupt laws, and did not affect the priority of the United States. In *Thelusson* v. *Smith*, 2 Wheat. 396, the question of a prior lien by mortgage did not arise. But the question of a prior lien by judgment did arise, and then the court, after quoting the words of the act of congress, say—"these expressions are as general as any that could be used, and exclude all debts due to individuals, whatever may be their dignity. The assignees are made personally responsible to the United States, if, in case of insolvency, they pay any debt previous to those due to the United States. The law makes no exception in favor of prior judgment-creditors; and no reason has been, or, we think, can be shown, to warrant this court in making one." The *United States* v. *Howland & Allen*, 4 Wheat. 108, only re-asserts the principles of former cases; and this is the last case upon the subject of these statutes.

*423] It is true, that in the argument of the former cases, it has been occasionally said at the bar, *arguendo*, that a mortgage *wou'd

defeat the priority of the United States. And in some of the cases, the court, *arguendo*, has incidentally admitted the position. These were but *dicta*. But it has never been solemnly decided by this court; and they have never been required to look solemnly at the question, with a view to its decision, by hearing an adverse argument against the proposition. They have said, that this priority is not in the nature of a lien; so as to avoid prior alienations of property by the debtor. And this admitted, he may sell it, he may part with his title to the property; and the alienation will be good.

But this is not the question. The question is whether the creation of a lien in favor of a creditor, does not leave that creditor still a creditor—the debt still a debt. And whether, if he retains this character of a creditor, down to the time of the insolvency, differing from other creditors in no other way than by having a lien for his debt; that creditor, with his lien, and that debt, be not postponed to the United States, by force of the act of 1799. It is not meant to admit, that the case before the court is the case of a mortgage. But taking it, in the first instance, in this, the strongest attitude which it is capable of assuming; the court is asked, whether under this statute, a mortgage creditor finds any protection in its terms or meaning against the priority given to the United States?

In *Thelusson* v. *Smith*, this court said, "the law makes no exception in favor of prior judgment-creditors." Does the law make any exception in favor of prior mortgage creditors? The answer must be the same, in both cases. It makes no exception in favor of any creditors. Whoever, therefore, stands in relation of a creditor to the insolvent, whoever is claiming a debt against him, is expressly postponed to the United States. The existence of a prior lien in his favor, will not protect him from this conseqnence. There was a prior lien in *Thelusson* v. *Smith*; the court decided the case upon the concession, that the judgment was a lien upon all the lands of the defendant. And when a lien is all that the creditor claims, it cannot vary the determination, that the lien is on a part of the estate instead of being on the whole. A lien upon the whole, considered merely as a lien, is precisely of the same nature with a lien upon a part. The terms general and specific lien, cheat the mind with an imaginary distinction, which has no real existence, either in law or reason. For considered in the light of a *lien* merely, the one means nothing more than a lien upon the whole; the other a lien upon a part. And it is not conceivable, that a lien upon part, can strengthen a lien upon the whole.

Now, what is a mortgage, but a lien on an estate for the security of a debt? In a court of law, it is, from its form, considered as an absolute conveyance of the estate; and the mortgagee can recover it in ejectment. But in equity, even after the day of payment has past, it is still considered as a mere security for a debt. And the Act of 1799 looks through the form, to the substance of the thing. Is the mortgagee still a creditor? The terms of the act postpone him to the United States. Is the debt for which the mortgage is given, still a debt? It is postponed to the debts of the United States. Is the mortgage, in its essence and object, anything more than a security for a debt? Is it anything more than a lien on a particular subject for a debt?

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It is objected, that the priority given to the act of 1799, is only a

priority to be paid out of the estate of the debtor: and the subject having been previously mortgaged, constitutes no part of his estate; but has become a part of the estate of the mortgagee. The answer to this is, that this is the very question in controversy. Lord HARDWICKE says expressly, "the person entitled to the equity of redemption is considered as the owner of the land, and a mortgage in fee is considered as personal assets." And again, "by a devise of all lands, tenements or hereditaments, a mortgage in fee shall not pass, unless the equity of redemption be foreclosed;" and again, "the interest of the land must be somewhere, and cannot be in abeyance; but it is not in the mortgagee, and therefore, must remain in the mortgagor." *Carbone* v. *Scarfe*, 1 Atk. 605–6. Is it not perfectly familiar to us all, that in a case of equity, a mortgage is considered as a mere security for a debt? Blackstone puts it, in this view of the case, on the same footing with a bond: a mortgage, says he, "is also landed security, as a bond is a personal security, for the money lent." 3 Bl. Com. 435.

Now, suppose a question between the United States and a prior mortgagee, to arise before a court of equity of the United States. The United States claim priority of payment out of the estate of the insolvent mortgagor, insisting that the mortgaged subject is a part of his estate. The mortgagee, on the other hand, alleges that the estate is not in the mortgagor, but in him. That the mortgagee is the owner of the property. Would not the court answer him in the language of Lord HARDWICKE, "you are not the owner; the mortgagor is the owner; the interest is in him; and the instrument you hold is not a conveyence of the estate, but a mere security upon it. It is a lien in your favor; but it leaves the ownership in the mortgagor; it leaves you still a mere creditor for a debt; holding, indeed, a lien on the estate—a lien intended to give you a preference—but that intention is defeated by a statute, which creates a preference in favor of the *425] *United States, which rides over all other liens; and considering you merely in the light of a creditor claiming a debt, must be postponed to the United States." If this would be the language of a court of equity, in such a case, in expounding and applying the statute, will the question be varied, because the construction of that statute arises before a court of law? Will the statute have a different application in one court from that which it would have in the other? In a question arising on the same statute, would a creditor be postponed in a court of equity, who would be preferred in a court of law? Would it be of any substantial use to the mortgage creditor, to prefer him in a court of law, if he must be postponed when carried before a court of equity?

The United States being remediless before a court of law, could they then, on that ground, go into a court of equity, and there strip the mortgagee of the momentary advantage which he had gained in the court of law? It is most manifest, that if the protection claimed for the mortgagee against the priority of the United States, proceeds only on the postulate that he is the owner of the mortgage subject, that postulate could not avail him before a court of equity; where it is expressly held, that he is not the owner, but that the mortgagor is the owner; the mortgagee being still a mere creditor, holding nothing more than a security on the subject for the debt; and if he be a creditor, holding merely a security, and not the owner of the property, it has never been disputed that the United States are to be preferred.

There is no hardship in the case, which does not apply with equal force to any other private creditor. Every man, like the mortgagee, trusts another on the credit of his property and means, and consequent ability to meet his engagements. It is hard upon them all, to be postponed to the government; and as hard upon the vigilant judgment-creditor as upon the mortgagee. Nor is it perceived how postponing the mortgage creditor, would tend any more to shake the confidence of man in man, and to embarrass the commercial operations of the country, than the postponement of all the other creditors. All men deal now upon an understanding, that the payment of the debts depends on the solvency of the debtor; and that in a case of established insolvency, the government has the preference. Mortgages and all other liens and preferences, would still hold between private creditors. It is only to the government, that these and all other creditors would give way. It is submitted, therefore, to the court, that if this were the case of a mortgage, the mortgagee would still be a creditor merely, and as such expressly postponed by the statute. We are dealing here with an equitable title; so the charge considers *it, and we are construing the statute with reference to such a title. [*426

But if, before a court of law, a mortgage, from its peculiar form and structure, would be considered as conveying the ownership of the property, because such a court could not look from the terms of the conveyance, to the private understanding of the parties, and that it should be a mere security for a debt, the difficulty does not exist here. Because here, upon the face of the agreement, and in its express terms, the court sees that nothing more was in the contemplation of the parties, than to create a security for a debt. At every step, it is proclaimed, that the intention of the parties looked no further than to the mere creation of a security—"a collateral security for the loan—a continuation of the collateral security for such loan." This is the express language, both of the *memoranda* on the bond, and the assignment of the bill of lading. It is not, as in the case of a mortgage, a consideration paid in the purchase of the goods; but a sum loaned, and security taken for the repayment of the loan. With this avowed, clear, continued, uniform declaration of the intention of both parties, can the court impute to them a different intention? And if their intention went no further than to create a security for a debt, does not the creation of the security leave the owner of that debt still a mere creditor? Would not the repayment of the loan, either by Thomson or his assignee, be the mere payment of a debt to a private creditor? And is not the payment of any private debt forbidden by the statute, until the debts due to the United States shall first be satisfied?

But it is argued, that although the object is admitted to be, to create a security for a debt, that security was intended to be created, and was created, by conveying to the creditor the title to the property, who thereby became the owner of it. The answer is, he is a creditor then upon the security of a fund of which he is the owner. Is not this a legal solecism? If the fund be his, he is no longer a creditor with regard to that fund; unless a man can be a creditor to himself. It is also asked, is not this the case with a mortgage? No; the moment that the mortgage is viewed in the light of a security, the ownership is at an end. In a court of equity, where it is considered in this light, we have seen, that the ownership of the

mortgagee is denied. In a court of law, the mortgage, after the day of payment is passed, is not considered as a security, but as a couveyance of the title, and then the mortgagee is held to be the owner—but not a creditor on the security of the fund. But we are yet to see a case where, before the same tribunal, a party has been considered as being at once a creditor upon the security of a fund, and the owner of that fund. He may have a
*427] *special or qualified property, as that of a bailee, which will enable him to maintain trover against him, but still he is not the owner of the fund, as against the bailor. He may have a lien, accompanied with possession, which will authorize him to hold the possession, even against the owner; but still it is a lien which he has, and nothing more; and a lien will not prevail against the United States. So, with regard to a pawn or pledge; it is, in a court of law, on the same footing with a mortgage, in that court. Before the day of payment has past, the lender on a pawn, though he has the possession, is considered as a creditor on the security of the subject pledged. When the day of payment is past, he ceases to be a creditor, and becomes the owner. The notion then of a lien on a fund, which belongs to the holder of the lien, is a legal solecism. They cannot co-exist; the character of a creditor with his lien, ceases, at the same moment when his ownership begins.

It has been already admitted, on the authority of decided cases, that the priority of the United States constitutes no lien, but leaves the power of alienation free. Is the creation of a lien an alienation, either total or partial? If a lien be an alienation, to the amount of the debt, then, to the amount of that lien, the priority of the United States cannot reach. But if such be the effect of a lien, the same effect must be produced, whether that lien be created by the act of the party, or the act of law; being in both cases a lien, the legal effect must be the same. But in the case of *Thelusson* v. *Smith* it was conceded by this court, that the judgment was a lien on all the defendant's lands. If, therefore, the effect of a lien be, to divest the estate of the debtor to the amount of that lien—to alienate that estate, and make it *pro tanto* the estate of the creditor, that effect was produced here, and the priority of the United States so far defeated. Yet it was not produced here, nor was the priority of the United States defeated, or in the slighest degree affected, by that conceded lien. Why? Because the act of congress had made no exception in favor of creditors holding a lien, or of judgment-creditors, who were conceded to be creditors holding a lien.

But if a difference should be supposed to exist between a lien created by the act of the law, and a lien created by the act of the party, and that the latter necessarily alienates the property *pro tanto*, we have a decision of this court to the contrary—a decision which marks the distinction between the creation of a lien, and the alienation of the title by the act of the party. A bottomry-bond is a contract, in the nature of a mortgage, when money is raised for the repairs of a ship, and the master or owner pledges the keel or
*428] bottom of the ship, to secure the *repayment of the money. Here, all the books concede, that there is a clear lien created by the act of the party; but does that lien produce an alienation of the property? *Blaine* v. *The Charles Carter*, 4 Cranch 332, proves the reverse; it does not pass the title, and therefore, the holder of the lien in that case, lost it by *laches*. It is merely a lien, to be enforced in a court of admiralty.

The question then returns—what was the condition of the Atlantic Insurance Company, with regard to the property, on the 19th November 1825, when the insolvency occurred, and the priority of the United States arose? Were they the owners of this property, in part or in whole, or were they merely creditors, holding a security on this property, for the satisfaction of the debts; and this merely on a par with the holder of a lien by bottomry? This depends on the construction of the documents.

1. The first document on which they rest their claim, is the *respondentia* bond. The loan on which this *respondentia* bond was given, was confessedly made two months after the vessel and cargo had sailed for China. The interest charged is marine interest, at 10½ per cent. per annum. Was the contract valid, upon the law which governs that peculiar contract? It is needless to carry the investigation to the law of Rome, and of France, with which, it is agreed, we having nothing to do. It may be remarked, however, in passing, that under these laws, it was never pretended, that this species of loan divested the borrower of his title to the property. Nothing more was ever thought of, than that he stood upon the footing of a privileged creditor; and the question was always one of mere precedence in the order of payment, which, however material among private creditors, could have been no question of lien, where the precedence of the government takes place over all others. Passing from the law of Rome and France, to our own law, none is known, which we have upon this subject, except the law of England; and with regard to that law, while the elementary writers, by their definitions and their commentaries, treat it as essential, that the loan should precede the departure of the vessel, or, at least, have been applied to the voyage, there is not a single adjudged case, which recognises a loan in such mode, for any other purpose than the purpose of the voyage.

The question is not, whether marine interest is against the statute of usury, when the principal as well as the interest is put at risk. It is conceded that it is not, *i. e.*, that such interest would not be a violation of the statute of usury. The single question on this point, made in the circuit court, was, whether, according to the law of this peculiar contract, it was not essential, that the money should have been lent for the purposes of the voyage, and under circumstances in which it *might have been applied [*429
to those purposes. Not that the lender was bound to see to the application; but that he was bound to look to the case, so far as to ascertain that the loan was made under circumstances in which it might have been so applied.

The only difference between bottomry and *respondentia* is, that the first gives a lien on the ship—the latter gives a lien on the goods. In all other respects, bottomry and *respondentia* are declared to be identical, so that a definition of the one is a definition of the other. Park. 410 (Eng. ed.) Now, what is the definition of bottomry?

2 Bl. Com. 457–8.—"Bottomry (which originally arose from permitting the master of a ship in a foreign country to hypothecate the ship, in order to raise money to refit) is in the nature of a mortgage of a ship, where the owner takes up money to enable him to carry on his voyage, and pledges the keel or bottom of the ship, part for the whole, as a security for the repayment." Park 410.—"The contract of bottomry is in the nature of a mortgage, in which the owner borrows money to enable him to fit out the

ship, or to purchase a cargo for a voyage proposed." 2 Marsh. 733.—"Bottomry is a contract in nature of a mortgage of a ship, in which the owner borrows money to enable him to fit out the ship, or to purchase a cargo for a voyage proposed." Again, Marsh. vol. 2, p. 736, says, "If the money was spent in the place where it was lent, it was not *pecunia trajectitia*, &c," so that, with the Romans, as with the moderns, it was of the essence of this contract, that the loan should be exposed to the perils of the sea, at the risk of the lender." In the next page (737), he says, "in bottomry, the lender furnishes the borrower with money to purchase the goods which are put in risk." And Park says, 413, 415 (4th ed.), "the lender supplies the borrower with money, to purchase those effects upon which he is to run the risk." Now, if the court say, that a man who borrows money to pay for his common purposes, and for other objects and concerns, is a borrower at *respondentia*, on a bottomry, because he puts the payment on the return of a ship from sea, with which the loan has no connection, there is an end of the objection. But there is certainly nothing in the English law, which countenances such a position.

With regard to the presumption, that the money was so applied, the United States offered to repel it, by showing that it never was so applied; but the inquiry was stopped, in the case of Arny—the court seeming to entertain the opinion, that the inquiry was immaterial. There is no English case which gives a different view of the law of *respondentia* and bottomry, from those extracted from Blackstone, Park and Marshall. The cases cited from the old English reporters, apply only to the *question of usury *430] under the statute, when the principal is put at risk. The form of the bonds, as referred to by Mr. Ingersoll, are in conformity with the law as laid down. But suppose the court to be of opinion, that the bond is free from objection on this ground, the question still is, whether this bond, on coming in with the other documents, passed the ownership of the property to the insurance company? The *respondentia* bond did not even create a lien. Park 410. A bottomry-bond creates a lien, but does not pass the title. *Blaine* v. *The Charles Carter*, 4 Cranch 332. Does the memorandum on the bond stipulate for a transfer of the title? It stipulates for all that was afterwards done, but expressly for the purpose of creating a collateral security; not for that of passing the title. Did the assignment of the outward bill of lading pass the title? That again expressly declares, that the whole object was to create a security, and to continue that security. Did the legal effect of the act reach beyond the intention of the parties? Such a construction could not be attached; the intention clearly expressed always governs the construction of the contract.

What are the authorities on this subject? Do they say, that the assign ment of a bill of lading, always produces the effect of passing the property? The assignment of a bill of lading does not always produce the same effect. It always depends on the relation of the parties, and the intent with which the act is done. It depends, says Holt, "on the mutual understanding" of the parties. 2 Holt 72. Here, the understanding is clear—it is to be done merely to create a collateral security. The modern cases in England, that have been cited as to the effect of the assignment of a bill of lading, are generally cases between the assignee of the bill and the assignees of the bankrupt; and not on the general provisions of the bankrupt law of Eng-

land. The bankrupt law of England, 5 Geo. II., c. 30, § 28, places the assignees of the bankrupt precisely on the same footing in which the bankrupt himself stood, at the moment of his bankruptcy. In cases of mutual credit, they are subject to all the set-offs to which he was subject, and to all the liens which he had created. The others represent only the private creditors, and when offered to another creditor, they are all of equal dignity; all liens, therefore, stand according to their priority. Hence, a mere agreement to assign a bill of lading, between such parties, has been held equivalent to an assignment, for the purpose of creating a preference among these equal creditors. Such was the case of *Lempriere* v. *Paisley;* the court of king's bench held, that such an agreement created a lien; and that the assignees of the bankrupt could not take *the property, without discharging the lien. 2 T. R. 455, Pigott's Arg. 489; Ashhurst 490; [*431 argument of Lord Kenyon, as cited by him, p. 493. Ashhurst calls it an equitable lien, not an equitable title; and he says, as "between the person who holds the equitable lien, and the assignees, if the lien subsists, before the bankruptcy, they shall never recover or retain the thing, without discharging the money due;" why? he gives the reason: "the party who has the equitable lien, ought not to have footing with the rest of the creditors, for whom the assignees are the trustees," &c. There, it is a question of preference of payment between creditors of equal dignity.

The case of *Atty et al., assignees Jamieson, bankrupt,* v. *Hatson,* 4 Camp. 325, is another case of preference of payment among creditors of equal degree, by force of such a lien. The case of *Olive* v. *Smith,* 5 Taunt. 56, is another, where the whole bearing of the bankrupt law is decided upon, and all these cases are found to turn on it. *Haille* v. *Smith,* 1 Bos. & Pul. 563, is another case under the bankrupt law; and there the effect of the bill of lading was expressed, and by the prior intention of the parties, it was held to transfer the property, because such was the prior intention, and that transfer was absolute.

On these bankrupt cases in England, it is proper to remark, that they are no guides for a decision under the statute of the United States. They were questions of preference between creditors of equal degree, and the question there always was, whether such a preference had been created by the bankrupt, before his bankruptcy, as gave him a preference to the other creditors. But here, under our statute, there is a creditor of the highest degree, who settles all questions of preference, as soon as he appears, by taking it himself, under the authority of the public law. These cases, therefore, are inapposite to the question before the court.

It has been already said, that in England, the effect of the assignment of a bill of lading, is not absolute, but depends on the intention of the parties. It may now be added, that there is no case in England, where the assignment of a bill of lading, or the consignment of a cargo, has been held to pass the property, but where there is a present debt, and where such consignment or assignment is made and received, as a payment *pro tanto.* Such was the case of *Hibbert* v. *Carter,* which was at first decided on that position. But afterwards, on proof that it was not the intention to pass the whole property, that decision was changed, and the ultimate recovery was, on that intention, against the indication afforded by the bill of lading. 1 T. R. 745. *Lickbarrow* v. *Mason,* 2 Ibid. 63, *is not a question between the [*432

original parties ; as to whom, it is there said, that their intention may be inquired into ; but it was the case of a purchaser, who had purchased and paid for the cargo, and took an assignment of the bill of lading to herself. The result of all the cases is, that such an assignment, as between the original parties, passes the property or not, according to the intention. And this conforms to the case of *Bucknall* v. *Roiston*, Prec. Ch. 285. This was the case of a bill of sale, which in *Haille* v. *Smith*, is said to be a different thing, from an agreement with regard to a bill of lading. This bill of sale was held, upon the intention of the parties, to amount to an equitable security ; sufficient to prevail against a general creditor, or the general creditors of the deceased, as giving a lien with regard to the specific subject, against other creditors of equal degree. Now, that the intention of the parties in this case looked no further than to the creation of a security, is averred by the holder. And when we come to look at the situation of the parties, we will find that the creation of a security by way of lien, was all that was proposed. There was no debt due—it depended on a contingency, whether there ever would be a debt. At the time of the insolvency, there was no debt. The holder of a *respondentia* bond is not considered as a creditor at all. Hence, in England, he could not prove his debt under a commission of bankruptcy, until a special statute was there made for his case. 1 Holt 424. It is not contended, that a contingent debt cannot be secured; there is no doubt, that it may. But the absolute transfer of property, so as to throw the ownership on a merely contingent creditor, is contrary to the nature of the case. The creation of a lien to meet the contingency, is natural and proper, and this is all that the parties proposed.

With regard to the return-cargo, which was the property in question, there are strong grounds for saying, that there was a marked intention to keep the property out of the lender, until the return of the vessel, and the delivery of the bill of lading. For, what he does stipulate from it, is not for a bill of lading, consigning the bill of goods to him ; but to order. Now, in whom does the property under such a title abide? Clearly in the shipper, until the title is actually delivered to order. The latter effect is a transfer only from that time, and here, not delivered till the priority of the United States had attached ; say, then, that the assignment of the outward bill, if standing alone, would have passed not only the outward cargo of specie, but the proceeds in the return-cargo ; yet that very assignment stipulated for an inward bill, to order, which threw the property upon the shipper, in Canton, who was the representative of Edward Thomson ; *and if the priority *433] of the United States could not attach before, because the property was in the company, it attached the very moment the property fell back on Thomson, with the consent of the company. While the return-cargo, then, was crossing the ocean, with a bill of lading to order, in whom was the property of that cargo? Clearly, in the shipper—charged, if you please, with an equitable lien in behalf of the company. A lien, which they could have enforced only in a court of equity, if the bill had not been delivered to their order. Because, at law, the title was manifestly in the shipper by virtue of the bill to order, for which they have stipulated.

It is not disputed, that under the authority of the decree in Prec. Ch. 289, they could have successfully enforced that lien against the other general creditors, and claimed a preference of them, by virtue of that prior lien. But could they have asserted that preference, against the United States?

Now, this case is to be considered as it stood prior to the delivery of the bill to order; because the priority of the United States arose prior to that time, and ranged through the whole period, during which the ship was crossing the ocean. If it attached, at any time during that period, it could not be dislodged by anything subsequently done, because it is to be tested only by the state of things which existed, when it arose, and when it was in full force. The trustees, under the general deed of assignment, had no power to alter the condition in which they found the property, so as to affect the priority of the United States. If they had acted ever so fairly, nothing done by them could have changed the condition of things to the prejudice of the rights of the United States. Clear of their priority by law, the United States are the first object of that trust itself; could the trustees, by any fraudulent act on their part, create a legal preference among those creditors? Whether the parties to be benefited by it were conusant of that fraud or not, it is apprehended, they could take no benefit by a fraud of the trustee. Hence, the impropriety of arresting the evidence on this subject.

The positions are again asserted, that with regard to the return-cargo, the sole subject of controversy, the legal title to that was in the shipper, that is, in Edward Thomson, by virtue of the bill to order, not yet delivered. That this being the very bill stipulated for in the assignment, the legal title was in Thomson, by the consent of the plaintiffs below, charged, at the best, with an equitable lien in their behalf. That in this condition of things, the priority of the United States fell upon the subject. *That although the equitable lien of the plaintiffs below would have prevailed against [*434 general creditors, and given the plaintiffs a preference to payment as against them; yet it is claimed, that the preference yielded to the priority of the United States; which having fastened upon the property, in its condition, could not be dislodged, by the subsequent delivery of the bills to order.

Story, Justice, delivered the opinion of the court.—This is an action of trespass *de bonis asportatis*, brought in the circuit court for the district of Pennsylvania, by the Atlantic Insurance Company, to recover against the defendant John Conard, the marshal of that district, the value of certain teas, shipped on board of the ships Addison and Superior, and levied upon by him, upon an execution in favor of the United States, against one Edward Thomson, as the property of the latter. The real question in the cause is, whether the Insurance Company or the United States, are entitled to the teas or their proceeds.

The material facts, disclosed at the trial in the circuit court, were as follows: Edward Thomson was a merchant, largely engaged in trade in the city of Philadelphia, in the year 1825; and on the 21st day of June of that year, borrowed, at *respondentia*, of the insurance company, the sum of $21,000, upon goods, &c., on board of the ship Addison, of that port, on a voyage, at and from Philadelphia, to Canton, and at and from thence, back to Philadelphia, beginning the risk, on the 21st of the preceding April, about which time the ship had sailed on the voyage. Edward Thomson had shipped on board of the Addison, for his own account and risk, for the voyage, 21,000 Spanish dollars, consigned to J. R. Thomson, his agent, and his assigns, and deliverable to him in Canton; and regular bills of lading were accordingly signed, one of which was retained by the shipper. At the time

of the execution of the *respondentia* bond, a memorandum of agreement was entered into by the parties, and an assignment made on the back of this bill of lading. The form and effect of these instruments will be matter of more particular comment hereafter. At present, it is only necessary to add, that the loan purports, on the face of the bond, to be a loan for the joint account of E. Thomson, E. H. Nicoll, F. H. Nicoll and F. S. Bailey ; but in reality, the transaction was for the use and benefit of E. Thomson, and the goods shipped in the Addison were on his sole account.

On the 14th July, of the same year, a loan was made to Edward Thomson, of $13,960, on goods on board the ship Superior, which had sailed on a similar voyage, on the 6th of June *preceding. A *respondentia* bond *435] was taken, in the same form, from the same parties, on the like voyage, with a similar memorandum of assignment of the bill of lading. The only difference between the transactions was, that this loan was applied in part payment of a former loan, made by the insurance company on another ship of E. Thomson's. On the 19th of November, E. Thomson, having become insolvent, made a general assignment of all his property to Peter Mackie and Richard Renshaw, for the use of his creditors. At this time, he was very largely indebted to the United States on duty bonds. The Addison left Canton, on her return to Philadelphia, having among her papers a bill of lading of the proceeds of the $21,000, consigned by the shipper (Mr. Fisher, attorney for J. R. Thomson), to order, in blank, and indorsed in blank by the shipper, and marked No. 5. This mark was to identify them as the proceeds of the $21,000. Mr. Fisher also gave the master a manifest, stating the cargo to be consigned to E. Thomson, and a general bill of lading of the whole cargo, consigning it to E. Thomson. The invoice and bill of lading were dated 22d November 1825. The general bill of lading was not signed. The Superior left Canton, having among her papers a bill of lading of certain articles, valued in the invoice at $3393, consigned to Peter Mackie, and also a bill of lading of certain articles, valued at $1139.86, consigned to Barclay Arny, and both dated 2d December 1825. Before the arrival of these ships in America, the United States had obtained judgment against E. Thomson, for large sums of money due upon his bonds at the custom-house. Both ships arrived in Delaware Bay, almost at the same time ; and an execution issued on behalf of the United States, on one of the judgments against E. Thomson, on the 13th March 1826, and was levied on the ships and their cargoes, on the 15th of March, while they were yet in the bay. It was under this levy, that the goods in controversy were seized by the marshal.

Two or three days before the ships came up to Philadelphia, Peter Mackie, the assignee of E. Thomson, having received duplicates of the invoice and bills of lading of the cargo of the Addison, delivered them to the agents of the insurance company, at Philadelphia ; and upon the arrival of the ship itself, handed over, to the same agent, the invoices and bills of lading, brought by the master. On the 22d of March 1836, Peter Mackie and Barclay Arny indorsed to the insurance company the invoices and bills of lading, which came to their order by the Superior. These papers came under cover to Edward Thomson, several being inclosed in the same envelope ; and Mackie allotted them to their respective owners, by means of the *436] numbers indorsed upon them. These numbers were *originally

placed upon the outward and homeward bills of lading and invoices, for the purpose of designating the proceeds of each particular shipment. It appeared, that part of the $13,960, borrowed of the insurance company on the goods in the Superior, was expended in disbursements in Canton; and the two invoices to Mackie and Arny, were consigned to them contrary to instructions; and they assigned them to the insurance company, under the belief that they were the proceeds of the outward shipment pledged for the loan. The reason assigned for there being a manifest and general bill of lading, consigning the cargo to Edward Thomson, was, to enable him to enter the cargo in his own name, after he had settled with the insurance company and paid the *respondentia* loans. The several particular invoices and bills of lading were then to be cancelled, and the master was to sign the general bill of lading, and the cargo was to be entered at the custom-house, in the name of E. Thomson. He was in the habit of taking up other large sums at *respondentia*, and this was the usual course of his arrangements in business.

Such is the general outline of the case. The loan on the shipment in the Superior, as has been already stated, differs from that on the shipment in the Addison, only in the circumstance that it was applied in discharge of a prior loan. In our judgment, that makes no difference, as to the legal rights of the parties. The borrower had a right to apply the loan in any manner he pleased; and the mode of its application, if it be otherwise *bonâ fide* and legal, does not change the posture of the rights of the lender. We shall, therefore, dismiss, at once, all further consideration of this point, and treat both cases, as if they stood on a single shipment.

Several objections have been taken to these *respondentia* bonds, to impeach their original validity. It is said, that they ought to be treated as usurious or gaming contracts; that they are not to be deemed *bonâ fide* transactions, upon real risks; but transactions void in point of law, upon their face. So far as the questions of usury or gaming, or *bona fides* upon substantial risks, are matters of fact, they were left fully open, and have been passed upon by the jury, who have found a verdict against them. So far as there are matters of law, apparent upon the record, proper to avoid the bonds, they are still open for inquiry. Two grounds have been relied on for this purpose; 1st, that the loans were made after the sailing of the ships on the voyage; and 2d, that the money loaned was not appropriated to the purchase of the goods put on board, and was not the identical property, on which the risk was run. In our judgment, neither of these objections can be sustained. It is not necessary, that *a *respondentia* loan should be made before the departure of the ship on the voyage,]*437 nor that the money loaned should be employed in the outfit of the vessel, or invested in the goods on which the risk is run. It matters not, at what time the loan is made, nor upon what goods the risk is taken. If the risk of the voyage be substantially and really taken; if the transaction be not a device to cover usury, gaming or fraud; if the advance be in good faith, for a maritime premium; it is no objection to it, that it was made, after the voyage was commenced, nor that the money was appropriated to purposes wholly unconnected with the voyage. The lender is not presumed to lend upon the faith of any particular appropriation of the money; and if it were otherwise, his security could not be avoided, by any misapplication of the

fund, where the risk was *bonâ fide* run upon other goods, and it was not a mere contract of wager and hazard. What could be the effect, if it were a mere wagering contract, it is unnecessary to consider; because there is the clearest proof here, that there was property on board, belonging to the borrower, and sailing on the voyage at his risk.

The form of the *respondentia* bond in the present case is, so far as we know, the common and usual form. The only deviation from the actual facts is, that it seems in some of its provisions to contemplate the voyage as not then commenced. This probably arose from using the common printed form, which is adapted to that, as the ordinary case; but it misled no one, and was certainly perfectly understood by the parties. The risk was taken for the whole voyage, precisely as if the ships had been then in port; and if, before the bonds were given, the property had been actually lost, by any of the perils enumerated in it, it is clear, that the loss must have been borne by the lenders. They could not have recovered it back, since the event was one within the scope and contemplation of the contract. The safety then of the property at that particular period does not vary the rights of the parties; and from the very nature of the transaction, it must have been utterly unknown to both, whether the ship was at the time in safety or not. They entered into the contract, upon the usual footing of policies of insurance, lost or not lost. So far as this deviation from the fact bore upon the point of the good faith and reality of the contract, as a genuine maritime loan, it was left to the jury to draw such inferences, as, upon the whole circumstances, they were warranted to draw. The charge of the learned judge, in the circuit court, was as favorable to the defence on this point, as it could be, upon the principles of law.

The next question is, in whom was the property in the shipment vested, at the time of the levy of the execution of the United States? Was it so vested in the insurance company, *either in law or equity, that they are now entitled to maintain the present suit, or in other words, to recover the proceeds in the marshal's hands? This depends upon the view taken of the objects, intentions and acts of the parties, and disclosed in the bonds, and the accompanying papers. When these are once ascertained and settled, it will not be difficult to arrive at the proper legal conclusion.

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It is contended on behalf of the United States, that no title or interest in the property shipped passed by the instruments, taken collectively, to the insurance company; that Edward Thomson remained the sole owner of the goods and their proceeds, during the whole voyage; that at most, the insurance company had but a lien upon them for the security of their debt, which was displaced by the priority of the United States; and finally, that if the insurance company had any title or interest in the property, it was not absolute, but by way of mortgage; and even this, coming in competition with the priority of the United States, by operation of law, yields to their superior privilege.

Before proceeding to the discussion of the right of the insurance company over the property in question, it may be well to consider, what is the nature and effect of the priority of the United States, under the statute of 1799, ch. 128. Although that subject has been several times before this court, the observations which have fallen from the bar, show, that the opinions of the

court have, sometimes, not been understood according to their true import. The 65th section of the act declares, that "in all cases of insolvency, or where any estate in the hands of executors, administrators and assignees, shall be insufficient to pay all the debts due from the deceased, the debt or debts due to the United States, &c., shall be first satisfied; and any executor, administrator or assignee, or other person, who shall pay any debt due by the person or estate, from whom, or for which, they are acting, previous to the debt or debts due to the United States from such person or estate being first duly satisfied and paid, shall become answerable in their own person and estate, for the debt or debts so due to the United States, or so much thereof as may remain due and unpaid; and actions and suits at law may be commenced against them for the recovery of the said debt or debts, or so much thereof as may remain due and unpaid, in the proper court having cognisance thereof." A subsequent clause of the same section declares, that, "the case of insolvency mentioned in this section shall be deemed to extend, as well to cases in which a debtor not having sufficient property to pay all his or her debts, shall have made a voluntary assignment thereof for the benefit of his or her creditors, or in which the *estate and effects of an absconding, concealed or absent debtor, shall have been attached [*439 by process of law, as to cases, in which an act of legal bankruptcy shall have been committed." It is obvious, that this latter clause is merely an explanation of the term "insolvency," used in the first clause, and embraces three classes of cases, all of which relate to living debtors. The case of deceased debtors, stands wholly upon the alternative in the former part of the enactment. Insolvency, then, in the sense of the statute, relates to such a general divestment of property, as would, in fact, be equivalent to insolvency in its technical sense. It supposes, that all the debtor's property has passed from him. This was the language of the decision in the case of the *United States* v. *Hooe*, 3 Cranch 73; and it was consequently held, that an assignment of part of the debtor's property did not fall within the provision of the statute. So too, a mere inability of the debtor to pay all his debts is not an insolvency within the statute; but it must be manifested, in one of the three modes pointed out in the explanatory clause already referred to. That was the point, on which the case of *Prince* v. *Bartlett*, 8 Cranch 431, turned.

What, then, is the nature of the priority, thus limited and established in favor of the United States? Is it a right, which supersedes and overrules the assignment of the debtor, as to any property which the United States may afterwards elect to take in execution, so as to prevent such property from passing, by virtue of such assignment, to the assignees? Or, is it a mere right of prior payment, out of the general funds of the debtor, in the hands of the assignees? We are of opinion, that it clearly falls within the latter description. The language employed is that which naturally would be employed to express such an intent; and it must be strained from its ordinary import, to speak any other. Assuming that the words "in all cases of insolvency," indicate an entire class of cases, and that the other member of the sentence "or when any estate," &c., is to be read distributively, as has been contended for on behalf of the United States, it does not, in the slighest degree, vary the construction of the statute. It will then read, that

"in all cases of insolvency, the debt or debts due to the United States, &c., shall be first satisfied."

But how are they to be satisfied? Plainly, as the succeeding clause demonstrates, by the assignees, who are rendered personally liable, if they omit to discharge such debt or debts. To enable the assignees to pay the United States, it is indispensable, that the fund should pass to them; and if the mere priority of the United States intercepted it, or gave a right to defeat it, the object of the statute would not be accomplished. *If
*440] the legislature had intended to defeat the passing of the property to the assignees, as against debts due to the United States, the natural language in which such an intention would be clothed, would be to declare, that so far, such assignment should be void. Then, again, the very enumeration of the cases of insolvency, in all of which the assignment passes, and is to pass, the whole of the debtor's property, confirms the interpretation already asserted. They are the very cases, where, by law, there is no exception as to the extent or operation of the assignment to divest the debtor's estate. One of these is the case of a legal bankruptcy; and in the act on this subject, passed in the next session of congress, there is an express provision, in the 62d section, that "nothing contained in this law shall in any manner affect the right or preference to prior satisfaction of debts due to the United States," as secured or provided by any law heretofore passed. Yet the bankrupt act contains no exception as to the property to be passed to the assignees, in favor of any person. In the case of the *United States* v. *Fisher et al.*, 2 Cranch 358, which was decided upon great deliberation, this court held, in the construction of a similar clause in the act of the 3d March 1797, ch. 74, that "no lien is created by this law; no *bonâ fide* transfer of property in the ordinary course of business, is overruled. It is only a priority in payment, which under different modifications, is a regulation in common use; and this priority is limited to a particular state of things, when the debtor is living, though it takes effect generally, if he be dead." And this doctrine was again recognised in the *United States* v. *Hooe*, 3 Cranch 73, 90.

If, then, the property of the debtor passes to the assignees; if debts due to the United States constitute no lien on such property; if the preference or privilege of the United States be no more than a priority of satisfaction or payment out of a common fund; it would seem to follow, as a necessary consequence, that even if the teas in controversy were the property of Edward Thomson, they passed by his general assignment, in November 1825 (which is not denied to have been a *bonâ fide* and valid transaction), to his assignees, and became their property, for distribution among his creditors, and were not liable to the levy under the execution of the United States. That, however, would be a question merely between the United States and the assignees, and would in no shape help the Atlantic Insurance Company to maintain their present suit.

Then, again, it is contended on behalf of the United States, that the priority, thus created by law, if it be not of itself *a lien, is yet
*441] superior to any lien, and even to an actual mortgage, on the personal property of the debtor. It is admitted, that where any absolute conveyance is made, the property passes, so as to defeat the priority; but it is said, that a lien has been decided to have no such effect; and that in the eye of a

court of equity, a mortgage is but a lien for a debt. *Thelusson* v. *Smith*, 2 Wheat. 396, has been mainly relied on in support of this doctrine. That case has been greatly misunderstood at the bar, and will require a particular explanation. But the language of the learned judge who delivered the opinion of the court in that case, is conclusive on the point of a mortgage. "The United States," said he, "are to be first satisfied; but then it must be out of the debtor's estate. If, therefore, before the right of preference has accrued to the United States, the debtor has made a *bonâ fide* conveyance of his estate, to a third person; or has mortgaged the same to secure a debt, or if his property has been seized under a *fieri facias*, the property is divested out of the debtor, and cannot be made liable to the United States." The same doctrine may be deduced from the case of *United States* v. *Fisher*, 2 Cranch 358, where the court declared, that "no *bonâ fide* transfer of property, in the ordinary course of business, is over-reached by the statutes;" and "that a mortgage is a conveyance of property, and passes it conditionally to the mortgagee." If so plain a proposition required any authority to support it, it is clearly maintained in *United States* v. *Hooe*, 3 Cranch 73.

It is true, that in the discussions in courts of equity, a mortgage is sometimes called a lien for a debt. And so it certainly is, and something more; it is a transfer of the property itself, as security for the debt. This must be admitted to be true at law; and it is equally true in equity; for in this respect, equity follows the law. It does not consider the estate of the mortgagee as defeated and reduced to a mere lien, but it treats it as a trust estate, and according to the intention of the parties, as a qualified estate, and security. When the debt is discharged, there is a resulting trust for a mortgagor. It is, therefore, only in a loose and general sense, that it is sometimes called a lien, and then only by way of contrast to an estate absolute and indefeasible. But it has never yet been decided by this court, that the priority of the United States will divest a specific lien, attached to a thing, whether it be accompanied by possession or not. Cases of lien, accompanied by possession, are, among others, the lien of a ship-owner to detain goods for freight, the lien of a factor on the goods of his principal for balances due him, the lien of an artisan for work and services upon the specific thing. On the other hand, there are liens, *where the right is perfect, independent of possession; as the lien of a seaman for wages, and the lien [*442 of a bottomry-holder on a ship for the sum loaned. In none of these cases, has it ever been decided, that in a conflict of satisfaction out of the thing itself, the priority of the United States cut out the lien of the particular creditor. And before such decision is made, it will deserve very grave deliberation, and a marked attention to what fell from the court, in *Nathan* v. *Giles*, 5 Taunt. 558, 574. At present, it is wholly unnecessary to decide it, for reasons which will hereafter appear.

The case of *Thelusson* v. *Smith*, 2 Wheat. 396, is not understood to justify any such conclusion. That case turned upon its own particular circumstances. A judgment *nisi* was obtained against Cramond on the 20th of May 1805, in favor of Thelusson and others. On the 22d of the same month, he executed a general assignment of all his estate to trustees, for the payment of his debts. At that time, he was indebted to the United States on several duty bonds, which became due at subsequent periods. Suits were instituted on these bonds, as they severally became due, and judgments were

obtained and executions issued against Cramond, under which, a landed estate called Sedgely, was levied upon and sold by the marshal ; and the action was brought by Thelusson and others against the marshal, to cover the proceeds of this sale in his hands. No execution had ever issued upon the judgment of Thelusson and others against Cramond, and of course, there had been no levy under that judgment, on the Sedgely estate, before or after the levy in favor of the United States. It was admitted, that in Pennsylvania, a judgment constitutes a lien on the real estate of the judgment-debtor ; and it was assumed by this court, in the argument of the cause, that the judgment of Thelusson and others bound the estate, from the 20th of May, when it was entered *nisi*, although in fact it was not finally entered, until nearly a year afterwards. The posture of the case, then, was, that of a judgment creditor seeking to recover the proceeds of a sale of land sold under an adverse execution, out of the hands of the marshal, upon the ground of his having a mere general lien, by his judgment, on all the lands of his debtor, that judgment never having been consummated by any levy on the land itself. The court decided, that the action was not maintainable. The reasons for that opinion are not, owing to accidental circumstances, as fully given as they are usually given in this court. But the arguments of the counsel point out grounds upon which it may have proceeded, without touching the general question of lien. The plaintiffs were entitled to recover only upon the ground, that they could establish in themselves a rightful title to the proceeds. Whether the land *443] *itself was rightfully sold under the execution of the United States, or any title to it passed by the sale, as against the assignees of Cramond, was not matter of inquiry in that case. However tortious or invalid it might be, still, if the plaintiffs had no title to the proceeds, they must fail in their action. Under the general assignment of the debtor, the priority of the United States attached ; and if the assignees were willing to acquiesce in the sale, the right of the United States to hold the proceeds could not be disputed by third persons. Now, it is not understood, that a general lien by judgment on land constitutes, *per se*, a property or right in land itself. It only confers a right to levy on the same, to the exclusion of other adverse interests, subsequent to the judgment ; and when the levy is actually made on the same, the title of the creditor, for this purpose, relates back to the time of his judgment, so as to cut out intermediate incumbrances. But subject to this, the debtor has full power to sell or otherwise dispose of the land. His title to it is not divested or transferred by the judgment, to the judgment-creditor. It may be levied upon by any other creditor, who is entitled to hold it against every other person, except such judgment-creditor ; and even against him, unless he consummates his title by a levy on the land, under his judgment. In that event, the prior levy is, as to him, void ; and the creditor loses all right under it. The case stands, in this respect, precisely upon the same ground as any other defective levy or sale. The title to the land does not pass under it. In short, a judgment-creditor has no *jus in re*, but a mere power to make its general lien effectual, by following up the steps of the law, and consummating his judgment by an execution and levy on the land. If the debtor should sell the estate, he has no right to follow the proceeds of the sale into the hands of vendor or vendee, or to claim the purchase-money in the hands of the latter. It is not

like the case where the goods of a person have been tortiously taken and sold, and he can trace the proceeds, and, waiving the tort, chooses to claim the latter. The only remedy of the judgment-creditor is against the thing itself, by making that a specific title, which was before a general lien. He can only claim the proceeds of the sale of the land, when it has been sold on his own execution, and ought to be applied to its satisfaction. To this state of things, the language of the court in *Thelusson* v. *Smith* is to be applied, when it is said, that if the debtor's property is seized under a *fi. fa.* it is divested out of the debtor, and cannot be liable to the United States. Applying these principles to the facts of that case, it is clear, that the Sedgely estate had not been divested out of the debtor, by any execution on the judgment of Thelusson and others ; that it either remained in *the debtor, and was liable to the execution of any other of his creditors, [*444 who chose to levy upon it, subject, of course, to have his title overruled by their subsequent levy, when perfected ; or that, subject in like manner, it passed by the assignment (if that was *bonâ fide*), to the assignees ; and in their hands, the United States would have a priority of payment out of it, as general funds in their hands. The judgment-creditors, as such, had no title to any fund in the hands of the assignees, until the priority of the United States was satisfied ; for that priority does not yield to any class of creditors, however high might be the dignity of their debts.

The fact, that a judgment-creditor has a lien, does not place him in a better situation, as a creditor, over the general funds of the debtor in the hands of the assignees. If he possess such a lien, he must enforce it in the manner prescribed by law ; and if he does, that may so far affect the interest of the assignees actually subjected to such liens. But it gives him no rights to the fund, until he has perfected his lien, according to the course of the law. Until that period, he has merely a power over the property, and not an actual interest in it. This ground is alluded to in that part of the opinion of the court, where, speaking of the priority of the United States, it is said, "the law makes no exception in favor of prior judgment-creditors, &c. Exceptions there must necessarily be as to the funds out of which the United States are to be satisfied ; but there can be none in relation to the debts due from a debtor of the United States to individuals. The United States are to be first satisfied ; but then it must be out of the debtor's estate." The real ground of the decision, was, that the judgment-creditor had never perfected his title by any execution and levy on the Sedgely estate ; that he had acquired no title to the proceeds, as his property, and that if the proceeds were to be deemed general funds of the debtor, the priority of the United States to payment had attached against all other creditors ; and that a mere potential lien on land did not carry a legal title to the proceeds of a sale, made under an adverse execution. This is the manner in which this case has been understood by the judges who concurred in the decision ; and it is obvious, that it established no such proposition, as that a specific and perfected lien can be displaced by the mere priority of the United States ; since that priority is not of itself equivalent to a lien.

We may then dismiss any further consideration of this topic, unless it shall appear, that the right of the *respondentia* holders in the present case is reduced to a mere general lien ; and as to them, at least (however it may be as to the assignees), no legal right exists to maintain an action

for the proceeds. *The attention of the court will then be at once addressed to the question, what was the nature and extent of the interest of the insurance company in the shipments in question? It is unnecessary to discuss what would have been the rights of the parties, if the *respondentia* bonds had stood alone; for that is not the posture of this case. The whole instruments must be taken together, and construed as one entire agreement. We must then examine the memorandum, the outward bill of lading, and assignments thereon, in connection with the bond. The bill of lading purports, on its face, to be a shipment, by Edward Thomson, of seven kegs containing $21,000, for account and risk of the shipper, to be delivered at Canton, to John R. Thomson, or his assigns. By the well-settled principles of commercial law, the consignee is thus constituted the authorized agent of the owner, whoever he may be, to receive the goods, and by his indorsements of the bill of lading to a *bonâ fide* purchaser, for a valuable consideration, without notice of any adverse interest, the latter becomes, as against all the world, the owner of the goods. This is the result of the principle, that bills of lading are transferrible by indorsment, and thus may pass the property. It matters not, whether the consignee, in such case, be the buyer of the goods, or the factor or agent of the owner. His transfer, in such a case, is equally capable of divesting the property of the owner, and vesting it in the indorsee of the bill of lading. And strictly speaking, no person but such consignee can, by an indorsement of the bill of lading, pass the legal title to the goods. But if the shipper be the owner, and the shipment be on his own account and risk, although he may not pass the title, by virtue of a mere indorsement of the bill of lading, unless he be the consignee, or what is the same thing, it be deliverable to his order; yet, by an assignment, either on the bill of lading, or by a separate instrument, he can pass the legal title to the same; and it will be good against all persons, except such a purchaser, for a valuable consideration, by an indorsment of the bill of lading itself. Such an assignment, not only passes the legal title, as against his agents and factors, but also against his creditors, in favor of the assignee. It is unnecessary to cite particular authorities on these points. They will be found supported by the authorities cited at the argument, and by the elementary treatises of Mr. Abbott, Mr. Holt and Mr. Chitty, on this subject; and particularly by *Nathan* v. *Giles*, 5 Taunt. 558. In the present case, Edward Thomson was the owner of the goods, and the consignee was merely his factor. He, therefore, had full power, notwithstanding the consignment, to pass the title to the property in the bill of lading, by a suitable instrument of assignment and sale, against anybody but a purchaser *without notice from his consignee, without any actual delivery of the goods themselves, if they were then at sea, and incapable of manual tradition.

*446]

The question, then, is, whether the indorsement upon this bill of lading, constitutes such an instrument? We are of opinion, that it does. It purports to be a transfer *in præsenti*; and uses the appropriate phrases of grant. The words are, "for value received, I hereby assign and transfer to the Atlantic Insurance Company of New York, the within bill of lading, and the specie, goods, &c., to be procured thereon and thereby, and any return-cargo, to be obtained, &c., by the proceeds thereof; and all the return-cargo to be taken on board the within-named ship, by or on my account, as col-

lateral security, according to an agreement duly executed, and adjoined to a *respondentia bond*," &c. (referring to the memorandum hereinafter stated). This is not a mere assignment of the bill of lading itself, operating as an equitable grant of the interest of the owner in that instrument; but it is of the goods contained in it, and the bill of lading is referred to by way of description of the subject-matter of the grant. There was a valuable consideration for it; and as Edward Thomson was the legal owner of the goods, the words "assign and transfer," are sufficient words of grant, to pass his legal title to the same, unless the operation of those words is controlled by some of the other parts of the instrument. The argument admits this; but it supposes, that the accompanying memorandum shows, that such was not the intention of the parties; and therefore, the words are to be construed according to that intention, which was to create a mere lien or equity on the part of the insurance company, on the goods.

Let us then examine the nature and scope of that memorandum. It begins, by a recital, that it hath been agreed, that the bill of lading for the goods, &c., mentioned in the *respondentia* bond, shall be indorsed to the insurance company, as a collateral security for the loan. This is carried into effect by the assignment above mentioned. It then goes on to recite, that it has been further agreed, that the property to be shipped homeward, as aforesaid, being the proceeds of the loan (thus considering the specie on board, as a substituted loan), shall be for the account and risk of the borrowers; that the bills of lading therefor shall express the same, and shall also express that the said property shall be delivered to the order of the shippers; and that the same shall be indorsed in blank, and shall be placed in the hands of the insurance company, either before or on the arrival of the said ship at Philadelphia, as a continuation of such collateral security. Now, supposing the transaction *bonâ fide*, what is there here that controls, even by way of recital, the operation of the words* of transfer? If the case were one of absolute transfer, there might be some room for doubt; but here [*447 the transfer was as collateral security. It was, therefore, a mortgage of the goods, and the returns. The shipment out and home, was, as in each case it must be, at the risk, and for the account of the shipper, subject, however, to the rights of the mortgagee; and the very provision that the bills of lading should be delivered to the order of the shipper, and indorsed in blank, and placed in the hands of the insurance company, establishes the fact, that it was the intention of the parties, that the property of the return-cargo should vest by such indorsement in them. The memorandum then proceeds to state, that it is expressly declared, that the indorsement or consignment shall not be held to exonerate the persons of the borrowers; nor compel the insurance company to accept the goods, &c., which may arrive under such bill of lading and consignment, in discharge of such debt; but that it shall be lawful for the company to receive and hold the goods, &c., for ninety days after their arrival at Philadelphia; and if the debt was not then paid, to sell the same at auction, and charge the borrowers with the balance. The plain effect of this stipulation is, to avow an explicit understanding, that the assignment of the goods should not put them at the risk of the company, but that they should be deemed collateral security only, and be sold after the limited time to discharge the debt, *pro tanto*. So far from the intention being indicated, that no property at all was to pass to the company, the

solicitude of the parties seems most carefully employed to repel the notion, that the transfer was absolute, and not by way of mortgage, as collateral security. The memorandum, therefore, confirms and does not impugn, in any degree, the natural construction of the language of the assignment indorsed on the bill of lading, as importing a present transfer. Indeed, we may go further, and assert, that the obvious intention of the parties was, to give a specific interest in the goods shipped, so as to make them secure against the claims of creditors; and that to construe the instruments to create no more than a lien, liable to be defeated by the acts of either party, or to be overreached by any privileged creditors, would be, not to follow, but to frustrate their intention. Of what use could this great apparatus of instruments, so anxiously prepared by the parties, be, if it conveyed no *jus in re*, and left the title of the insurance company to the goods, at the mercy of the creditors of Thomson, to be intercepted, at any time before it reached their hands, on its arrival? We are, therefore, of opinion, that the assignment in this case was sufficient to pass a legal title to the shipment and the proceeds thereof, against Thomson and his assignees and creditors.

If, indeed, the assignment had been of the outward shipment of *goods only, it would have carried the return-cargo, purchased with the proceeds; because the product or substitute for the original thing, by sale, or otherwise, follows the nature of the thing itself, so long as it can be ascertained as such, and becomes the property of him who was the owner, in the same quality as he held the thing. This is the general principle of law, and has been even extended to cases, where there has been a fraudulent or tortious misapplication of property. The case of *Taylor* v. *Plumer*, 3 Maule & Selw. 562, is directly in point; and contains a large collection of the authorities in the elaborate opinion of the court, pronounced by Lord Ellenborough. In this view of the matter, the only value of the homeward bill of lading would be, as a designation of the proceeds, so as to enable the company to trace and identify them. But the assignment, in terms, transfers the proceeds and returns, and cuts off all possibility of question upon this head. If, indeed, the title to the proceeds had originally been only an equitable title, and not strictly legal; yet as soon as the company had perfected that equity, by the indorsement in blank, and possession of the homeward bills of lading, their right would have been consummated at law, so as to entitle them to maintain a suit therefor. The case of *Haille* v. *Smith*, 1 Bos. & Pul. 563, was not so strong as the present; and there the court held, that the property passed, clothed with a trust for the payment of the debt.

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If this, then, be the result of the general principles of law, in cases of this nature, what is there to prevent their application to the present case? First, it is said, that this debt upon a *respondentia* bond is of too contingent a nature to uphold a mortgage, as collateral security for the payment of it. We know of no principle or decision, that justifies such a conclusion. Mortgages may as well be given to secure future advances and contingent, as those, which already exist, and are certain and due. The only question that properly arises in such cases is the *bona fides* of the transaction. Then, again, it is said, that the papers here disclose a transaction fraudulent in its own nature. But we are of opinion, that there is no necessaay implication of law, on the face of these papers, which stamps it fraudulent; for aught that ap-

pears, the agreement may have been entered into with the most sincere and scrupulous good faith ; and whether fraudulent or not in fact, was a question for the jury upon the whole evidence, which was properly left to their consideration ; and they have by their verdict negatived the fraud. The circumstance, that the goods were to be at the risk of the shippers, and on their account, does not, of itself, affect either the validity or *bona fides* of the transfer. That must ordinarily occur, where the transfer is made as collateral security, and it *was one of the leading facts in *Haille* v. *Smith*, already cited. (1 Bos. & Pul. 563.) [*449

But the main objection relied on, and which, indeed, constitutes one of the exceptions to the opinion of the circuit court is, that possession of the return shipment was not obtained, until after the levy by the United States ; and it is contended, that the want of such possession is, *per se*, a badge of fraud. The circuit court on this point decided, "that the actual possession of the above return-cargoes, by the masters of the Superior and Addison, until levied upon by execution at the suit of the United States against Thomsom, is not, *per se*, in law, a badge of fraud, which ought to invalidate or affect the title of the plaintiffs to these cargoes." It appears to us, that this decision is entirely correct in point of law, under the circumstances of the case.

Without undertaking to suggest, whether, in any case, the want of possession of the thing sold constitutes, *per se*, a badge of fraud, or is only *primâ facie* a presumption of fraud, a question upon which much diversity of judgment has been expressed ; it is sufficient to say, that in case even of an absolute sale of personal property, the want of such possession is not presumptive of fraud, if possession cannot, from the circumstances of the property, be within the power of the parties. A familiar example of this doctrine is in the case of a sale of a ship or goods at sea, where possession is dispensed with, upon the plain ground of its impossibility ; and it is sufficient, if the vendee takes possession of the property, within a reasonable time after its return home. But in cases where the sale is not absolute, but conditional, the want of possession, if consistent with the stipulations of the parties, and, *à fortiori*, is flowing directly from them, has never been held, *per se*, a badge of fraud. The books are full of cases on this subject. The case of *Bucknall* v. *Roiston*, Prec. Ch. 285, runs almost upon all fours with the present. The cases of *Sturtevant* v. *Ballard*, 9 Johns. 338, and *Bissell* v. *Hopkins*, 3 Cow. 166, contain strong illustrations of the principle ; and being decisions in the very state, by whose laws the validity of the present agreement is to be tried, are of high authority. They sustain the doctrine asserted by the circuit court, in the most ample manner ; and there is a learned note by the reporter to the latter case, which embodies in an exact manner the principal authorities, English as well as American, on this subject. Now, in the case at bar, the goods, at the time of the transfer, were at sea, on a voyage, in which they were to be sold, or exchanged by the consignee, and the proceeds sent back in the same ships. It was, therefore, properly in the contemplation of the parties, and indeed, a necessary result of their stipulations, and the *goods should not be intercepted, or taken possession of, by the company, until the close of the voyage ; and that the return shipments [*450 should conform to this arrangement. There is no pretence to say, that the plaintiffs did not seek possession of the goods, within a reasonable time after

the arrival of the goods home. Their power to accomplish it was dislodged by the execution of the United States, and they obtained, as early as practicable, possession of the bills of lading, and vouchers of their rights. But so far as the want of possession was matter of evidence presumptive of fraud, it was left open to the consideration of the jury; and the grievance now is, not that it was so left, but that the court ought to have instructed the jury, as matter of law, that the want of possession, under the circumstances of the case, was, *per se*, a badge of fraud. We have already expressed an opinion, that the court were right in the instructions actually given.

Upon the whole, we are of opinion, that the directions of the court, upon the merits of the cause, at the trial, were correct in point of law; and that, consequently, there is no error in that part of the judgment.

It remains to consider, very briefly, certain exceptions taken to the testimony, in the progress of the trial. The first exception is, that the corporate capacity of the plaintiffs was not regularly proved, before the introduction of the *respondentia* bond. It is to be considered, that this was a trial upon the merits; and by pleading to the merits, the defendants necessarily admitted the capacity of the plaintiffs to sue. If he intended to take the exception, it should have been done by a plea in abatement, and his omission so to do, was a waiver of this objection. But, independently of this special ground, the very agreement in the case upon which the trial was had, as well as the admissions of the bond given to the United States, as security to refund the amount, if judgment should pass against the plaintiffs, was certainly, *primâ facie* evidence of an admission on the part of the United States, of the corporate capacity of the plaintiffs, and to throw the burden of proof on the other side.

The second exception was to the question put to Austin L. Sands, whether he was agent of the company. We see no objection to this question. It was put in a form most unexeeptionable; and it was a matter of subsequent inquiry, in what manner his agency was created; and it does not appear, from the nature of the question, whether it might not have been sufficient to establish that he was an agent *de facto*, to receive the bond. It was, indeed, but an exception to the order of proofs, where several things are to be established to lead to a result; and in what order the inquiry is to be had, is *matter of discretion in the court itself, and not of absolute right in the party. *451]

The next exception is to the allowance of the bond to go to the jury, upon proof of its execution by Thomson only. It was a joint and several bond, and if executed by Thomson alone, it might be material to the plaintiff's case. It was not introduced as general evidence, as to all the parties who were named in it, but only as to Thomson, and was connected with the title derived under him. Proof of the signature of Thomson, was, under the circumstances, *primâ facie*, evidence of his execution of the instrument.

The fourth, fifth, sixth and seventh exceptions turned altogether upon the question—whether acts and proceedings of third persons, not in privity with the insurance company, nor known to them, were evidence against them? Most clearly, they were not.

The eighth exception involves the point, whether the plaintiffs were bound to look to the application of the loan made by them? If not, the question asked was properly rejected. And we are of opinion, that the

plaintiffs had nothing to do with the application of the money ; and that when received by Thomson, he had a right to dispose of it in any manner he pleased.

Upon the whole, the judgment of the circuit court is to be affirmed, with costs.

JOHNSON, Justice.—I concur in the opinion delivered in this cause, and the rather, because I think it overturns the report of the decision in the case of *Thelusson* v. *Smith*. It would be vain, to endeavor to reconcile this decision, with that which is imputed to the case referred to. This was nothing, in its origin, but a mortgage to the Atlantic Insurance Company ; and a mortgage of a mere right, a metaphysical, transitory thing, over which the act of the party could not operate more immediately, or more forcibly, than a judgment upon land, under the laws of Pennsylvania.

But I avail myself of this occasion, and I have long wished for an opportunity to put on record some remarks upon the report of the case of *Thelusson* v. *Smith*. I have never acknowledged its authority in my circuit, on the point supposed to be decided by it ; to wit, the precedence of the debt of the United States, as to a previous judgment, in the case of a general assignment ; and I propose now to show, what I think any one may see, by a close inspection of the facts, even as stated in the report, to wit, that the question there supposed to be decided, really never was raised by the special verdict. It is true, it was argued, and no other question, judging from the report, *was argued. But when the court came to inspect the record, it must have seen, that the special verdict did not raise the question, [*452 as between the parties to that suit. And moreover, I find, that the reporter has omitted one very material fact found in the special verdict ; which was, that the United States had no interest in the issue, since their judgment had been voluntarily paid off by the assignees of Cramond, the bankrupt. I copy the special verdict entered from the original roll, which I have inspected at the present term.

The jury found, "that on the 22d of May 1805, William Cramond, of Philadelphia, merchant, stood indebted to the United States in several bonds for duties, as follows (describing the bonds, all of which were due after the date of assignment). On the respective bonds, suits were brought, judgments entered, executions issued, and a sale made of a certain real estate called Sedgely, the property of William Cramond, and the proceeds thence arising came to the hands of the defendant, John Smith, marshal of Pennsylvania district, from whom it is claimed by the plaintiffs (who are) creditors of the said William Cramond, on the following grounds : A suit was instituted by the plaintiffs, in the circuit court of the United States for the district of Pennsylvania, against the said William Cramond, as of October sessions 1802, and a judgment in the said suit, in favor of the plaintiffs, and against the said Cramond, was obtained, for $32,253, on the 20th of May 1805. On the 22d of May 1805, the said William Cramond was insolvent, and had no sufficient property to pay all his debts ; but his insolvency was not a matter of general notoriety. On the 22d day of the said month, the said William Cramond executed a general assignment of his estate and effects, bearing date the same day and year, and delivered it to the assignees therein named (*prout* assignment), being, on the said 22d of May,

unable to satisfy all his debts. The moneys in the hands of the defendants, are claimed by the assignees under the said assignment, *who have satisfied the United States the amount of the debt due the United States.* If upon the whole matter," &c., in the usual alternative form of a special verdict.

Judgment below was rendered for defendant, and it is impossible it could have been otherwise ; but not, as I conceive, upon the ground stated, since it is one which the verdict does not raise. It is true, the question was argued, but adjudications are not to have their effect from the questions argued, and the views taken by counsel in their points or briefs. There is a sensible rule laid down on this subject, in a book of grave authority, and the truth of which this court has had occasion to verify not unfrequently ; the purport of which is, that counsel ought not to move anything in arrest of jugdment, *except the roll wherein the judgment is *453] entered, or the *postea*, be in court (6 Mod. 24), and the reason assigned is, that the court may be satisfied that the matter moved in arrest of judgment is truly recited from the record ; for the court will not rely upon the allegation of counsel at the bar.

It often happens, after the most protracted discussions, that the court differ from counsel in their views of the question actually raised on the record, and on grounds which have not been argued. In the case of *Thelusson* v. *Smith*, I hold it to be incontrovertible, that the question of priority could not have been adjudicated upon, on the verdict, as set out in the record. The special verdict does not give the date of the levy, and sale by the marshal, under the judgment by the United States ; but as all Cramond's bonds to the United States fell due after the date of the assignment, it follows, that the judgment, and necessarily, all proceedings under it, were subsequent to the execution of that deed. The land levied on, therefore, had passed out of Cramond, before the judgment of the United States was obtained, and of consequence, the levy and sale under their execution was a mere nullity. Could this furnish the ground of an action for money had and received by the Thelussons, in right of a judgment prior to the consignment, against Smith, the marshal ? It obviously could not. For as against the Thelussons' rights, whatever they were, nothing had passed. The purchaser of the lands at marshal's sale, who had received nothing for the money, might have brought such an action against the marshal ; and the assignees might have sued for, and recovered, the land ; in which case, it would have been held by them, as before, subject to Thelusson's judgment. But as between Thelusson and the marshal, there was no privity of action. And this was the true ground for rendering the judgment of this court, in the suit against the marshal. It is true, the special verdict introduces the assignees into the cause, as claiming the money raised by the marshal, on the supposition, that after satisfying the United States, they succeeded to the priority of the United States. But suppose, this recovery had been had against Smith, what was there to prevent the assignees from going on at law, to recover the land of the vendee ? They were no parties to the record, and there is nothing in the pleadings, or the verdict, to show that they had intervened, or had a right to intervene, in the name of the United States. They could not maintain a right to succeed to the United States, under the provisions of the 65th section of the act of 1799 (1 U. S. Stat. 676) ; because that right is extended only to sureties upon the bond. If they had acquired any

right as against the Thelussons, it was a mere general equity, which *could only have been asserted in a court of equity. At law, in this indirect mode, it could not have been asserted, if it could have availed them at all.

I, at least, would have it understood, that I concurred in the judgment in the case of *Thelusson* v. *Smith*, on no other ground than the want of privity between the parties. Nor can I acknowledge it as authority to any other point; since the United States were satisfied, and the assignees could not be regarded in any view, at law, as succeeding to the priority of the United States, if the United States had priority; and since that priority could not come in question, in a case in which the sale of the land was a mere nullity; as is distinctly affirmed in the present decision, because the assignment divested all the interest of the insolvent, so as to place it beyond the action of the *fieri facias*, issuing on the judgment of the United States.

Judgment affirmed, with costs.

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*The President, Directors & Company of the Bank of Columbia *v.* Peter Hagner. [*455

Dependent and independent contracts.

When no specific time for the payment of money is fixed in a contract, by which the same is to be paid by one party to the other, in judgment of law, the same is payable on demand. p. 463.

In contracts for the sale of land, by which one agrees to purchase, and the other to convey, the undertakings of the respective parties are always dependent, unless a contrary intimation clearly appears.[1] p. 464.

Although many nice distinctions are to be found in the books upon the question, whether the covenants or promises of the respective parties to the contract, are to be considered independent or dependent; yet it is evident, the intimation of courts have strongly favored the latter construction, as being obviously the most just. p. 465.

In such cases, if either vendor or vendee wish to compel the other to fulfil his contract, he must make his part of the agreement precedent, and cannot proceed against the other, without actual performance of the agreement on his part, or a tender and refusal. p. 465.

An averment of performance is always made in the declaration, upon contracts containing dependent undertakings, and that averment must be supported by proof. p. 465.

The time fixed for the performance of a contract, is at law, deemed its essence, and if the seller be not ready and able to perform his part of the agreement, on that day, the purchaser may elect to consider the contract at an end. But equity, which, from its peculiar jurisdiction, is enabled to examine into the cause of delay in completing a purchase, and to ascertain how far the day named was deemed material by the parties, will, in certain cases, carry the agreement into execution, although the time appointed has elapsed. p. 465.

It may be laid down as a rule, that at law, to entitle the vendor to recover the purchase-money,

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[1] Covenants are to be construed as dependent or independent, according to the intention of the parties, and the good sense of the case; technical words must give way to such intent. McCrelish *v.* Churchman, 4 Rawle 26; Bredin *v.* Agnew, 3 W. & S. 300; Wright *v.* Smith, 4 Id. 527. The intention is to be sought for, rather in the order of time, in which the acts are to be done, than from the structure of the instrument. Goodwin *v.* Lynn, 4 W. C. C. 714; Grant *v.* Johnson, 5 N. Y. 247. When the acts are to be performed at different times, the covenants will be construed as independent. Goldsborough *v.* Orr, 8 Wheat. 217; Philadelphia, Wilmington and Baltimore Railroad Co. *v.* Howard, 13 How. 306, So, a stipulation which goes only to a part of the consideration, will, in general, be treated as an independent covenant. Fame Insurance Co.'s Appeal, 83 Penn. St. 396.

he must aver in his declaration performance of the contract on his part, or an offer to perform at the day specified for the performance; and this averment must be sustained by proof, unless the tender has been waived by the purchaser. p. 467.

If, before the period fixed for a delivery of a deed for lands, the vendee has declared, he would not receive it, and that he intended to abandon the contract, it may render a tender of the deed, before the institution of a suit, unnecessary; but this rule can never apply, except in cases, where the act which is construed into a waiver, occurs previous to the time for performance. p. 467.

The taking possession of property by the vendee, before conveyance, is a circumstance from which may be inferred, that he considered the contract closed, but will not deprive him of the right to relinquish the property, if the vendor can not make a title, or neglect to do so. After a relinquishment, for such causes, the vendee may sustain an action to recover back the purchase money, if it has been paid. p. 468.

Where the legal title cannot be conveyed to the vendee, by the vendor, and the vendee must resort to a court of equity to establish his title, *notwithstanding a conveyance of all the right of the vendor to him, the court will not compel him to pay the purchase-money—it would be compelling him to take a law-suit, instead of the land.[1] p. 468.

*456]

Error to the Circuit Court of the District of Columbia. The plaintiffs instituted their suit in the circuit court for the county of Washington, against the defendant, on a special agreement to purchase two lots of ground, in the city of Washington. The plaintiffs, to support the issues joined on their part, offered in evidence certain deeds, papers and letters; the handwriting of the parties and the delivery of the letters, at their several dates, being admitted.

John Templeman, being indebted to the plaintiffs in a large amount, conveyed, by deed, dated 31st of March 1809, to Walter Smith, in trust to secure the debt, certain lots in the city of Washington, the two lots alleged to have been sold to the defendant included; the said trustee being authorized to sell, at public sale, the property conveyed. On the 31st of March 1821, the bank, under seal, authorized Walter Smith to release the two lots to John Templeman, and under this authority, the trustee conveyed the property to Templeman, who, by deed, dated 29th April 1821, conveyed the same to Peter Hagner, the defendant. The conveyance by Walter Smith to Templeman, and from Templeman to Hagner, were made by the direction of the bank, for the purpose of vesting a title to the two lots in Mr. Hagner, in execution of their part of the agreement upon which the suit was founded, and before the suit was commenced.

The material evidence offered by the plaintiffs to establish their claim upon Mr. Hagner, and to prove a contract made by him, for the purchase of the two lots, was contained in a correspondence, &c., between General John Mason, the president of the bank, and Mr. Hagner; commencing on the 14th May 1817, and ending on the 19th of May 1821, numbered from 1 to 11.

No. 1, dated 14th May 1817, letter, Peter Hagner to General Mason, expressed a wish to purchase the lots, if the bank was disposed to sell them, at a reasonable price. No. 2, from General Mason to Mr. Hagner, dated October 16th, 1817, stated, that the board of directors had fixed the price of the lots at twenty-five cents per square foot. No. 3, from Mr. Hagner to General Mason, dated October 17th, 1817, communicated an offer of ten cents per square foot, which, by letter dated 17th December 1817, No. 4,

[1] Sitzel *v.* Kopp, 9 W. & S. 29.

was extended to fifteen cents per square foot. No. 5 was a memorandum sent by Mr. Hagner to General Mason, to be signed by him, and which was so done, on the 27th of April 1818; the memorandum bearing date April *25th, 1818, and stating, that the lots were on that day sold to Mr. [*457
Hagner, at twenty-five cents per square foot; "payable at such periods as the bank may approve."

On the 27th April 1818, No. 6, Mr. Hagner wrote to General Mason, desiring to have the payments for the lots purchased by him, at twenty-five cents per square foot, to meet his income; and proposed to have the same divided into six quarterly payments, the first to be made on the first day of the following October; offering his notes, and asking for a deed; or if this should not be agreed to, stating that he would bind himself to pay the money as proposed, "and receive a bond of conveyance, conditional to give a full title, when the money should be paid." This letter requested a return of the memorandum, No. 5. Upon this letter, there was written, in pencil, in the handwriting of General Mason, according to the usual practice at the sittings of the board of directors, "accepted—interest on each note, as it becomes due." No. 7, April 27th, 1818, from General Mason to Mr. Hagner, inclosed the memorandum, No. 5, and mentioned that his proposition would be submitted to the board.

On the 7th October 1818, Mr. Hagner wrote to Gen. Mason (No. 8), stating that he was prepared to pay the instalment falling due on the 1st October, and requesting a bond of conveyance. December 26th, 1820 (No. 9), Mr. Hagner, by letter, stated that a long time had passed since his purchase, without the title to the lots having been completed; and the bank continued without authority to convey. The bank, at the time of the purchase, had no authority to sell at *private* sale, and must have made title by a circuitous and doubtful process of a public auction, at which some one might have interposed and obtained the lot. That the bank might have held him bound to take the property, although not reciprocally bound; and that the answer of the president of the bank, was not certain and absolute, but was referred to and made dependent on the determination of the board of directors. Under these, and other circumstances stated by him, he communicated his determination to relinquish the purchase.

On the 8th May 1821, Mr. Hagner notified General Mason (No. 10), that he considered his agreement to purchase the lots void, and that he has no claim or title to them. In reply to this letter, upon the 19th May 1821 (No. 11), Gen. Mason says:—"You will no doubt, Sir, recollect a conversation I had with you soon after the reception of your letter of the 26th December last, when I informed you that that letter had been submitted *to the [*458
board of directors, and that it had been determined, that the purchase by you of the lots in question being considered in all respects a firm and *bonâ fide* purchase, it would not be relinquished, and that measures would be taken to make you a title valid in law. I am now instructed to inform you, that those measures have been taken; that deeds to that effect have been made by the proper parties, which are expected to be soon received here, when they will be tendered you, and a compliance with your part of the contract expected."

Evidence was also given, on the part of the plaintiffs, to prove the entire insolvency of John Templeman, and the non-payment by him of any part of

his debt to the plaintiffs. That on the 28th September 1821, a tender of the deeds already mentioned was made by an officer of the bank to the defendant, who refused to accept them. The deed of Templeman to Hagner, dated 3d of April 1821, was recorded by consent, without prejudice. A witness also proved, that in the month of June 1818, he was employed by defendant to inclose the two lots in question, and did inclose them with a board fence; that before inclosing the said lots, an old house was pulled down, by order of the defendant, and some part of the materials used in making the said inclosure; that some time afterwards, the witness was employed by defendant to pull down the fence, which was done, and the lots left open; that the said house was a small frame house, very old, and in bad repair; that it had been inhabited, some time before, but was not in tenantable order and condition; that if the house had been put in good repair, which would have cost half as much as building a new house of the same size and kind, it would have rented for about three dollars per month.

The clerk of the circuit court of the district of Columbia certified, that there was no judgment in force, on the 30th day of March 1821, against John Templeman, and proof was also made, that the taxes on the two lots of ground, from 1809 to 1821 inclusive, had been assessed to, and paid by the Bank of Columbia. On the 19th of May 1821, the situation of the lots was examined by order of the president of the bank, and it was found "that the fence had been removed, apparently that spring, and the lots appeared to have been cultivated the fall before."

Upon this evidence, the defendant, by his counsel, prayed the court to instruct the jury, that upon the evidence so given on the part of the plaintiffs, though found by the jury to be true, as above stated, the plaintiffs are
*459] not entitled to recover in this *action, the purchase-money for the lots in the declaration mentioned; which instruction the court gave as prayed.

The plaintiffs prayed the court to instruct the jury, that upon the evidence, the plaintiffs were entitled to recover such damages, as the jury should think the plaintiffs had sustained, by the defendant refusing to comply with the contract stated in the declaration, if they should believe, from the said evidence, that the defendant consented to the delay on the part of the plaintiffs to make a deed, or give a bond of conveyance for the lots mentioned in the declaration; which instruction the court refused to give.

A bill of exceptions was then tendered, by the counsel of the plaintiffs, to the instructions given by the court on the prayers of the counsel for the defendants, and also to their refusal by the court to give the instructions to the jury prayed for by the counsel for the plaintiffs.

While the bill of exceptions was preparing, the following additional evidence was discovered by the plaintiffs, and was offered and read to the jury: —A deed, commissioners to J. Templeman, 19th Septembtr 1801: Liber G. fol. 490. A deed, Templeman & Stoddart to Bank of Columbia, 19th January 1802: H. 386. A deed, Stoddart to Templeman, 25th September 1804: M. No. 12, 251. A deed, Templeman to the Bank of Columbia, 7th March 1807: No. 18, 346. The deed of 7th March 1807, conveyed *inter alia* to the plaintiffs, the two lots alleged to have been sold by Mr. Hagner, and authorized the bank to sell the property vested in them, by private or public sale. This evidence being exhibited, the court adhered to the instructions

and opinions given to the jury, and an additional exception was taken thereto by the counsel for the plaintiffs, and a writ of error was prosecuted to this court.

For the plaintiffs in error, it was contended, that upon the evidence, the plaintiffs were entitled to recover, and that the circuit court ought to have so instructed the jury.

Key, for the plaintiffs.—1. A contract for the purchase and sale of the two lots of ground was made between Mr. Hagner and the Bank of Columbia, the president of the bank having full authority from the board of directors to conclude the same. That the defendant had no evidence of the authority of the president to make the contract, was his own neglect, and he dealt with him as the agent of the bank, and under the contract, took possession of the property. *By the contract, the defendant was to pay for the lots, according to his proposition in the letter of the 27th of April [*460 1817, and the acceptance "noted in pencil," is the agreement in writing by the bank to the terms proposed, of which, sufficient evidence exists, in addition to the circumstances of the defendant's entry on the lots, showing that he knew of the agreement of the bank.

2. The contract subsisted down to the period of the defendant's refusal to fulfil it. It subsisted on the 7th October 1818, as shown by his letter referring to his propositions of payment upon the 27th April 1817; by his remaining in possession, and this continued until January 1820, when all the payments became due, no application having been made to complete the title, although it may be inferred, that he knew some measures would be required for the purpose. The acquiescence of the defendant in the delay, bound him during its existence.

3. When, on the 26th December 1820, he communicated his determination to withdraw from the contract, he had no such privilege. He was bound to wait, if the title was not incurably bad, a reasonable time, until it should be completed. Sugden 252–5. If aware of the difficulties in the title, arising from the sale made under the deed of trust by Walter Smith, by which a public and not a private sale of the lots was to be made, he should have tendered performance on his part, and demanded performance of the vendors. Instead of this, if, by that letter, he intended to renounce at once, this could not be done, legally, unless in the case of an incurably bad title. The formal relinquishment is made on the 8th of May 1821, and this being the first complaint of non-performance by the bank, it was promptly attended to. Sugden on Vendors, 157, 249–52, 34, 35. The refusal on the part of the defendant made a tender of performance by the plaintiffs, previous to a bill of specific performance on this action, unnecessary. Sugden 162–3; 3 Doug. 684. But no such tender was necessary. Sugden on Vendors 160, 164.

The bank did offer a good title, as is shown by the evidence. Templeman had no ultimate interest; it was released, and his deed, made with the consent of the bank, gave a good title. Those who are entitled to the money, which may arise from the sale of an estate, are the substantial owners of it. Sugden 300. To sustain this suit, it is sufficient, if a good title can now be made, and this can be done under the deed of 7th March 1807. Sugden 250–1.

Jones, for the defendant.—1. There never was a complete contract
*461] entered into by Mr. *Hagner. He made propositions, and they were never fully accepted by the bank; nor was he at any time informed of the order or determination of the bank thereon. It was the duty of the plaintiffs, when the money became due, to have tendered a performance of their contract, and not to have postponed the same until September, 1821, the day before the action was instituted.

No purchaser is bound to take an equitable title, and in this case, the bank had not a legal title, under the conveyance to Walter Smith, under which the title tendered was derived. The title must be complete at the time of performance of the contract. Sugden on Vendors 158.

When the original security is in form of a trust, it must remain so until the trust is executed, by a sale of the property in the time prescribed. A court of equity would not have confirmed the title to the defendant, they would have said to the trustee, Walter Smith, go and execute your trust.

As to the title of the 28th of September 1821, tendered to the defendant, it was not a valid title. By the law of Maryland, no land can be conveyed by a power of attorney; it was not made by the bank, and it passed through Templeman, who was insolvent. The defendant could not be compelled to accept such a title. There is no authority to be found, by which a vendor can call on another to complete a title which he contracted to give.

Entry on the property does not furnish anything but a presumption, that a title would be made; and this was never done.

As to the time which will be allowed for completing a title, the following cases were cited. Sugden on Vend. 284; 1 Marsh. 583; 6 Taunt. 259; 5 East 198; 1 Smith 390.

The plaintiffs, after the case had gone to the jury, exhibited a new title. The first was as a creditor, and the conveyance was to be derived from the trustee; the second title was under an old deed, by which the bank was authorized to convey. The deed of 1807 was controlled or revoked by the subsequent deed; and notwithstanding that deed, the trustee alone could make the sale. 1 Marsh. 285; 5 Taunt. 282; 3 Bos. & Pul. 181.

Thompson, Justice, delivered the opinion of the court.—This case comes up from the circuit court of the district of Columbia, upon a writ of error. It was an action against the defendant Hagner, on a special agreement to purchase of the plaintiffs two lots of ground, in the city of Washington.
*462] The *court below, on the prayer of the defendant, instructed the jury, that upon the evidence given on the part of the plaintiffs, though found by them to be true, would not entitle the plaintiffs to recover in this action, the purchase-money for the lots mentioned in the declaration. Under which instruction, a verdict was found, and judgment rendered for the defendant; to reverse which, the present writ of error has been brought.

The special agreement, as stated in the declaration, is substantially, that on the 25th of April 1818, it was agreed between the plaintiffs and defendant, that the plaintiffs should sell to defendant lots No. 1 and 2, in square 141, in the city of Washington, the property of the plaintiffs, at and for the price of twenty-five cents for each and every square foot contained in said

lots; and that defendant agreed to purchase the lots, at that price, and to pay for the same, when thereunto required by the plaintiffs; setting out the quantity of land and amount of the purchase-money, with an averment, that the plaintiffs had full power and authority to make the sale, and that they then were, and ever since have been, fully competent and able to make and deliver a good and sufficient deed, conveying to the defendant a good title in fee to said lots. And that, afterwards, on or about the 8th day of May 1821, the defendant declared and gave notice to the plaintiffs, that he considered the agreement and sale void, and would not comply with the same, and discharged the plaintiffs from making or causing to be made any deed of conveyance. And the plaintiffs further aver, that afterwards, on the 28th of September, in the year 1821, they being willing and able to make a conveyance of a good title to said lots, offered so to do, and requested the defendant to pay the purchase-money, according to the terms of the agreement, which he refused to do. The first inquiry that naturally arises, is, whether any contract was, in point of fact, concluded between the parties. It has been objected, that it does not appear, that General Mason, through whom, in behalf of the bank, the negotiation was carried on, had any authority for that purpose. There is certainly great plausibility in this objection. There is no evidence, expressly showing such authority. But this perhaps ought to be considered as having been waived by the defendant; as that part of the correspondence from which the contract is supposed to be collected, was carried on with him in his official character of president of the bank. And the defendant, at no time, puts his objection to carrying the contract (if any was made) into execution, upon the want of authority in Mason, to make it.

The contract is alleged, in the declaration, to have been made on the 25th of April 1818, and the letter of Mason, of *that date, and signed by him, as president of the bank, has been considered as closing the [*463 contract. This letter is as follows:—"I have this day sold to Peter Hagner, of Washington city, lots No. 1 and 2, in square 141, in Washington city, and belonging to the Bank of Columbia, at twenty-five cents per square foot; payable at such periods as the bank may approve."

The time of payment being left to the option of the bank, it is said, that in judgment of law, the purchase-money was payable on demand; and this is no doubt true, if the bank had then closed the negotiation, and apprised the defendant that such was their determination, as to the payment of the purchase-money. But this was not done; and the terms of the letter look to, and necessarily imply some further negotiation. The payment was to be at such periods as the bank may approve. It was, therefore, clearly understood to be payable by instalments; and the periods to be approved by the bank, which would seem to leave the subject open to propositions to be made on the part of Hagner, and submitted to the bank to be approved. And that such was the understanding of the parties, is evident from the letter written by the defendant, two days after, April 27th, 1818, to the president of the bank, as follows:

"It would be desirable to me to have the payments to make for the lots No. 1 and 2, in square 141, purchased of you, by me, on Saturday, at 25 cents per square foot, in proportions and at periods, to be met by my income. I accordingly propose, that the whole amount of the purchase-money be

divided into six quarterly payments, the first to be on the first of October next. If this be approved by the bank, I will give my notes, and I presume the bank will have no objections to give me a deed. If, however, it be preferred, I will bind myself to pay the money, at the times stated above, and receive a bond of conveyance, conditional to give a full title, when the money is paid. Do me the favor to send me, in return, a memorandum of our agreement on Saturday." Upon this letter was written in pencil, by General Mason, "accepted—interest on each note as it becomes due."

Whatever, therefore, might have been the right of the bank to have closed the contract, in the terms of the letter of the 25th of April, it was certainly waived, by an acceptance of the modification, contained in the letter of the 27th of April. Nor would any contract seem to be closed by this letter. It contained two distinct propositions, by the defendant; the one to give his notes for the purchase-money, payable in six quarterly payments, the first to be made on the 1st of October then next, and *take
*464] a deed from the bank; the other, to bind himself to pay the money at the times stated, and take a bond for a deed, to be given when the whole purchase-money was paid. This necessarily required some further answer from the plaintiffs, not only to signify their election between the propositions; but to do some further act, in confirmation of such an election. Either to give the deed, or a bond for the deed. The note in pencil, made by the president of the bank, upon the letter, could not fairly be understood, as implying anything more than an acceptance of the proposition to pay by instalments; and settling the terms of the contract, to be concluded between the parties, upon the bank's electing which proposition to accept, as to the mode of concluding the contract. But the contract could not be said to be consummated, until such election was made and the writings executed.

Here the matter rested for nearly three years, without anything being done on the part of the bank to close the contract; or to intimate, that they considered any contract in force, in relation to the purchase; and that, not until after the defendant had given them formal notice, that he considered the agreement void, and at an end. And he certainly had very good reason to think the bank so considered it; or that no agreement had in fact ever been concluded. For the defendant, by his letter of the 7th of October 1818, gave the plaintiffs notice, that he was prepared to pay the first instalment; which, according to his proposition, fell due on the first of that month; and requesting of them a bond for a deed; to which no answer appears to have been given, nor any one of the instruments paid or demanded; although the whole purchase-money became payable by the first of January 1820, according to the proposed terms of the contract. Upon the review of the case, it is at least very doubtful, whether any contract was concluded between the parties; and if the cause turned upon this point alone, the judgment of the court below would be affirmed, by a division of opinion in this court. But as there are other questions in the cause, the determination of which leads to the same result, and upon which no difference of opinion exists, it has been throught proper to notice them.

Admitting, then, that a contract was entered into between the parties, the inquiry arises, whether the plaintiffs have shown such a performance on

their part, as will entitle them, in a court of law, to sustain an action for the recovery of the purchase-money?

In contracts of this description, the undertakings of the respective parties are always considered dependent, unless a *contrary intention clearly appears. A different construction would, in many cases, lead [*465 to the greatest injustice, and a purchaser might have payment of the consideration-money enforced upon him, and yet be disabled from procuring the property for which he paid it. Although many nice distinctions are to be found in the books upon the question, whether the covenants or promises of the respective parties to the contract, are to be considered independent or dependent; yet it is evident, the inclination of courts has strongly favored the latter construction, as being obviously the most just. The seller ought not to be compelled to part with his property, without receiving the consideration; nor the purchaser to part with his money, without an equivalent in return. Hence, in such cases, if either a vendor or vendee wish to compel the other to fulfil his contract, he must make his part of the agreement precedent, and cannot proceed against the other, without an actual performance of the agreement, on his part, or a tender and refusal. And an averment to that effect, is always made in the declaration, upon contracts containing dependent undertakings, and that averment must be supported by proof. And that the one now before the court, must be considered a contract of this description, cannot admit of a doubt.

The plaintiffs, however, aver that they were willing and able to made a conveyance of a good title, and offered so to do, on the 28th day of September 1821; but this was only the day before the suit was commenced, and nearly two years after the time fixed for performance; and they set up, as an excuse for the delay in making the tender of a deed, the notice received from the defendant on the 8th of May 1821, that he considered the agreement void, and refused to carry it into effect.

The time fixed for performance, is, at law, deemed of the essence of the contract. And if the seller be not ready and able to perform his part of the agreement, on that day, the purchaser may elect to consider the contract at an end. In Sugden's Law of Vendors 275, it is said, "The general opinion has always been, that the day fixed was imperative on the parties, at law. This was so laid down by Lord KENYON, and has never been doubted in practice. The contrary rule would lead to endless difficulties, if, in every case, it must be referred to a jury to consider, whether the act was done within a reasonable time; and the precise contract of the parties would be avoided, in order to introduce an uncertain rule, which would lead to endless litigation. But equity, which from its peculiar jurisdiction, is enabled to examine into the cause of delay in completing a purchase, and to ascertain how far the day named was deemed material by the parties, will, in certain cases, carry the *agreement into execution, although the time [*466 appointed has elapsed." But he justly adds, perhaps, there is cause to regret, that even equity assumed this power of dispensing with the literal performance of contracts, in cases like those.

It was urged at the bar, that the rule on this subject was the same at law and in equity, and the case of *Thompson* v. *Miles*, 1 Esp. 184, was referred to, in support of this proposition. And it is true, that some of the remarks which fell from Lord KENYON on the trial of that cause, would

seem to countenance such an opinion. For he permitted the seller to prove he had a good title; although the power of making that title was attained after the action was brought. This was certainly going great lengths for a court of law. But it ought to be observed, that in that case, no time appears to have been fixed for completing the contract; and an application for the title had not been made by the purchaser, previous to the action brought by the vendor for breach of the contract; which it seems was considered necessary in that case. But, that Lord KENYON did not mean to be understood, as holding that the evidence would have been admissible to sustain the action, if there had been a time fixed for the performance of the contract, is very evident, from his doctrine in numerous other cases before him. Thus, in the case of *Bury* v. *Young*, 2 Esp. 641, he says, a seller of an estate ought to be prepared to produce his title deeds, at the particular day. That a court of equity will, under particular circumstances, enlarge the time. And in the case of *Cornish* v. *Rowley*, 1 Wheat. Selw. 137, the action was for money had and received, to recover back money paid as a deposit, on an agreement for the purchase of an estate, the defendant having failed to make out a good title, on the day when the purchase was to be completed; the counsel for the defendant said they were ready to make out a good title; to which Lord KENYON replied: "As to the sentiments I have long entertained relative to the purchase of real estate, I find no reason for receding from them; they have been confirmed by conversing with those whose authority is much greater than mine; the vendor must be prepared to make out a good title on the day when the title is to become completed." On which, the counsel for the defendant asked, "Do I understand your lordship to say, that though the defendant can now make out a good title, yet, as that title did not form a part of the abstract, the plaintiff may avail himself of that circumstance?" To which Lord KENYON answered, "he certainly may; and avoid the contract:" and he directed the jury to find a verdict for the plaintiff, for the deposit money.

In the case of *Davis* v. *Hone*, 2 Sch. & Lef. 347, Lord REDESDALE said, a court of equity frequently decrees specific *performance, when the *467] action at law has been lost, by the default of the very party seeking the specific performance. To sustain an action at law, performance must be averred, according to the very terms of the contract. And again, in the case of *Lennon* v. *Napper*, 2 Sch. & Lef. 684, he reiterates the same doctrine, that courts of equity, in all cases of contracts for lands, have been in the habit of relieving, where the party, from his own neglect, has suffered a lapse of time, and from that and other circumstances, could not sustain an action to recover damages at law; for, at law, the party plaintiff must have strictly performed his part of the contract. And in the case of *Wilde* v. *Fort and others*, 4 Taunt. 334, the rule is recognised, that if the vendor of an estate at auction, does not show a clear title, by the day specified, the purchaser may recover back his deposit, and rescind the contract, without waiting to see whether the vendor may ultimately be able to establish a good title or not. A purchaser is not bound to accept a doubtful title.

From these authorities, it may be laid down as a settled rule, that at law, to entitle the vendor to recover the purchase-money, he must aver in his declaration a performance of the contract on his part, or an offer to perform,

at the day specified for the performance. And this averment must be sustained by proofs, unless the tender has been waived by the purchaser.

The time fixed for the performance of the contract, in this case, must be understood to have been the 1st of January 1820. The payment of the consideration-money was to have been completed on that day, and no part of it having been paid, the defendant had a right to abandon his contract, unless the plaintiffs were then ready and offered to perform, on their part; of which there was no evidence whatever offered upon the trial. They have attempted, however, to show, that a tender of a deed was rendered unnecessary, by reason of the letter of the defendant, of the 8th of May 1821; in which he gave notice of rescinding the contract. But this letter can have no such effect; it was written sixteen months after the time fixed for the delivery of the deed, and when the defendant had a right to rescind the contract. If, before the period had arrived, when the deed was to be delivered, the defendant had declared, he would not receive it, and that he intended to abandon the contract, it might have dispensed with the necessity of a tender, as the conduct of the defendant might, in such case, have prevented the act from being done; and he who prevents a thing from being done, shall never be permitted to avail himself of the non-performance, which he himself has occasioned. But that rule can never apply, except in cases where the act which *is construed into a waiver, occurs previously to the time fixed for performance. [*468

The possession taken of the lots by the defendant could, at most, only be considered a circumstance from which to infer, that he considered the contract closed; but could not deprive him of the right of relinquishing it, and restoring the possession, if the plaintiffs were unable to make a title to him, or neglected to do so. The possession was taken, doubtless, under a belief that the contract would be performed by the plaintiffs, and a full title conveyed to him; but if the contract was unexecuted, the defendant had a right to disaffirm it, and restore the possession; and could have sustained an action to recover back the purchase-money, had it been paid. Sugd. on Vend. 173, 183, and cases there cited. The plaintiffs have, therefore, clearly failed to show such a performance, on their part, as to entitle them, in a court of law, to call upon the defendant for payment of the purchase-money.

But admitting, that no objection, in point of time, lay to the tender of the deeds, the day before the commencement of the present action; no title was thereby conveyed to the defendant, or, at all events, not such a one as he would, at any time, have been bound to accept. It was a title derived from John Templeman, under the deed of the 31st of March 1809. Whereas, Templeman had previously conveyed the same lots to the plaintiffs, by his deed of 7th of March 1807, in trust, with authority to sell the same for the payment of a debt due to the bank, and to pay over to him the surplus, if any there should be. The legal title to these lots is, therefore, still in the bank, and may be subject to the trust declared in the deed, from anything that appeared upon the trial, And to allow the bank to recover the purchase-money, and turn the defendant over to a court of chancery, to obtain a title, would be going farther than any known principles in courts of law will warrant; no act whatever having been done by the plaintiffs, to transfer to the defendant the title vested in them under the deed of 1807. To substantiate

the present action, under such circumstances, would be compelling the defendant to take a law-suit, instead of the land for which he contracted.

Judgment affirmed, with costs.

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*469] *Doe, on the demise of John A. Elmore, Plaintiff in error, *v.* William A. Grymes and John J. Beatie, Defendants in error.

Nonsuit.

The courts of the United States have no authority to order a peremptory nonsuit, against the will of the plaintiff, on a trial of a cause before a jury; the plaintiff may agree to a nonsuit, but if he do not so choose, the court cannot compel him to submit to it.[1] p. 471.

Where the state of the record does not show a judgment of nonsuit to have been entered, although the bill of exceptions state the fact, the plaintiff may apply for a *certiorari*, to bring up a perfect record, or dismiss the writ of error, and proceed *de novo*. p. 472.

Error to the Circuit Court of Georgia. An action of ejectment was instituted in the circuit court of the United States for the district of Georgia, for the recovery of 287½ acres of land, in which the plaintiffs claimed title as follows:

A grant from the state of Georgia to Samuel Alexander; and a deed from John Cessna, styling himself "sheriff of Greene county in the state of Georgia," purporting to convey to Buckner Harris, by virtue of a sale under an execution against Herod Gibbs, "two hundred and eighty-seven and a half acres of land in said county, on Little Beaver dam, on the waters of Richland creek, and bounded on Academy lands, and land belonging to William Alexander, which land was formerly the property of Samuel Alexander;" a deed from Buckner Harris to Ezekiel E. Park, for a tract of land "containing two hundred and eighty-seven and a half acres, in the county of Greene, and state of Georgia, on the Little Beaver dam of Richland creek; being an equal half of the double bounty of land granted to Samuel Alexander, adjoining Academy lands."

The plaintiff then introduced a witness, who testified, that "Ezekiel Park was in possession of a tract of land, lying in Greene county, usually called Park's old mill tract, on Beaver dam creek, for about twenty years." He then produced a deed from Ezekiel E. Park to John A. Elmore, for a tract of land "in the county of Greene, and state of Georgia, on the Little Beaver dam creek, or fork Richland creek, being one equal half of a double bounty tract, originally granted to Samuel Alexander, adjoining lands belonging to the University; being the same originally sold and conveyed to Herod Gibbs, by the grantee, on the 14th of March 1790." He then exhibited a deposition of the county-surveyor, stating that he had made a re-survey of the premises in dispute, agreeable to a plot annexed to his deposition, which corresponded in its outlines with that annexed to the original grant, "com-

*470] pletely *covering the premises in dispute;" which he designated on the plat. The plaintiff then called a witness, who testified that W.

[1] De Wolf *v.* Rabaud, *post*, p. 476; Crane *v.* Morris, 6 Pet. 598; Silsby *v.* Foote, 14 How. 219; Castle *v.* Bullard, 23 Id. 172; Schuchardt *v.* Allen, 1 Wall. 369; Insurance Co. *v.* Folsom, 18 Id. 250; Carr *v.* Gale, 3 W. & M. 38; Boucicault *v.* Fox, 5 Bl. C. C. 87.

A. Grymes was in possession of the premises, at the commencement of the action, and closed his testimony.

The defendant's counsel, thereupon, moved for a nonsuit, on the following grounds: 1st. Because the plaintiff had failed to make out his title by the documentary evidence on which he rested his case. 2d. Because there was no sufficient evidence of possession, to give a title, under and by force of the statute of limitations of Georgia.

The circuit court ordered a nonsuit to be entered, against the consent of the plaintiff; and a writ of error was prosecuted by him, and the cause brought before this court. Upon the judgment of nonsuit, the defendants in error claimed to maintain before the court—that the circuit court had power to order a nonsuit, without the assent of the plaintiff.

The case was argued by *Wilde* and *McDuffie*, for the plaintiff in error; and by *Berrien*, for the defendant.

Berrien.—The doctrine laid down in the books of practice, and adopted in some of the state courts, is not supported by any express decision in the courts of Great Britain. That proposition is, that a plaintiff, on the bare allegations of his declaration, without a tittle of proof, is entitled to demand the verdict of a jury in his cause. Any modification of this proposition admits the power, and objects only to the mode of its exercise. An examination of the adjudged cases in England will show that they do not warrant the position. *Watkins* v. *Towers*, 2 T. R. 275, was a motion to enter nonsuit, after verdict. *Santler* v. *Heard*, was a verdict taken subject to the opinion of the court, whether plaintiff ought not to have been nonsuited; 2 W. Bl. 1031; 2 Salk. 669. *Macbeath* v. *Haldimand*, 1 T. R. 172, the point was not made, on a motion for a new trial; on reporting the fact, BULLER, J., said, that on the trial, he had thought the plaintiff ought to be nonsuited; but his counsel appearing, when plaintiff was called, he had left the question to the jury.

It is said, that the plaintiff would be deprived of his writ of error to this court: this is not so. Final judgments spoken of in the judiciary act, are meant to be contradistinguised from interlocutory judgments. Any judgment which is final in the suit, though not final as *between the parties, with the exceptions mentioned in the act, may be brought here [*471 by writ of error. A judgment of nonsuit is such a judgment, and may be the foundation of a writ of error. The defendant is entitled to judgment and execution for costs; the suit is finally disposed of. It is a final judgment in a civil action. In England, error lies on such a judgment; *Box* v. *Bennet*, 1 H. Bl. 432; *Kempland* v. *Macauley*, 4 T. R. 436. *Evans* v. *Phillips*, 4 Wheat. 73, does not contradict this; the ground of that decision was, that the plaintiff had assented to the nonsuit. Why may not the errors of the court below, be corrected in this form, as well as by an exception to instructions, or the refusal to give them?

Wilde and *McDuffie*, for the plaintiff in error:—1. It has always been considered, that a nonsuit cannot be ordered, without the consent of the plaintiff, who has a right to submit his case to a jury and the court; and the court, should the jury err, may order a new trial. In the courts of the United States, another objection exists to the exercise of such

power, as the court has decided, that a writ of error will not lie on a judgment of nonsuit (*Evans* v. *Phillips*, 4 Wheat. 73), it not being a *final* judgment. If the courts below should have this power, a plaintiff may be prevented the opportunity of bringing his case before the highest judicial tribunal of the United States. If a court can, in any instance, order a nonsuit, against the consent of the plaintiff, it may be only when no questions of fact are involved, but the only matter before the court is a question of law. This case exhibits facts upon which a jury were the proper judges. The plaintiff claimed the land by possession ; this, and the extent of the possession, was exclusively for the consideration of the jury.

The practice of the state of Georgia as to the entry of nonsuits has been fluctuating. The judicial system of that state does not comprehend an appellate court, with exclusive final judicial powers, but each circuit court has a right of granting appeals to itself, and on such appeals, a second trial takes place. Hence, this point has been decided differently in different courts, and at different periods; and hence, the practice of the courts of Georgia is unsettled, and various, as it necessarily must be, in the absence of a supreme court to regulate and determine the same.

Marshall, Ch. J., delivered the opinion of the court.—The court has had this case under its consideration, and is of opinion, that the circuit court had no authority to order a peremptory nonsuit, against the will of the *472] plaintiff. He had *a right by law to a trial by a jury, and to have had the case submitted to them. He might agree to a nonsuit ; but if he did not so choose, the court could not compel him to submit to it. But the state of the record does not enable this court to render a final judgment, because the record is defective, in not showing a judgment of nonsuit, entered in the circuit court. Although the bill of exceptions states that fact, yet the record does not contain the judgment itself. The plaintiff may therefore apply for a *certiorari*, to bring up a perfect record, or dismiss the present writ of error and proceed anew, as his counsel may think best for the interest of their client.

Johnson, Justice. (*Dissenting.*)—The only question of any importance in this cause is, whether a circuit court can, in any case, order a plaintiff to be nonsuited. I ordered the plaintiff below to be nonsuited, because the evidence was so inadequate to maintain his suit ; and had the jury found for him, I should have set aside the verdict, and ordered a new trial. The practice of the court from which this cause comes up, is this : when the plaintiff has closed his evidence, the defendant is at liberty to move for a nonsuit, or proceed with his testimony. If he introduces evidence, it is too late to move for a nonsuit ; and the question always to be examined is, whether, upon the evidence introduced by the plaintiff, admitting it to be true, the jury can find a verdict for him. So that, it is, in fact, a substitute for a demurrer to evidence, or for a motion for instruction that the plaintiff cannot recover upon the case made out by him in evidence.

There are several reasons, why I must maintain that the courts of the sixth circuit have a right to exercise the power to order a nonsuit, even against the will of the plaintiffs ; and why it would be wise, in all our circuits, to introduce the same practice. It happens, unfortunately for the defendant in error here, that a majority of the judges of this court have

pursued a different practice in their circuits ; but this, I must insist, is no sufficient reason for subverting, otherwise than by rule, the practice of other states in which this right has been recognised in the administration of justice, coevally with the existence of their courts. Such has been the case in the states of which the sixth circuit consists, and the acts of 1789 and 1792 have adopted into the courts of the United States, of the respective circuits, not only the forms of process, but the "modes of proceeding," in suits known to the states respectively. That this comes under the denomination of a mode of proceeding, or in the other words, an established practice of the state composing the sixth circuit, appears to me incontrovertible.

*By what right, then, can this court reverse a judgment of that circuit, founded in a practice thus sanctioned by law? It does seem [*473 to me, that the defendant below has a right in this judgment, vested by express statute law, and ought not to be put to the expense of this reversal. For what purpose is power given to this court to alter the practice of the circuits, by such regulations as they may deem expedient, if such practice is not to be held legal, until altered by a rule of this court? This court surely does not mean to decide, that such was not the received practice of that circuit ; this would be a decision in the teeth of positive fact ; and if the purport of the decision be, that it is an illegal practice, the immemorial practice itself, and the process acts of the United States, furnish an express negative to such a decision. The idea seems to be, that it is a practice inconsistent with the relation in which our circuit courts stand to this court —that ours is not a *nisi prius* system, or something to that effect. What then? This court can alter the practice by a rule, but, to overturn a judgment that has already been rendered under such a practice, I must respectfully contend, approaches very near to *ex post facto* legislation, not adjudication ; the province of which is to operate only upon existing laws. But it is not a practice appropriate exclusively to a *nisi prius* system, as is proved by this, that writs of error are sued out, continually, in England, upon judgments on nonsuit (see the cases cited in 1 Arch. Pract. 229–30), and though it had been, the states were at liberty to adopt it into their practice, although the *nisi prius* system be unknown to them. That they had adopted it, is conclusive against this assumed incompatibility. And in practice, it subserves the purposes of justice, under our system, as effectually as a bill of exceptions, or a demurrer to evidence ; and in several respects, much better. It saves the practitioner from the weight of responsibility, which often results from being compelled to elect between a voluntary nonsuit, and a demurrer to evidence, or a bill of exceptions, which may terminate fatally to his client ; and it not unfrequently saves his client from the fatal effects of negligence and misapprehension, either of himself or his attorney, or from surprise. In point of convenience and expedition, in the administration of justice, I presume, there cannot be two opinions. On this point, so far as *exemplum docet*, we may cite Great Britain, Massachusetts and New York, with some confidence, against Pennsylvania, Maryland and Virginia.

But it is contended, that in England, the plaintiff is not nonsuited, if he insists on answering, when called. If the fact be admitted, what then? England is not altogether absolute in dictating to the courts of the United States, and if those of the *states of the sixth circuit have [*474

asserted some independence in their rules of practice on this subject, I presume, their right was unquestionable to do so.

But I want no other authority than the courts of Great Britain, to justify the practice of the sixth circuit, in this behalf. From the earliest period, we find the English courts in the exercise of this power, and whoever will examine the cases collected in Mr. Morgan's Treatise on the doctrine of New Trials (3 vol. Essays), will find what a very wide range has been taken by those courts in the application of that practice. Nor have the more modern cases manifested any inclination to retrace their steps. Its salutary effects are universally felt, and perhaps contribute as largely as any other cause to the rapid progress of their courts in disposing of their dockets. If there exists any case prior to that of *Macbeath* v. *Haldimand*, 1 T. R. 172, in which the right of the plaintiff to refuse to be nonsuited was recognised, I cannot recollect it; since, in that case, it would seem, that in ordinary cases the right is recognised. But there is abundant proof, that the British courts do assert the power to control the exercise of that right, by the plaintiff, when they think proper. In the cases of change of venue, on motion of plaintiff (3 W. Bl. 1031), the right is disputed, on the assumed ground, that he undertakes to prove some material fact. Now, where can be the objection to apply the same reason to every case that goes to a jury? Does not a plaintiff, in fact, undertake the same thing, whenever he troubles a court with his suit, and has a jury sworn to try his cause upon evidence? he is no longer subjected to amercement, if he fails to recover, and the right to nonsuit him, where he fails to produce evidence that will justify a verdict, is but a reasonable substitute for the absolute penalty to which he was once subjected.

But it is contended, that an absurdity is produced, and an acknowledged right violated. Yet the alternative exhibits a more direct and obvious absurdity, since in the case of *Macbeath* v. *Haldimand*, and in every case of the kind, the court asserts a positive control over the consciences of the jury, by telling them, "they are bound to find for the defendant." And the greater absurdity must henceforward be incurred, of swearing a jury in a cause, and requiring a verdict, at the caprice of a plaintiff, who produces not a tittle of evidence to maintain his issue. Nor is any right of the plaintiff taken from him, if his rights be regarded in their just extent. He cannot claim a verdict of the jury, if he does not produce evidence to sustain it, and it is only in that case, that he is precluded from submitting his case to their consciences. When we consider what were the ancient penalties for a false verdict, before they were superseded by the introduction of new trials; it must appear just *and reasonable, that the plaintiff should rather be exposed to the necessity of bringing a new suit, or moving for a new trial, than that the jury should be subjected to attaint at his will. And on the subject of fiction and legal absurdity, it is certainly too late, at this day, for our courts of justice to be very fastidious, on a consideration which has been so thoroughly set at nought, by the action of ejectment, fine and recovery, and sundry other matters of the kind; to which they have resorted for the purpose of substantial justice and public convenience.

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I must submit, I suppose, but I cannot do it, without protesting against the right of forcing upon my circuit, the practice of other circuits in this mode. By a rule of this court, it is, unquestionably, in the power of the court to

do it. But until then, I can never know what is the practice of my own circuit, until I come here to learn it.

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*James De Wolf, junior, Plaintiff in error, *v.* David Jacques Rabaud, Jean Phillippe Frederick Rabaud, Alphonse Marc Rabaud, aliens and subjects of the king of France, and Andrew E. Belknap, a citizen of the state of Massachusetts, Defendants in error. [*476

Nonsuit.—Citizenship.—Statute of frauds.—Promise to pay the debt of another.

A nonsuit may not be ordered by the court, in any case, without the consent and acquiescence of the plaintiff.[1] p. 497.

A question of a citizenship of the party to a cause, cannot constitute a part of the issue, on the merits; it must be brought forward by a proper plea in abatement, in an earlier stage of the cause, than the trial on the merits.[2] p. 498.

The statute of frauds of New York, is a transcript, on this subject, of the statute 29 Charles II., ch. 3; it declares, that no action shall be brought to charge a defendant on a special promise for the debt, default or miscarriage of another, unless the agreement, or some memorandum or note thereof, be in writing and signed by the party, or by some one by him authorized. The words "collateral" or "original" promise, do not occur in the statute, and have been introduced by courts, to explain its objects, and expound its true interpretation. p. 499.

Whether, by the true intent of the statute of frauds, it was to extend to cases where the collateral promise (so called) was a part of the original agreement, and founded on the same consideration, moving at the same time, between the parties; or whether it was confined to cases where there was already a subsisting debt or demand, and the promise was merely founded upon a subsequent and distinct understanding, might, if the point were entirely new, deserve very great deliberation; but it has been closed within very narrow limits, by the course of the authorities, and seems scarcely open for general examination; at least, in those states, where the English authorities have been fully recognised and adopted in practice. p. 499.

If A. agree to advance B. a sum of money, for which B. is to be answerable, but at the same time, it is expressly upon the understanding, that C. will do some act for the security of A. and enter into an agreement with A. for that purpose, it would scarcely seem a case of mere collateral undertaking, but rather a trilateral contract; the contract of B. to repay the money, is not coincident with, nor the same contract with C. to do the act; each is an original promise; though the one may be deemed subsidiary or secondary to the other; the original consideration flows from A. not solely upon the promise of either B. or C. but upon the promise of both *diverso intuitu*, and each becomes liable to A., not upon a joint, but a several original undertaking; each is a direct original promise, founded upon the same consideration.[3] p. 500.

The case of Wain *v.* Walters, 5 East 10, was the first case which settled the point, that it was necessary, in order to escape from the statute of frauds, that the agreement should contain the consideration for the promise, as well as the promise, itself; if it contain it, it has since been determined, that it is wholly immaterial, whether the consideration be stated in express terms, or by necessary implication. That case has been adopted, to a limited extent, by the courts of New York, into its jurisprudence, as a sound construction of the statute.[4] p. 501.

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[1] Elmore *v.* Grymes, *ante*, p. 469, and cases cited in the note.

[2] Wickliffe *v.* Owings, 17 How. 47; Jones *v.* League, 18 Id. 76; Rateau *v.* Bernard, 3 Bl. C. C. 244; Bobyshall *v.* Oppenheimer, 4 W. C. C. 482; Hilliard *v.* Brevoort, 4 McLean 24; Morgan *v.* Curtenius, Id. 266; Evans *v.* Davenport, Id. 574. An objection to the apparent jurisdiction of the court must be taken by plea. Sheppard *v.* Graves, 14 How. 505, 512; Pond *v.* Vermont Valley Railroad Co., 12 Bl. C. C. 281.

[3] This is a mere *dictum* of the learned judge; he admits, that he is not following the construction of the statute, but merely suggests what might be the better construction, were it *res nova*; he admits, that the authorities are against his views. Carville *v.* Crane, 5 Hill 485, *per* Cowen, J. And see Hetfield *v.* Dow, 3 Dutcher, 440, 451.

[4] Townsley *v.* Sumrall, 2 Pet. 174. See Castle *v.* Beardsley, 10 Hun 343, and note to Castle *v.* Brown, 21 N. Y. 336 (Banks' ed.) In

*The decisions in the courts of New York, on the construction of its own statute, and the extent of the rules deduced from it, present to this court, a guide in its decisions upon the construction of their statute. p. 501.

Rabaud *v.* De Wolf, 1 Paine 580, affirmed.

Error to the Circuit Court of New York, for the Southern District. The defendants in error brought an action of *assumpsit*, in the circuit court of the United States for the southern district of New York, against the plaintiff in error, to recover damages for the breach of his contract, to ship to them, at Marseilles, five hundred boxes of white Havana sugar. The declaration contained several special counts ; of which, the first and second only were relied upon at the trial.

The first count stated, that at the time of making the respective promises and undertakings of the defendant, the plaintiffs were copartners in trade, carrying on business at Marseilles, in France, under the firm of Rabaud, Brothers & Company. That one George De Wolf, of Bristol, Rhode Island, being desirous of drawing upon the plaintiffs at Marseilles, for 100,000 francs; on the 15th March 1825, at New York, in consideration that the plaintiffs, at the special instance and request of the defendant, would authorize the said George De Wolf to draw bills of exchange upon the plaintiffs for the said sum of 100,000 francs, the defendant undertook, and promised, that he would ship, for the account of George De Wolf, on board of such vessel as George De Wolf should direct, five hundred boxes of white Havana sugars, consigned to the plaintiffs, at Marseilles; and the plaintiffs afterwards did duly authorize George De Wolf to draw bills of exchange upon them, at Marseilles, for the said sum of 100,000 francs, which bills were drawn by him on the 16th of November 1825, and paid by the plaintiffs on the 3d day of March 1826. That on the 4th day of January 1825, at the city of New York, George De Wolf did direct and name a vessel, the brig Quito, then lying in the port of New York, and ready to receive the said sugars, on board of which vessel the sugar should and ought to have been shipped by the defendant, on account of George De Wolf, and consigned to the plaintiffs, at Marseilles, according to his said promise and undertaking ; of all which promises, the defendant had notice ; and although he was then and there requested to ship the sugar on board the said vessel, yet he did wholly refuse the same.

The second count differed from the first only in stating the contract to have been, that, "in consideration that the plaintiffs, at the request of the defendant, would authorize George De Wolf to draw bills of exchange upon them, at Marseilles, for another sum of 100,000 francs, on account of other five hundred *boxes of white Havana sugar, to be shipped by the
*478] defendant, for account of George De Wolf, on board of such vessel as George De Wolf should direct, and consigned to them, the plaintiffs, at Marseilles, the defendant undertook, &c.," and averring, that relying on the promise and undertaking of the defendant so made, they, the plaintiffs, after the making thereof, did duly authorize George De Wolf to draw bills of exchange upon them for another sum of 100,000 francs, on account of the last-mentioned five hundred boxes of white Havana sugars, to be shipped by

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Pennsylvania, under a similar statute, it has been determined, that the consideration of an agreement to answer for the debt of another need not be expressed upon the face of the instrument, but may be shown by parol. Shively *v.* Black, 45 Penn. 345 ; Giltinan *v.* Strong, 64 Id. 242.

the defendant, on account of George De Wolf, and consigned to the plaintiffs, at Marseilles.

The cause was tried at the October term of the circuit court of the United States for the southern district of New York, in 1826, when the jury, under the charge of the court, found a verdict for the plaintiffs below for $19,950.85. The opinion of the court, in the charge to the jury, was excepted to by the counsel for the defendant, and a bill of exceptions sealed by Mr. Justice Thompson, sitting as judge of the circuit court; and the opinion delivered by him stated the evidence adduced in the cause.

On the trial of the cause in the circuit court, the plaintiffs below gave evidence, by the testimony of George De Wolf, who was examined under a commission, at Havana, that he, George De Wolf, had several transactions with the plaintiffs, previous to that which gave rise to this suit, and had at various times drawn bills on them. That he had three interviews with Mr. Belknap, on the subject of the shipment of the sugars; which interviews were had, first in Wall street, in the city of New York; secondly, at the counting-house of James De Wolf, jun., the plaintiff in error; and thirdly, at the boarding-house of Mr. Belknap. James De Wolf, jun., was present at the first interview, and he, with a certain Frederick G. Bull, was present at the second, at his counting-house. Mr. George De Wolf stated, that the transactions relative to the shipment of the sugars were, that, in Wall street, he proposed to Mr. Belknap to address him five hundred boxes of sugars to the house at Marseilles, on receiving authority to draw on account of the same, to the extent of 100,000 francs. Mr. Belknap, being engaged, an interview was proposed at the counting-house of Mr. James De Wolf, jun., which took place, and at which Mr. Belknap observed, that the advance was heavy; and a calculation was made by F. G. Bull, the confidential clerk of Mr. James De Wolf, jun., and by Mr. James De Wolf himself, of the value of the sugar, compared with the proposed advance; the conclusion of which was, an agreement that the sugars should be shipped, and the authority to draw granted to George De Wolf; Mr. James De Wolf engaging, by *letter, to ship the sugars in behalf of George De Wolf; which form of letter was afterwards carried by George De Wolf to Mr. Belknap, [*479 was assented to by him; was signed by Mr. James De Wolf, jun., and the authority to draw granted and used accordingly. This letter, and the authority to draw, were in the following terms:—

New York, 15th November 1825.

Mr. James De Wolf, Jun.

Dear Sir:—You will please ship, for my account, on board of such a vessel as I shall direct, five hundred boxes white Havana sugar, consigned to Messrs. Rabaud, Brother & Co., Marseilles, and oblige your friend and obedient servant, George De Wolf.

Agreed to—James De Wolf, Jun.

New York, 15th November 1825.

Messrs. Rabaud, Brothers & Co., Marseilles.

I have this day authorized George De Wolf, Esq., to draw on you for —— thousand francs, and I request you to honor his bills to that amount.

Your obedient servant, A. E. Belknap.

Mr. George De Wolf also stated, that his object was to ship the sugars in one of his own vessels; that he was then indebted to the house in Marseilles, about thirty thousand francs, but could not say that Mr. James De Wolf knew of the debt. The sugars were shipped, to obtain the usual advance, and the consignees were to have the usual commissions in the transaction. Bills, to the amount of the advance, were afterwards drawn and negotiated in Boston, and the proceeds of the same applied as follows: $13,000 remitted to Mr. James De Wolf, in checks on the bank, and in an acceptance of Isaac Clapp, a broker in Boston; and the residue of the proceeds of the transaction passed to the account of George De Wolf by Mr. Clapp. It was admitted, that the bills were regularly paid at Marseilles, by the defendants in error.

It was also in evidence, by the testimony of Mr. George De Wolf, that at the time of the negotiation for the bills, George De Wolf had in the hands of the plaintiff in error, from three to four hundred boxes of sugar; of which, sixty had been remitted from Rhode Island, on account of which he drew the sum of $4000, and the remainder were purchased for his account by James De Wolf, jun.; and at the same time, he was indebted to James De Wolf jun., a considerable amount. *Mr. George De Wolf also testified, *480] that the sugars to be shipped, were to be on his own account, and not on that of the plaintiff in error; that the agreement with James De Wolf was, that the proceeds of the negotiation of the advance should be remitted to him, and upon this verbal agreement, Mr. James De Wolf granted his signature to the letter of the 15th of November 1825. Mr. James De Wolf afterwards wrote to the witness, that he should decline to make the shipment in question, until he should receive the remittances agreed upon. When the letter was first presented, James De Wolf declined signing it, deferring it to the next morning, when he should see Mr. Bull; and it was signed the next morning. That the letter or memorandum of agreement had for its sole object the shipment of the sugars to Marseilles, that market being preferred to New York; and to place in the hands of James De Wolf, jun., the proceeds of the bills, in order to further the shipment; and not with reference to accounts existing between him and the plaintiff in error; and that the plaintiff in error knew the defendants, and particularly Mr. Belknap, in the transaction, as stated. Mr. George De Wolf also stated in his evidence, that he did not know that Mr. Belknap was acquainted with the circumstance that the proceeds of the bills were to go to the plaintiff in error; or with the state of accounts between him and James De Wolf, junior.

Evidence was also given, to show, that the plaintiffs below carried on business in Marseilles, in France, and that all of the said parties, with the exception of Mr. Belknap, were native subjects of France; and that Mr. Belknap was a native citizen of the United States, had resided some years in France, and now, always considering Boston as his home, resided in Boston; where he lodged in a boarding-house, in which he hired rooms by the year; and was understood to pay taxes in Boston; his letters of business were addressed to Boston; and he was absent from there, in the United States, occasionally, for the purposes of transacting business for the firm in Marseilles.

Soon after the negotiation of the 15th November, Mr. George De Wolf became insolvent, and at the time of his failure, he was largely indebted

to the plaintiff in error. Being thus embarrassed he addressed to Mr. Belknap the following letter :

Bristol, R. I., 27th December 1825.

Mr. A. E. Belknap.

Dear Sir :—I am in receipt of yours of the 23d instant, and note its contents. Owing to my embarrassments, the Magnet, which I *had wrote you would proceed to New York to take the sugars, which Mr. [*481 James De Wolf, junior, was to ship to your house in Marseilles, will not go on. You are, therefore, at liberty to make any arrangements with him you may think proper, for the interest of all concerned. I am extremely sorry that you met with an accident to prevent your visiting me, as it would have afforded me much pleasure in seeing you. Believe me, very truly, your friend, George De Wolf.

Which letter was, upon the 27th day of December 1825, shown to the plaintiff in error, by Mr. Belknap ; and a copy of the same was, upon the 3d of January 1826, delivered to him, inclosed in the following letter :—

New York, January 3d, 1826.

Mr. James De Wolf, Junior, New York.

Sir :—I inclose you a copy of a letter which I yesterday received from Mr. George DeWolf, of Bristol, Rhode Island. In pursuance of the authority given me by him, I shall, without delay, engage and provide a vessel, on board of which I shall require you (according to your contract of the 15th November last) to ship for account of Mr. George De Wolf, five hundred boxes white Havana sugar, consigned to Messrs. Rabaud, Brothers & Co., Marseilles. Your obedient servant, A. E. Belknap.

On the 4th January 1826, Mr. Belknap addressed the plaintiff in error, in the following terms :

New York, January 4th, 1826.

Mr. James De Wolf, Junior, New York.

Sir :—In pursuance of the notice I gave you in my letter of yesterday, I have engaged the American brig Quito, Captain Wink, now lying at Fly Market wharf, in this city, for the purpose of receiving, on freight, for Marseilles, five hundred boxes of white Havana sugar. The Quito is a good staunch vessel, and is now ready to receive the sugar. I, therefore, require you to ship on board of her, for account of Mr. George De Wolf, of Bristol, R. I., five hundred boxes of white Havana sugar, consigned to Messrs. Rabaud, Brothers & Co., of Marseilles, according to your contract of 15th November last. Herewith, is a copy of a letter I addressed to Mr. George De Wolf, on the 23d of December last, his answer to which I showed you yesterday ; at the same time, I gave you a copy of it. If you prefer to ship the sugar in any vessel other than the Quito, I have no *objec- [*482 tion, provided you will designate the vessel, and give notice to me immediately, and make the shipment without delay. Your obedient servant, A. E. Belknap.

To this letter, the plaintiff replied as follows :

New York, January 5th, 1826.

Mr. A. E. Belknap.

Sir:—In answer to your letter of the 4th instant, I have merely to say, that whenever Mr. George De Wolf, or any person authorized by him, will pay me for five hundred boxes of Havana sugar, I will ship the same, consigned to Messrs. Rabaud, Brothers & Co., at Marseilles. Your obedient servant, James De Wolf, Jun.

Evidence was also given, that the brig Quito was engaged early in January 1826, by Mr. Belknap, to carry the sugar to Marseilles, that she was a competent vessel for the purpose, and that the freight to be paid for the transportation of the sugar was the usual and customary charge for the same.

The plaintiffs in error objected, at the trial, to the reading of the letter of 27th December 1825, from George De Wolf to Mr. Belknap, which objection was overruled by the court.

On the part of the plaintiffs in error, at the trial of the cause before the circuit court, Frederick G. Bull was introduced as a witness, whose testimony is stated in the bill of exceptions to have been given as follows:

That he is, and for nine years past has been, a confidential clerk in the employment of the said James De Wolf, junior; that he was present at the counting-room of the said defendant, on the 15th day of November 1825, when the interview mentioned and described in the said deposition of the said George De Wolf took place, between the said George De Wolf, the said Andrew E. Belknap, and the said James De Wolf, junior; that the said George De Wolf and Andrew E. Belknap came into the counting-room, on said 15th day of November, in company, and were conversing together; that they there found the said James De Wolf, junior, and the witness; that after some little time had elapsed, the said James De Wolf, junior, and the witness, withdrew into an inner apartment or adjoining room, and were in a few minutes followed by the said George De Wolf, and the said Andrew E. Belknap; that while the said Andrew E. Belknap and the said George De Wolf were in conversation, the latter addressed a question to the said James De Wolf, junior,
*483] and asked him, how much five hundred *boxes of sugar would bring, or amount to, at some specified price; that the said James De Wolf, junior, turned to the witness, and asked him to make the calculation; that the witness did make a hasty calculation, and gave for answer, "about seventeen thousand dollars;" that he heard no proposition made by the said James De Wolf, junior, to the said Andrew E. Belknap, nor by the said Andrew E. Belknap to the said James De Wolf, junior, nor any conversation between the said Belknap and the said defendant of any importance, although he thinks that the said defendant did speak to the said Belknap once or twice during the said interview; that the said James De Wolf, junior, appeared, so far as the witness observed, to take little or no interest in the conversation or business which was going forward and taking place between the said George De Wolf and the said Andrew E. Belknap; that during the time of said conversation and interview (which occupied not more than ten or fifteen minutes), the said James De Wolf, junior, left the counting-room for a short time and returned; that the said James De Wolf, junior, is in the habit

of communicating all matters of business to the witness, and consulting him concerning the same, and the witness does not think it at all probable, that the said James De Wolf, junior, would have made any contract or agreement with the said Andrew E. Belknap, either at that time or any other, without the knowledge of the witness; that the said James De Wolf, junior, during part of the time of the said interview, was walking about his counting-room, while the said George De Wolf and the said Andrew E. Belknap were conversing together, and at one time, came up to the witness, and addressed some remarks to him; that the witness was writing at the desk, and occupied in his own affairs of business, and did not pay very particular attention to the conversation of the said parties; that the defendant and Belknap might have conversed on the subject of the sugar, without the witness knowing it; and the witness would not undertake to say, that an agreement by the said defendant with the said plaintiff might not have been made, without the knowledge of the witness; that the witness does not know, that the said Andrew E. Belknap knew that the proceeds of said bills were to have been remitted to the said defendant, by the said George De Wolf, before the said defendant was bound to ship the said sugar; that the said George De Wolf was, on the 15th day of November 1825, and for a long period anterior thereto, and ever since has been, largely indebted to the said James De Wolf, junior; that the sum of $13,000, for and on account of the 500 boxes of sugar mentioned in the said deposition of George De Wolf, was never paid by the said George to the said defendant, and never came into his hands: *that George De Wolf did, on or about the 23d day of November 1825, remit to the defendant, his, George De Wolf's, draft [*484 for $6000, on Isaac Clapp, of Boston, at three days' sight, and a check upon the United States branch bank, at New York, for $1000; which said draft and check were both paid, and the amount thereof received by the said James De Wolf, junior: that the said George De Wolf did also, shortly after, transmit to the defendant, his, the said George De Wolf's draft upon the said Isaac Clapp, at thirty days' sight, for $7000, which was received by the defendant, but was never paid, either by the acceptor, the said Isaac Clapp, or the drawer, the said George De Wolf; but the same was protested for non-payment, and still remains due and unpaid.

The counsel for the defendant below, then offered to prove by Mr. Bull, that there was an express understanding and agreement between the defendant and George De Wolf, at the time the said letter of the 15th of November was signed by the defendant, that the latter should furnish the defendant with the funds necessary for the purchase of said sugar, before the said defendant would be under any obligation to ship the same. This testimony was not permitted to go to the jury; the court stating, that "the defendant below could offer no testimony to the jury, of any arrangement between him and George De Wolf, relating to the funds for the payment for the sugar, unless it should also appear that Mr. Belknap was party thereto, or that the same was brought to his knowledge." The counsel for the defendant below excepted to this opinion.

The defendant below also gave in evidence on the trial, the following letter, containing matter contradictory to the testimony of George De Wolf.

Boston, November 28th, 1825.

Mr. James De Wolf, Junior.

Dear Sir :—I send you my draft on Mr. Clapp for $6000, at three days' sight, as he cannot get any draft or checks on New York, having tried all the banks and brokers ; he has not sold the exchange, or any part of it as yet, but thinks he can in three or four days. Last sales, 19¼ cents ; money very scarce ; the New Yorkers have sent on a great deal of paper ; banks stopt discounting. He will remit you the balance as soon as he sells, then, if a draft can be procured ; or otherwise will authorize you to draw on him for the balance. I inclose a check on the branch for $1000, making $7000, which credit this account. I am, your friend and obedient servant.

George De Wolf.

*485] *The case was argued by *Ogden* and *Jonathan Prescott Hall*, for the plaintiff in error ; and by *Webster* and *Charles C. King*, for the defendants(*a*).

(*a*) The following charge was delivered by Mr. Justice Thompson to the jury.—This case is of considerable importance in point of amount, and may be considered as a struggle between two innocent parties to throw off from their own shoulders a loss which must fall upon one or the other, by reason of the failure of George De Wolf. In such cases, it is reasonable to expect, that each party will urge with great zeal the points relied on to effect his object. It has been distinctly stated by the counsel, that situated as this cause is, it is not probable that a decision here will put an end to the controversy, but that it will be carried to the supreme court of the United States; and to enable the parties to avail themselves of their rights in this respect, and to take exceptions to the opinion I may express, it may be necessary for me not only to be explicit, but to repeat in some measure what I have already had occasion to say in disposing of the motion for a nonsuit. The result in the present case will depend principally upon the questions of law which are involved, and with which you have no concern. Some of these questions are, however, so connected with facts, which it is your province to decide; and for the purpose of enabling the parties to avail themselves of whatever exceptions they may have to take, many remarks may be made in the course of my charge to you, which, in strictness, are not to be addressed to a jury.

The first question arising is, whether the plaintiffs have shown themselves entitled, under the constitution and laws of the United States, to come into this court to prosecute their action. It has not been denied, but that all the plaintiffs, except Belknap, are aliens, and have a right to bring their suit in this court. The declaration avers, that Belknap is a citizen of the state of Massachusetts, and it is contended on the part of the defendant, that this averment has not been proved. From the evidence, it appears, that Belknap was either born in Boston, or removed there, with his father, at a very early age, from New Hampshire, and continued to live in Boston, until he went to France, where he remained ten or twelve years, when he returned to Boston. That he is an unmarried man, having no family; lives at lodgings ; has rooms, as one of the witnesses understood, hired by the year, and is there about two-thirds of the time. The residue of the time he is absent on business of the firm of which he is a partner, principally in New York and Philadelphia, and other cities of the United States. One of the witnesses testified, that, on one occasion, he went with him to town-meeting, to vote at an election, he did not see him vote, but understood he went there for that purpose. All the witnesses, in answer to the general question, where was the home of Belknap, say it was at Boston, that they should address him at that place, as his place of residence, if they did not know of his absence ; that letters from abroad are addressed to him at that place. These are the leading and principal facts in evidence as to Belknap's being a citizen of Massachusetts. That he is a citizen of

Hall and *Ogden*, for the plaintiff in error.—The defendants in error brought an action of *assumpsit* in the court below, against the plaintiff in error, founded upon a *special agreement; they are, therefore, bound to prove the contract stated in the declaration expressly [*487

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the United States cannot be questioned; and if a citizen of any particular state, within the sense of the meaning of the constitution and law, it must be of Massachusetts. No evidence has been offered, to raise a doubt on this point. Whenever absent from Boston, it was temporarily, and on the business of the plaintiffs; and to deprive an American citizen of the right of suing in this court, on the ground of his not being a citizen of any particular state, there ought to be very strong evidence of his being a mere wanderer without a home. Belknap does not appear to stand in this situation. His domicil, his home, and permanent residence, may, with the greatest propriety, be said to be in Boston. There is no pretence, that it was merely colorable, for the purpose of qualifying himself to bring this action; and to deprive him of that privilege, would be extending this disability beyond the reason and policy of the law. The facts in relation to Belknap do not appear to be in dispute, so far as I have understood them; and if, according to your understanding of the evidence, they are as I have stated, the averment that he is a citizen of the state of Massachusetts is sufficiently proved.

2. The next inquiry relates to the merits of the cause, and embraces the main question upon which the rights of the parties must be decided. The action is founded on a special contract, alleged to have been entered into by the defendant, and which he has not complied with. The declaration contains several counts, in which the cause of action is in some respects laid in different ways, but is substantially, that the defendant, in consideration that Belknap would authorize George De Wolf to draw on the plaintiffs for 100,000 francs, undertook and promised to ship for account of George De Wolf, on board such vessel as he should direct, 500 boxes of white Havana sugar, consigned to the plaintiffs in this cause, accompanied with the necessary averments and allegations of breaches. And the great question is, whether this contract has been proved by such evidence as to make it legally binding on the defendant.

The letter of the 15th of November, 1825, from George De Wolf to the defendant, requesting him to ship for his account 500 boxes of white Havana sugar, consigned to the plaintiffs, and underwritten by the defendant, "*agreed to*," is the principal evidence in this cause, to establish the contract. It is said, that this letter, under the statute of frauds, does not, on its face, contain any binding contract on the part of the defendant, and that the defects cannot be supplied by parol evidence. This objection, I think, cannot be sustained. The first question to be settled, and which is matter of fact for your determination, is, whether the arrangement between Belknap and George De Wolf, as to the authority to draw on the house in Marseilles, on the shipment and consignment of 500 boxes of sugar, and the undertaking of the defendant, were made and entered into at one and the same time, so as to form one entire transaction. The evidence on this point rests principally on the deposition of George De Wolf. For although Mr. Bull did not hear the defendant assent to the arrangement, yet, from his own statement, such an arrangement or contract might have been entered by the defendant, without his hearing it; it is, therefore, at most, but a negative kind of evidence, and ought not to outweigh the positive testimony of George De Wolf, unless he is discredited in some way, of which you will judge. His testimony is in writing, and will be submitted to the jury, when they withdraw to make up their verdict. They will read and judge for themselves. I understood him to say, that the defendant was with him, when they first met in Wall street, and had some conversation about the authority to draw, and the shipment of the sugar, he, George De Wolf, then stating to Belknap, that he had between three and four hundred boxes of the sugar then in the defendant's possession; that a time was appointed to meet at the defendant's counting-house to negotiate further on the subject; that such

as laid. This is a cardinal rule in pleading. *Anon.*, 1 Ld. Raym. 735; *Hockin* v. *Cooke*, *4 T. R. 314. The plaintiffs must, in the first place, prove a promise from the defendant to the plaintiffs, and then,

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meeting did take place, and the agreement then concluded, as contained in the letter of the 15th of November 1825. The consideration for this undertaking was the authority given by Belknap to George De Wolf, to draw on the plaintiffs for 100,000 francs. This consideration, it is true, although fully proved, is not expressed in the written contract. And one question is, whether it can be supplied by parol evidence; and I think it may, if the undertaking of the defendant was entered into at the same time with that between Belknap and George De Wolf, so as to form one entire transaction. This evidence does not in any manner contradict the written agreement, but is perfectly consistent with it. As between the plaintiffs and George De Wolf, the consideration might be clearly be supplied by parol proof; and if the undertaking of the defendant was, at the same time, it required no consideration moving from the plaintiffs to him; the consideration to George De Wolf was sufficient to uphold and support the contract of the defendant. The undertaking of the defendant to make the shipment, was certainly the principal, if not the sole consideration, upon which Belknap authorized the drafts on the plaintiffs; for George De Wolf says expressly, that he does not believe, the authority would have been given, without such undertaking by the defendant; so that it might be urged with great force, that the whole credit was given and rested on the engagement of the defendant to make the shipment. If the contract of the defendant was entered into at the counting-house, at the time mentioned, it is of no consequence, that the letter was not signed, until the day after. This was only reducing to form, and putting into the shape agreed upon, and consummating the arrangement, and would have relation, as between these parties, to the time when the agreement was, in point of fact, entered into.

But if I should be mistaken in this view of the evidence, and the jury should be of opinion, that the contract between Belknap and George De Wolf was completed, and unconnected with the engagement of the defendant, before he undertook to make the shipment and consignment, then the evidence is not sufficient to maintain the present action. It would then be a collateral undertaking, made subsequent to the principal contract, and would require some other consideration than that which supported the principal contract. Whether it is indispensable that such consideration should be expressed in the written agreement or not, it is unnecessary to decide, because no such consideration has been proved, if it was admissible to supply it by parol evidence.

3. It is said, in the next place, that the plaintiffs have failed in establishing a right to recover in this action, by reason of a variance between the allegation in the declaration, and the proof in support of it, in relation to the letter of advice from Belknap to his copartners, apprising them of his having authorized the drafts of George De Wolf. The declaration alleges, "that in consideration that the plaintiffs would authorize George De Wolf to draw upon them for 100,000 francs, the defendant undertook and promised, &c." But that the written authority shown in evidence was in blank, as to the sum to be drawn, and that in this consisted the variance. This letter being in blank, cannot be set up as a variance between the allegation and the proof. The declaration does not state that the authority was in writing, nor refer in any way to the letter in question; and George De Wolf swears, that he was authorized to draw on the plaintiffs for 100,000 francs. That in pursuance of such authority, he did draw upon them for that sum, and his bills were accepted and paid. The drafts which accompanied the letter of advice showed the amount, and the bills having been paid, the blank is of no importance in the present action.

4. The next inquiry is, whether any vessel was designated to receive the sugars, according to the terms of the agreement. By the contract, the sugars were to be shipped on board such vessel as George De Wolf should direct. He, having become insolvent, wrote a letter to Belknap, authorizing him to make arrangement with the

any consideration of benefit to the defendant, or of injury to the plaintiffs, moving between the parties, will sustain the promise. 1 Roll. Abr. 6.

It is admitted by the learned judge, in his charge to the jury, *that [*489 "the letter" from Geo. De Wolf to the defendant, dated November 15th, 1825, and upon which the latter subscribed the words "agreed to," is the principal evidence in the cause. This letter, we say, neither proves, nor conduces to prove, the promise laid in the declaration. In the first place, the plaintiffs are not parties to the contract contained in the writing; and it is a general rule, that no person can maintain an action of *assumpsit*, upon an agreement to which he is not a party; for in such case, there can be no contract express or implied. *Jordan* v. *Jordan*, Cro. Eliz. 369; *Crow* v. *Rogers*, 1 Str. 592; *Bourne* v. *Mason*, 1 Vent. 6. The construction to be put upon this letter is matter of law, and it ought not to pass to the jury without explanation from the court. 1 T. R. 172. This agreement, upon its face, clearly purports to be a contract between George De Wolf upon the one part, and James De Wolf, jr., upon the other. The words of the letter are to be explained according to their natural import; and we are not to go in search of conjectures, in order to extend them, when the meaning conveyed by the terms of the agreement is evident, and leads to no absurd conclusion. 3 Chitty on Com. & Mer. 107; Powell on Cont. tit. "Interpretation;" Vattel's Law of Nations 224. An express contract is gathered

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defendant on this subject, and to designate the vessel; which he accordingly did, and gave notice thereof to the defendant, and demanded the shipment of the sugars; this was amply sufficient. The authority reserved to George De Wolf, to direct in what vessel the shipment should be made, was for his benefit, which he might waive. He was not bound personally to designate such vessel; he might do this by his agent, and the authority given to Belknap was constituting him such agent for that purpose; and the act of Belknap in this respect, was, in judgment of law, the act of George De Wolf; and it is proof, that the vessel designated was in every respect fitted for the purpose. Nor was any objection made by the defendant, at the time, on this ground; but he declined making the shipment, because George De Wolf had not furnished him with funds to purchase the sugars; and the objection that the vessel was not designated by George De Wolf cannot now be set up. The act of his agent was his act, and the evidence, therefore, fully supports the contract as laid in the declaration.

5. The only remaining question is, as to the rule by which the damages are to be ascertained. Upon this subject much of the evidence which has been introduced on the part of the plaintiffs, and the various estimates and calculations which have been submitted to the jury, may be entirely laid aside, according to the view which I have taken of the question. I concur with the defendant's counsel on this point, that the measure of damages must be the value of the sugars in New York, at the time of the breach of the contract by the defendant, in refusing to make the shipment according to his contract. If this was a question between George De Wolf and the plaintiffs, for settling the account of the proceeds of the sugars, had they been shipped, it might have required the application of different principles. But the breach of the contract on the part of the defendant, consists in not making the shipment and consignment, according to his undertaking. He did not undertake to deliver the sugars to the plaintiffs at Marseilles. He had no concern with the transportation, or the expenses incident thereto. If he had shipped the sugars on board the vessel designated, consigned to the plaintiffs, his contract would have been complied with. The plaintiffs are accordingly entitled to recover the value of the sugars in New York, at the time when the defendant was bound by his contract to make the shipment. This amount the jury will ascertain from the evidence that has been offered them on that subject.

merely from the words of the parties themselves, who are bound to know the meaning which the law will attach to express words. It rests on no uncertain inferences of the probable meaning of the parties; but on the actual declaration of intention, made in direct terms. 3 Chitty on Com. & Mer. 3–4.

"The letter," judged by these rules, is plainly a contract between the defendant and George DeWolf, resting upon a consideration passing between *them*, and the insertion of the names of the plaintiffs was a mere direction, as to whose care the sugar when shipped should be committed. The plaintiffs are the mere agents or intended bailees of George De Wolf, and have no apparent interest in the subject-matter of the contract. The agreement is placed, by the terms made use of, entirely under the control of George DeWolf, who has the power of designating a vessel to receive the sugar. He is a party in fact, and a party in interest, and by complying with the terms of the agreement imposed upon him, he would have the right, and the sole right to seek an enforcement of the contract. The words "for my account," contained in the letter, prove that the agreement was not made with nor for the plaintiffs, and they have no authority for bringing an action in their own name, for a violation of the contract. This position may be supported by an analogy drawn from bills of lading. A bill of lading, expressed in
*490] the ordinary *form, transfers the property absolutely to the consignee, and he becomes, in legal contemplation, the owner of the goods. But if words are made use of, in the bill of lading, which show that the property of the shipment remains in the consignor, and that the consignee is the mere agent or factor of the consignor; then no action for a violation of the contract contained in the bill of lading, will lie in the name of the consignee; it must be brought in the name of the consignor. If the rights of the consignee, arising from advances made in expectation of the consignment, are violated, he has no remedy upon the contract, but must bring trover, or go into a court of equity. *Evans* v. *Martell*, 12 Mod. 156; 3 Chitty on Com. & Mer. 401, n. 2, n. 5; *Potter* v. *Lansing*, 1 Johns. 215; *Davis* v. *James*, 5 Burr. 2680; *Sargent* v. *Morris*, 3 B. & Ald. 277. The action must be brought in the name of the party who has the legal interest in the subject-matter of the contract; and a mere equitable right, if any exist, will not support an action upon an express agreement, to which the plaintiffs are not parties. If this sugar had been shipped, it would have been shipped as the property of George De Wolf, who would have been liable for freight, insurance and commissions. The property would have been at his risk; and in case of the bankruptcy of the plaintiffs, George De Wolf would have had the right to repay to them the advance received, and to stop the goods *in transitu*. "This not being an action for deceit and imposition, but on a written contract, the right of the plaintiffs to recover is measured precisely by that contract." *Tayloe* v. *Riggs* (*post*, p. 591).

2. The letter, upon its face, is plainly a contract between the defendant and George De Wolf. It is not negotiable, and the delivery of it, therefore, to the plaintiffs by George De Wolf, gives them no authority to maintain an action upon the agreement, in their own names. This instrument bears no analogy to a bill of exchange; not being made payable in money, and containing no operative words of transfer. It is a mere executory agreement to ship merchandise, and if valid, would only subject the defendant to dam

ages for its violation, as between the original parties. *Smith* v. *Smith*, 2 Johns. 240; *Jerome* v. *Whitney*, 7 Ibid. 321; *Coolidge* v. *Ruggles*, 15 Mass. 387. If this letter or order had been for the payment of money, but drawn in its present restricted form, it would not have entitled the plaintiffs to maintain an action, in their own names, upon the acceptance or special contract. No instrument in the form of a bill of exchange, was ever held to be negotiable, unless in some substantial form made payable to *order* on the face of it. The law, as laid down in the case of *Hill* v. *Lewis*, 1 Salk. 133, has always been adhered to. (See *Gerard* v. *La Coste et al.*, 1 Dall. 194; **Downing* v. *Backenstoes*, 3 Caines 137; *Stevens* v. *Hill*, 5 Esp. 247.) [*491

3. This letter being a contract being between George De Wolf and the defendant, is, as between the original parties, *nudum pactum*, for the want of mutuality and void. George De Wolf was not bound to designate a vessel, nor to receive the sugar; and it is a universal rule, that a contract cannot bind one party and not the other. "A promise may be voluntary, but an agreement, to be binding, must contain a mutual engagement." *Lyon* v. *Lamb*, Fell on Mer. Guar. 336; 1 Roll. Abr. 23; Co. Litt. 55 *a*; *Doe* v. *Smith*, 2 T. R. 438; *Clayton* v. *Jennings*, 2 W. Bl. 706; *Paine* v. *Cave*, 3 T. R. 148; *Cooke* v. *Oxley*, Ibid.; *Wain* v. *Warlters*, 5 East 16; *Kingston* v. *Phelps*, Peake's Cas. 227; *Tucker* v. *Wood*, 12 Johns. 190; *Parkhurst* v. *Van Cortlandt*, 1 Johns. Ch. 282; *Jennings* v. *Reynolds*, 3 Brod. & B. 13; *Wood* v. *Edwards*, 19 Johns. 211; *McLemore* v. *Powell*, 12 Wheat. 557; 2 Bl. Com. 447; 1 Fonbl. Eq. 383, note *a*, vol. 3, 129; 4 T. R. 764–5; 7 Ibid. 129–31; 7 Bro. P. C. 184.

4. But if the agreement be not void for want of mutuality; still, payment of the value of the sugar to the defendant, is a condition precedent to his undertaking to ship, clearly implied from the face of the instrument, and should have been averred in the declaration. Chit. Pl. 314–15; 1 Wms. Saund. 320, note 4, at the end; Com. Dig. tit. Pleader, C. 51; 1 T. R. 645; 7 Ibid. 121; 1 Saund. 319, 320; 1 East 203, 208, 619; *Cowper* v. *Andrews*, Hob. 41; 1 H. Bl. 363.

5. The contract of the defendant, relative to the shipment of the sugar, was entirely in writing, and is contained in the letter of November 15th, 1825. If this agreement is free from ambiguity, so as to be capable of a sensible exposition, from its own terms, without reference to extrinsic matters, *dehors* the instrument itself; then, no parol evidence can be introduced, to vary the terms of the agreement, or to change the parties thereto. *Clarke* v. *Russell*, 3 Dall. 421; *Gunnis* v. *Erhart*, 1 H. Bl. 289; *Coker* v. *Guy*, 2 Bos. & Pul. 565; *Thompson* v. *Ketcham*, 8 Johns. 189; *Gilpins* v. *Consequa*, Pet. C. C. 87; *Dean* v. *Mason*, 4 Conn. 428; *N. Y. Ins. Co.* v. *Thomas*, 3 Johns. Cas. 1; *Jackson* v. *Troy*, 12 Johns. 427; 11 Mass. 27; 2 Bro. C. C. 219; Peake's Ev. 117; *Vandervoort* v. *Columbia Ins. Co.*, 2 Caines 155; *Mumford* v. *McPherson*. 1 Johns. 418; *Brigham* v. *Rodgers*, 17 Mass. 571; *Powell* v. *Edmunds*, 12 East 10; *Jackson* v. *Sill*, 11 Johns. 216; *Parkhurst* v. *Van Cortlandt*, 1 Johns. Ch. 283; *Hampshire* v. *Pierce*, 2 Ves. 216; *Jackson* v. *Hart*, 12 Johns. 77; *Grant* v. *Naylor*, 4 Cranch 224.

6. But if there be any doubt upon this subject, and the parol evidence be admitted to explain the agreement, then we say, that neither the parol proof, nor "the letter" taken in connection *with the parol [*492

proof, can sustain the plaintiff's declaration. (1.) Because there is no proof upon the record, that the defendant ever made the promise set forth in the declaration, either to or for the plaintiffs; but on the contrary, the evidence is conclusive, that the very promise, claimed by the plaintiffs to have been made to them and for their benefit, was made by the defendant to George De Wolf, and for his benefit. The defendant having moved for a nonsuit at the trial, has a right to examine the testimony upon this point, at this time, in the same manner as upon the original motion. If the testimony offered in evidence by the plaintiff, be insufficient, in point of law, to sustain his declaration, the defendant has a right to call upon the court to nonsuit the plaintiff. *Swift* v. *Livingston*, 2 Johns. Cas. 112; *Clements* v. *Benjamin*, 12 Johns. 298; *Pratt* v. *Hull*, 13 Ibid. 298; *Crookshank* v. *Gray*, 20 Ibid. 350.

(2.) The consideration upon which the defendant's promise was made, is entirely different from that set forth in the declaration, and this is a fatal variance. *King* v. *Robinson*, Cro. Eliz. 79; 1 Com. Dig. 334, tit. Action upon the Case upon Assumpsit.

(3.) Were there any doubt upon these points, the defendant ought to have been permitted to remove them by the testimony of Mr. Bull. If it be contended, that this promise, although not made directly to the plaintiffs, was nevertheless made to George De Wolf, for their benefit; then, the testimony offered by the defendant at the trial, ought to have been received to contradict this assertion.

(4.) But the promise contained in the letter, if made *to* George De Wolf, for the benefit of the plaintiffs, will not sustain the declaration, unless he can be considered as the mere agent of the plaintiffs; and this supposition is contradicted, not only by the words of the instrument itself, but by the plaintiffs' own witness. [The counsel here referred to and commented on the following cases: *Dutton* v. *Poole*, 2 Lev. 210; *Schemerhorn* v. *Vanderheyden*, 1 Johns. 139: *Felton* v. *Dickinson*, 10 Mass. 287; *Piggott* v. *Thompson*, 3 Bos. & Pul. 149, and the note; *Martin* v. *Hynd*, Cowp. 437; *Com. of Feltmakers* v. *Davis*, 1 Bos. & Pul. 102; 3 Salk. 234; Comb. 450; 3 T. R. 757; 1 Chit. on Pl. 4; 1 Com. Dig. 309, and note *p*, tit. Action upon the Case upon Assumpsit.] Indeed, in the case of a written contract *inter partes*, no other than an immediate party to the instrument itself, can maintain an action upon it. *Offley* v. *Ward*, 1 Lev. 235; *Gilbey* v. *Copley*, 3 Ibid. 139; *Salter* v. *Kingsley*, Carth. 77.

If George De Wolf was the agent of the plaintiffs, then they are bound by his acts, and must place the proceeds of the bills of exchange in the
*493] hands of the defendant, according to George *De Wolf's express promise, before he will be under any obligation to ship the sugar.

7. No vessel has ever been designated by George De Wolf, on board of which the defendant has been required, by George De Wolf, to ship the sugar; and until such designation, no right of action will accrue in favor of any person against the defendant. The letter of George De Wolf, dated December 27th, 1825, and addressed to A. E. Belknap (relied upon by the counsel for the plaintiffs, to prove an authority in Belknap to designate a vessel, as the agent of George De Wolf), is insufficient for that purpose. It gives Belknap no such authority; and besides, George De Wolf had no right, legal or moral, after his bankruptcy, and after failing to place funds in the hands

of the defendants, either for the purchase or payment of the sugar, to call upon him to ship the same, consigned to the plaintiffs at Marseilles.

8. The agreement of the defendant relative to the shipment of the sugar, if made with the plaintiffs at all, was collateral to an undertaking on the part of George De Wolf, that he would cause the sugar to be shipped by the defendant, in consideration of an authority to be given to him to draw bills of exchange upon the plaintiffs, for his own benefit. For the non-fulfilment of this promise, George De Wolf was and is liable, and the defendant's undertaking is essentially a guarantee, given in aid of George De Wolf's credit, or for the performance of an act which he was bound by a promise, confessedly original, to perform. From the performance of this promise, George De Wolf has never been exonerated, and the defendant's undertaking is collateral to that of George De Wolf.(*a*) The testimony of the plaintiffs is, therefore, inadmissible, under the statute of frauds, to prove their declaration, for the want of a sufficient memorandum of the agreement in writing. Whatever doubts may have existed upon this subject, it is now well settled, that in cases under the statute of 29 Car. II., c. 3, § 4 (1 N. Y. Rev. Laws 78, ch. 44, § 11), the consideration upon which the agreement rests as well as the promise itself, must appear upon the writing. *Wain* v. *Warlters*, 5 East 16; *Lyon* v. *Lamb*, Fell on Guar. 336; *Saunders* v. *Wakefield*, 4 B. & Ald. 595; *Jenkins* v. *Reynolds*, 3 B. & Bing. 14; *Sears* v. *Brink*, 3 Johns. 211; *Leonard* v. *Vredenburg*, 8 Ibid. 27; *Stewart* v. *McGuin*, 1 Cow. 99; *Sloan* v. *Wilson*, 4 Har. & Johns. 322; *Stephens, Ramsay & Co.* v. *Winn*, 2 Nott & McCord 372.

* *Webster* and *King*, for the defendants.—1. As this cause is brought here by a writ of error, we apprehend, that the court will not [*494 go into an examination of the weight of testimony. The verdict of the jury is conclusive, that the defendant made the agreement stated in the plaintiffs' declaration. It is unnecessary now to inquire, what was the agreement between the defendant and George De Wolf, or whether that agreement could be enforced; and it was equally so, at the trial, unless that agreement was brought home to the knowledge of Belknap, so as to become a part of the defendant's contract with the plaintiffs.

2. But aside from the verdict, the testimony proved the contract as laid in the declaration. If we put the case upon the verbal agreement between the parties, if we contend that we may (3 Dall. 300), then, the testimony of George De Wolf clearly made out our case. The letter is only corroborative of the verbal agreement. If we go upon the written contract, as contained in the letter of the 15th November 1825, then, we contend, that the written agreement is, in its terms, as much an agreement with the plaintiffs as with George De Wolf, and may inure to their benefit. If the letter had not expressed, that the sugars were to be shipped for the account of George De Wolf, the agreement of the defendant would have been a mere undertaking with the plaintiffs.

But for the purpose of this action, it is sufficient, that the agreement

(*a*) Buckmyn *v.* Darnall, 2 Ld. Raym. 1085; Anderson *v.* Hayman, 1 H. Bl. 120; Gordon *v.* Martin, Fitzg. 302; Matson *v.* Wharam, 2 T. R. 80; Jones *v.* Ballard, Chase *v.* Day, 17 Johns. 114; Buller's N. P. 280, 281; Jackson *v.* Rayner, 12 Johns 291.

contained in the letter of the 15th November, was in fact made and entered into by the defendant, for the use and benefit of the plaintiffs. That it was so, was fully proved. They advanced the consideration of the undertaking, on the faith of its being performed; and the defendant, at the time when he signed the letter, knew, that it was to be delivered to Mr. Belknap, who, on its credit, would authorize George De Wolf to draw the bills. It was not necessary, in order to entitle the plaintiffs to maintain their action, that George De Wolf should have been a mere agent without interest. The cases cited do not support the position of the counsel. The rule is, that if the promise is made to A. for the benefit of B., from whom that consideration moves, the law will intend that A. is the mere agent of B. (1 Com. Dig. Action on the Case, Assumpsit, E. and note; *Weston* v. *Barker*, 12 Johns. 276; *Lawrason* v. *Mason*, 3 Cranch 492.)

3. The main question, and that which involves the merits of this cause, arises upon that part of the charge of the learned judge, in which he instructs the jury, "that if the undertaking of the defendant was entered into, at the same time with that between Belknap and George De Wolf, so as to form one entire *transaction, then, the consideration of the defendant's undertaking might be proved by parol." It is conceded, that if the undertaking of the defendant was original, and not within the statute of frauds, parol evidence of the consideration was admissible. If the consideration be stated in connection with the written agreement, the undertaking is in its terms direct to the plaintiffs, and nothing more remains to be supplied by parol evidence. But if it were necessary, parol evidence was admissible to prove the *res gestæ*, and purpose of that letter and agreement. *Bateman* v. *Phillips*, 15 East 272; 7 Taunt. 295; 5 Wheat. 326.

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But it is contended, that the undertaking of the defendant (if an undertaking to the plaintiffs) was a collateral agreement, within the statute of frauds; and that the consideration as well as the promise, must be in writing, in order to be binding upon the defendant. Admitting the law to be now settled by the English cases, as we say it ought not to be, we contend, that if the general proposition which was first laid down by Lord Ellenborough in the case of *Wain* v. *Warlters*, can be maintained, still our case cannot, in any view of it, be brought within the principle of that case. In *Wain* v. *Warlters*, the defendant undertook to pay the previously subsisting debt of another person, upon a new consideration—that the plaintiff would forbear to sue. In the present case, the jury have expressly found that the arrangement between Mr. Belknap and George De Wolf, as to the authority to draw on the house in Marseilles, on the shipment and consignment of the sugar, and the undertaking of the defendant to make that shipment, were made and entered into at one and the same time, so as to form one entire transaction; and that the authority given by Mr. Belknap to George De Wolf to draw on the plaintiffs for 100,000 francs, was the consideration of the entire agreement. If, then, the undertaking of the defendant was collateral, and within the statute of frauds, it was simultaneous with the original undertaking, and supported by the same consideration; and upon the authority of *Leonard* v. *Vredenburg*, 8 Johns. 29, the parol evidence of the consideration was admissible. *Leonard* v. *Vredenburg* was decided upon deliberate consideration, and has been followed and confirmed in the subsequent cases (*Bailey* v. *Freeman*, 11 Johns. 221. *Nelson* v.

Dubois, 13 Ibid. 175), and it is regarded as settled law, in the state of New York.

4. The undertaking of the defendant was not collateral in any sense; but was an original undertaking, exclusively his, and need not have been in writing. By agreeing to ship the sugars and to consign them to the *plaintiffs, on the account of George De Wolf, the defendant did not undertake to pay any debt of George De Wolf, then existing, or about to be created. The defendant was the only person who undertook or was bound to make the shipment. He did not engage that George De Wolf should ship the sugars, or that he would ship, on the default of George; but he assumed the entire and exclusive responsibility of providing and shipping the five hundred boxes, according to the terms of the letter. [*496

5. The letter from George De Wolf to Mr. Belknap, dated at Bristol, on the 27th December 1828, constituted Mr. Belknap the agent of George De Wolf for the purpose of naming the vessel, on board of which the defendant was to make the shipment. It was intended as an authorization for that purpose, and was regarded as such, both by Mr. Belknap and the defendant. But whatever objection might have been made by the defendant, either to the sufficiency of that authority, or to the right of George De Wolf, after his bankruptcy, either to name the vessel, or to authorize Mr. Belknap, or any other person to do so, they were waived by the defendant, in his letter to Mr. Belknap, under the date of the 6th of January 1826, wherein he puts his refusal to ship the sugars, on the single ground, that they had not been paid for.

Story, Justice, delivered the opinion of the court.—Messrs. Rabaud, Brothers & Co., of Marseilles, brought a suit in the circuit court of the southern district of New York, against James De Wolf, jun. (the plaintiff in error), to recover damages, for not shipping them 500 boxes of sugar, on account of one George De Wolf, according to an agreement entered into by him with them. The declaration contained four counts, and in each of them the substance of the contract stated, is, that the defendant, in consideration that one Belknap (one of the partners in the house of Rabaud, Brothers & Co.) would authorize George De Wolf to draw on the plaintiffs for 100,000 francs, undertook and promised, that he would ship, for the account of George De Wolf, on board such vessel as he, George De Wolf, should direct, five hundred boxes of white Havana sugar, consigned to the plaintiffs, at Marseilles. The declaration then proceeds with the proper averments and breaches necessary to maintain the action. Upon the trial, under the general issue, the jury found a verdict for the plaintiffs, and judgment was given for them accordingly. The cause now comes before this court upon a writ of error, and bill of exceptions taken at the trial.

The bill of exceptions is voluminous, and contains, at large, the evidence admitted at the trial, as well as the charge of the *learned judge who presided at the trial. It is unnecessary to refer to that evidence, or to consider its nature, bearing and extent, upon which so ample a comment has been made at the bar, except so far as it applies to some question of law decided by the court, to which an exception has been taken. The whole facts were left open to the jury, and so far as they were imperfect or incon- [*497

clusive, the defendant has had the full opportunity of addresing his views to the jury, and they have found their verdict against him.

In the progress of the trial, a letter of the 27th December 1825, written by George De Wolf to Belknap, was offered by the defendant in evidence, for the purpose of showing an authority from George De Wolf to Belknap, to direct or name a vessel to the defendant, on board of which the sugars might be shipped. The defendant objected to its admission, and the objection was overruled; this constitutes the first ground of error, now insisted on by the defendant. We are of opinion, that the letter was rightly admitted, for both of the reasons stated in the charge. It was evidence of such an authority; and the defendant made no objection to it, at the time, on account of any insufficiency in this respect: but put his defence, by his letter of the 5th of January 1826, on an entirely distinct ground.

After the evidence for the plaintiffs was closed, the defendant moved for a nonsuit, which motion was overruled. This refusal certainly constitutes no ground for reversal in this court. A nonsuit may not be ordered by the court, upon the application of the defendant, and cannot, as we have had occasion to decide, at the present term, be ordered in any case, without the consent and acquiescence of the plaintiff. *Elmore* v. *Grymes* (*ante*, p. 469).

In the further progress of the trial, upon the examination of one Frederick G. Bull, a witness for the defendant, the counsel for the defendant offered to prove, by Bull, that it was an express understanding and agreement between the defendant and George De Wolf, at the time the letter of the 15th November 1825 (which will be hereafter more particularly noted) was signed by the defendant, that the latter should furnish the defendant with the funds necessary for the purchase of the sugar, before the defendant would be under any obligation to ship the same. This testimony was rejected by the court, unless it should also appear that Belknap was party thereto, or that the same was brought home to his knowledge. We can perceive no error in this decision. If the defendant had entered into the contract with the plaintiffs, stated in the declaration, and the private arrangement made between the defendant and George De Wolf, constituted no part of that contract, and was unknown to them, it certainly ought not to prejudice their rights. It was *res inter alios acta;* and had no
*498] *legal tendency either to disprove the plaintiffs' case, or to exonerate the defendant from his liability.

The other exceptions are exclusively confined to the charge given to the jury, upon the summoning of the court, upon points of law. The first objection was to the sufficiency of the evidence to establish the citizenship of Belknap, as averred in the declaration. This is now waived by the counsel, and, indeed, could not now be maintained, because it has been recently decided by this court, upon full consideration, that the question of such citizenship constitutes no part of the issue upon the merits, and must be brought forward by a proper plea in abatement, in an earlier stage of the cause.

The great question upon the merits, arises upon that part of the charge, which relates to the agreement contained in the letter of the 15th of November 1825, from George De Wolf to the defendant, and the accompany-

ing assent of the letter, with reference to the statute of frauds. That letter is in the following terms :

New York, 15th November 1825.

Mr. James De Wolf, Jun.

Dear Sir :—You will please ship for my account, on board such vessel as I shall direct, five hundred boxes white Havana sugar, consigned to Messrs. Rabaud, Brothers & Co., Marseilles, and oblige your friend and obedient servant, (Signed) George De Wolf.

Agreed to—(Signed) James De Wolf, Jun.

Upon this part of the case, the charge was as follows : "It is said, that this letter, under the statute of frauds, does not purport on its face to contain any binding contract on the part of the defendant, and that the defects cannot be supplied by parol evidence. This objection I think cannot be sustained. The first question to be settled, and which is matter of fact for your determination is, whether the arrangement between Belknap and George De Wolf, as to the authority to draw on the house in Marseilles, on the shipment and consignment of five hundred boxes of sugar, and the undertaking of the defendant, were made and entered into at one and the same time, so as to form one entire transaction." The judge then proceeded to sum up the evidence on this point, and added, "the consideration for this undertaking was the authority given by Belknap to George De Wolf, to draw on the plaintiffs for one hundred thousand francs. This consideration, it is true, although fully proved, is not expressed in the written contract. And one question is, whether it can be supplied by parol evidence ; and I think it may, if the undertaking of the defendant was entered into at *the same time, with that between Belknap and George De Wolf, so as to form one entire transaction. The evidence does not, in any [*499 manner, contradict the written agreement, and is perfectly consistent with it. As between the plaintiffs and George De Wolf, the consideration might be clearly supplied by parol proof ; and if the undertaking of the defendant was at the same time, it required no consideration from the plaintiffs to him, the consideration to George De Wolf was sufficient to uphold and support the contract of the defendant." And he finally stated, that if he was mistaken in this view of the evidence, "and the jury should be of opinion, that the contract between Belknap and George De Wolf was completed, and unconnected with the engagement of the defendant, before he undertook to make the shipment and consignment, then the evidence was not sufficient to maintain the present action. It will then be a collateral undertaking, made subsequent to the principal contract, and would require some other consideration than that which supported the principal contract."

The question, then, so far as it was a question of fact, whether the defendant did enter into the asserted agreement with the plaintiffs, and whether it was a part of the original arangement with George De Wolf, and upon the original consideration moving from the plaintiffs, was before the jury, and they have found in the affirmative. The question of law remains, whether this was a case within the statute of frauds, so as to prevent paro' evidence from being admissible, to charge the defendant ?

The statute of frauds of New York is a transcript, on this subject, of the statute of 29 Car. II., c. 3 : it declares, "that no action shall be brought

to charge a defendant on a special promise for the debt, default or miscarriage of another, unless the agreement, or some memorandum or note thereof, be in writing, and signed by the party, or by any one by him authorized." The terms "collateral" or "original" promise, do not occur in the statute, and have been introduced by courts of law, to explain its objects and expound its true interpretation. Whether, by the true intent of the statute, it was to extend to cases where the collateral promise (so called) was a part of the original agreement, and founded on the same consideration, moving at the same time between the parties, or, whether it was confined to cases, where there was already a subsisting debt and demand, and the promise was merely founded upon a subsequent and distinct undertaking, might, if the point were entirely new, deserve very grave deliberation. But it has been closed within very narrow limits, by the course of the authorities, and seems scarcely open for general examination; at least, in those states where
*500] the English authorities have been fully *recognised and adopted in practice. If A. agree to advance B. a sum of money, for which B. is to be answerable, but at the same time, it is expressed upon the undertaking, that C. will do some act for the security of A., and enter into an agreement with A. for that purpose; it would scarcely seem a case of a mere collateral undertaking; but rather, if one might use the phrase, a trilateral contract. The contract of B. to repay the money, is not coincident with, nor the same contract with C. to do the act. Each is an original promise, though the one may be deemed subsidiary, or secondary to the other. The original consideration flows from A., not solely upon the promise of B. or C., but upon the promise of both, *diverso intuitu*, and each becomes liable to A., not upon a joint but a several original undertaking. Each is a direct, original promise, founded upon the same consideration. The credit is not given solely to either, but to both; not as joint contractors, on the same contract, but as separate contractors, upon co-existing contracts, forming parts of the same general transaction. Of that very nature is the contract now before the court; and if the intention of all the parties was, that the letter of the 15th of November should be delivered to Belknap, as evidence of the original agreement between all the parties, and indeed, as part execution of it, to bind the defendant, not merely to George De Wolf, but to the plaintiffs (and so it has been established by the verdict), then it is not very easy to distinguish the case from that which was put.

But assuming that the true construction of the statute of frauds is, as the authorities seem to support, and that such a promise would be within its purview; it remains to consider, whether the arguments at the bar do establish any error in the opinion of the circuit court. In the first place, there is no repugnance between the terms of that letter and the parol evidence introduced. The object of the letter was to establish the fact, that there was a sufficient consideration for the agreement; and what that consideration was, and also the circumstances under which it was written, as explanatory of its nature and objects. Its terms do not necessaraily import, that it was an agreement exclusively between George De Wolf and the defendant. If the paper was so drawn up and executed, by the assent of all the parties, for the purpose of being delivered to Belknap, as a voucher, and evidence to him of an absolute agreement by the defendant to make the shipment, and so was, in fact, understood by all the parties at the time;

there is nothing in its terms inconsistent with such an interpretation. The defendant agrees to the shipment. But with whom? It is said, with George De Wolf alone; but that does not necessarily follow, because it is not an instrument in its terms *inter partes*. If the parties intended that it should express the joint assent *of George De Wolf and the defendant, to the shipment, and it was deliverable to Belknap accordingly, as [*501 evidence of their joint assent that it should be made upon the terms and in the manner stated in it, there is nothing which contradicts its proper purport; and it is then, precisely, what the parties require it to be. It was for the jury to say, whether the evidence disclosed that as the true object of it; and to give it effect accordingly, as proof of an agreement in support of the declaration. The case of *Sargent* v. *Morris*, 3 Barn. & Ald. 277, furnishes no uninstructive analogy for its admission.

In the next place, was the parol evidence inadmissible, to supply the defect of the written instrument, as to the consideration, and *res gestæ*, between the parties? The case of *Wain* v. *Warlters*, 5 East 10, was the first case which settled the point, that it was necessary, to escape from the statute of frauds, that the agreement should contain the consideration for the promise, as well as the promise itself. If it contained it, it has since been determined, that it is wholly immaterial, whether the consideration be stated in express terms, or by necessary implication. That case has, from its origin, encountered many difficulties, and been matter of serious observation, both at the bar, and on the bench, in England and America. After many doubts, it seems, at last, in England, by the recent decisions of *Saunders* v. *Wakefield*, 4 Barn. & Ald. 595, and *Jenkins* v. *Reynolds*, 3 Brod. & Bing. 14, to have settled down into an approved authority. It has not, however, received a uniform recognition in America; although in several of the states, and particularly in New York, it has, to a limited extent, been adopted into its jurisprudence, as a sound construction of the statute. On the other hand, there is a very elaborate opinion of the supreme court of Massachusetts, in *Packard* v. *Richardson*, 17 Mass. 122, where its authority was directly overruled. What might be our own view of the question, unaffected by any local decision, it is unnecessary to suggest; because the decisions in New York, upon the construction of its own statute, and the extent of the rules deduced from it, furnish, in the present case, a clear guide for this court. In the case of *Leonard* v. *Vredenburg*, 8 Johns. 29, Mr. Chief Justice KENT, in delivering the opinion of the court, adverting to the fact, that that case was one of a guarantee, or promise collateral to the principal contract, but made at the same time, and becoming an essential ground of the credit given to the principal or direct debtor; added, "and if there was no consideration other than the original transaction, the plaintiff ought to have been permitted to show that fact, if necessary, by parol proof; and the decision in *Wain* v. *Warlters* did not stand in the way." One of the points in that case was, whether the parol proof *of the consideration [*502 was not improperly rejected at the trial; and the decision of the court was, that it ought to have been admitted. It is not, therefore, as was suggested, at the argument, a mere *obiter dictum*, uncalled for by the case. It was one, though not the only one, of the points in judgment before the court. The same doctrine has been subsequently recognised by the same court in *Bailey* v. *Freeman* 11 Johns. 221, and in *Nelson* v. *Dubois*, 13 Ibid. 175.

It does not seem necessary to pursue this subject further, because here is a clear authority, justifying the admission of the parol evidence, upon the principle of the local jurisprudence. It seems to us a reasonable doctrine, founded in good sense and convenience, and tending rather to suppress than encourage fraud. But whether so, or not, it sustains the opinion of the circuit court, in a manner entirely free from exception.

The next objection to the charge, founded on the variance between the declaration and proofs, has been abandoned at the argument, and need not be dwelt upon. And the last objection, to wit, to the designation of a vessel for the shipment as ineffectually made, has been already in part answered; and we entirely coincide with the views expressed on this point, by the circuit court.

Without, therefore, going more at large into the points of the case, or commenting upon the various authorities and principles so elaborately brought out in the disussions at the bar, it is sufficient to say, that we perceive no error in the judgment of the circuit court, and it is, therefore, to be affirmed, with costs.

Judgment affirmed.

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*503] *John Davis and others, Plaintiffs in error, *v.* Richard B. Mason, Lessee.

Lex loci rei sitæ.—Tenancy by the curtesy.—Execution of will.

In an action of ejectment to recover land in Kentucky, the law of real estate in Kentucky, is the law of this court, in deciding the rights of the parties. p. 505.

It seems, that the rigid rules of the common law do not require, that the husband shall have had actual seisin of the lands of the wife, to entitle himself to a tenancy by curtesy, in waste, or what is sometimes styled, "wild lands."[1] p. 505.

If a right of entry on lands exists, it ought to be sufficient to sustain the tenure acquired by the husband, where no adverse possession exists. p. 508.

At present, it is fully settled in equity, that the husband shall have curtesy of trust, as well as of legal, estates; of an equity of redemption, of a contingent use, or money to be laid out in lands.[2] p. 508.

Under the law of the state of Kentucky, and the decisions of their courts upon it, a will, with two witnesses, is sufficient to pass real estate; and a copy of such will, duly proved, and recorded in another state, is good evidence of the execution thereof. p. 508.

It is a settled rule, in Kentucky, that although more than one witness is required to subscribe a will, disposing of lands, the evidence of one may be sufficient to prove it. p. 502.

Error to the Circuit Court of Kentucky. The lessee of Richard B. Mason commenced an action of ejectment, in the circuit court for the district of Kentucky, against John Davis and others, tenants in possession, for the recovery of 8000 acres of land, claiming to recover the same under a right of entry, under and by virtue of, a grant from the state of Virginia to George Mason, of Fairfax, dated 19th of March 1817.

William Mason and others conveyed, by deed, their interest in and to the land in contest (they being children of the patentee), to George Mason, of Lexington, the eldest son of George Mason the patentee. George Mason, the grantee, and the father of the lessor, died the —— day of December

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[1] Beekman *v.* Sellick, 8 Johns. 262; Buchanan *v.* Duncan, 40 Penn. St. 82.

[2] See Dubs *v.* Dubs, 31 Penn. St. 149; Van Rensselaer *v.* Dunkin, 24 Id. 252.

1796, having first made his last will and testament; in a codicil to which, made on the 3d of November 1796, he devised to the child of which his wife was then *enciente*, his Kentucky lands, "if the child should be born alive, and arrive at the age of twenty-one years, or married, whichever may first happen." Richard B. Mason, the lessor of the plaintiff, was, by the evidence in the cause, the posthumous child referred to in the codicil. This will was fully proved, and admitted to record, according to the laws of Kentucky, and was said to vest the title in Richard B. Mason.

At the trial of the cause in the circuit court, the plaintiffs in error requested the court, by instruction to the jury: 1st. *To exclude the depositions of Lund Washington and George Graham, on the alleged [*504 ground, that they were not taken and certified according to law. 2d. To exclude what the defendants designated as "the third codicil" annexed to the will of George Mason, which it is said, was not proved and certified according to law. 3d. That the plaintiff could not recover, unless he could show that the land sued for, was entered, after George Mason, the elder, made his will, and not patented at his death. 4th. That if, from the evidence, they believed that the daughters of the patentee were dead, before the commencement of this suit, they should find for the defendants, as the deed from the husbands did not pass the interest of the *femes;* nor had the husbands a right by curtesy to the lands, as they never had other or further possession of the lands than that given by deed. The court refused to give the several instructions prayed for, and a bill of exceptions was tendered, upon which the case was brought before this court. The facts of the case which appeared upon the record, in connection with the matters contained in the exceptions, are stated in the opinion of the court.

The defendants in error insisted: 1st. That the court should have excluded the third codicil; it was not, upon proof, ordered to be recorded by the county court of Fairfax county; it is not certified, as having been proved, and ordered, or admitted to record; it was not proved upon the trial, by any admissible and competent proof, to have been executed by George Mason. 2d. That there was no competent proof upon the trial, that the lands in contest passed by conveyance to George Mason. It does not appear, that they were not patented, before the date of the will of George Mason, and otherwise disposed of by him in his will. The plaintiff should have proved that the lands were acquired by the said George Mason, after his will, and not having done so, the court should have given the instructions asked for, on that point, by defendants. 3d. The court erred in stating to the jury, that the deed conveyed to George Mason, the curtesy right of the husbands of the *femes covert*, daughters of George Mason, sen. 4th. The court erred in refusing to give the instructions asked for by defendants, upon the other points stated in the bill of exceptions.

The case was argued by *Rowan*, for the plaintiffs in error; and by *Wickliffe*, for the defendant in error. In reference to the rights of the husbands in the estates of their wives, Mr. Wickliffe cited 3 Bos. & Pul. 643.

*Johnson, Justice, delivered the opinion of the court:—The [*505 plaintiffs here were defendants below, to an action of ejectment, brought to recover 8000 acres of land, lying in the state of Kentucky. The

law of real estate in Kentucky, therefore, is the law of this court, in deciding on the rights of the parties.

The plaintiffs below derive title under, 1st, a patent to George Mason, of Gunston, issued in 1787 ; 2d, a deed of bargain and sale, from seven out of nine legal representatives of the patentee, their brother, to George Mason of Lexington, executed in 1794 ; 3d, a codicil to the will of George Mason of Lexington, devising the premises to the lessor of the plaintiffs. Judgment was rendered for plaintiffs, to recover eight-ninths of the premises. The defendants below relied on their possession, affecting to claim through the patent to the elder Mason ; but adducing no evidence to connect themselves with it. The questions to be here decided are brought up by a bill of exceptions, taken by the defendants below ; and they will be considered, as they regard the deduction of title, in the order in which they have been stated above.

The first question, in this order, relates to the deed executed by the representatives of Mason, the elder, to Mason, the younger ; under whose will the lessor of the plaintiffs makes title. No exception was taken to the proof, upon which this deed went to the jury. The exceptions go to the nature and extent of the estate which passed under it. And first, it was insisted, that it could pass nothing, unless the plaintiffs should show, that the land sued for was entered, after George Mason, senior, made his will, and not patented at his death ; on the ground, that, otherwise, it passed under his will, and did not descend to these donors. But it is obvious, that this instruction was properly refused, since the fact nowhere appears in the record, that the elder Mason ever made a will, competent in law to transfer real estate. The deed, it is true, purports to carry into effect his intentions towards his children ; but *non constat*, whether that intention had ever been signified, otherwise than by parol, or by an informal will. If a will had ever been executed, with the formalities necessary to defeat the heir-at-law, the defendants should have availed themselves of it by proof.

The next instruction prayed for by defendants, and rejected by the court, was, "that if, from the evidence, the jury believed, that the daughters of the patentee were dead, before the suit was brought, that then, they ought to find for defendants, as to the undivided interest of such daughters, and that the deed did not pass their interest. The court instructed the *jury, *506] that the deed did not pass the interest of the daughters, but passed the interest of their husbands, who were tenants by the curtesy, although they had never had other or further possession of the land, than what they acquired by deed. To understand this part of the bill of exceptions, it is necessary to notice, that from the record it appears, that among the parties of the first part to the deed to G. Mason, the younger, were four daughters of G. Mason, the elder, and their husbands ; that the daughters had formally executed a release of inheritance, under a commission issued from a court in Virginia ; but because the states were then separated, as a judicial proceeding, it had no validity as to lands in Kentucky ; and the lessor of the plaintiffs was compelled to stand upon the interest conveyed to him by the deeds of the husbands, as tenants by the curtesy.

In order to prove the pedigree of the donors, the marriage, birth of issue, &c., and of the sons-in-law of the elder Mason, the testimony of two witnesses was introduced by plaintiffs, taken under the act of congress. To

the introduction of this testimony, an objection was made and overruled; and this constituted another ground of exception, which, however, has been very properly waived by the counsel, in argument here. It appears, that the requisitions of the act have been well complied with. This testimony, besides establishing the pedigree, marriage and birth of issue, &c., of the husbands and their wives, and identity of the lessor of the plaintiffs, as devisees of G. Mason, the younger, also goes to prove the death of some, if not of all the daughters; and the exception is intended to raise the question, whether, in the absence of evidence of actual seisin, the husbands had good estates as tenants by the curtesy, in the portions of the land belonging to their respective wives; if they had not, then, by the death of their wives, their estates were determined. To repel this objection to the vesting of the estate by the curtesy, evidence is introduced into the bill of exceptions, to prove, that "the adverse possession of the premises, relied on by the defendants, did not commence, until after the execution of the deed, and after the death of George Mason;" in other words, that the land was waste, or as is sometimes styled, "wild lands," at the time of executing the deed, and at all times before and down to the time of the devise, from George Mason, jr., to the lessors of the plaintiff, took effect.

It is believed, that the rigid rules of the common law have never been applied to a wife's estate in lands of this description. In the state of New York (8 Johns. 271), these rules have been solemnly repelled; and we know of no adjudged case, in any of the states, in which they have been recognised as *applicable. It would, indeed, be idle, to compel an heir or purchaser, to find his way to pathless deserts, into lands still overrun [*507 by the aborigines, in order to "break a twig," or "turn a sod," or "read a deed," before he could acquire a legal freehold. It may be very safely asserted, that had a similar state of things existed in England, when the Conqueror introduced the tenure; the necessity of actual seisin, as an incident to the husband's right, would never have found its way across the channel. It is true, that Perkins and Littleton, and other authors of high antiquity, and great authority, lay down the necessity of actual seisin, in very strong terms, and exemplify it, by cases, which strikingly illustrate the doctrine. But even they do not represent it as so unbending as to be uncontrolled by reason. The distinction is taken, between things which lie in livery, and things which lie in grant; and with regard to the latter, the seisin in law, is enough, because they admit of no other; and as Lord Coke observes, "the book says, it would be unreasonable, the husband should suffer, for what no industry of his could prevent;" and further, "that the true reason is, that the wife has those inheritances which lie in grant, and not in livery, when the right first descends upon her, for she hath a thing in grant, when she has a right to it, and nobody else interposes to prevent it." And in another place, he says, "a husband shall be tenant by curtesy, in respect of his wife's seisin in law, where it was impossible for him to get an actual seisin," for "the favor which the law shows to the husband that has issue by his wife, shall not be lost, without some default in him." So, when describing what is livery of seisin, and defining the distinction between livery in deed, and livery in law, he says of the latter, "if the feoffee claims the land, as near as he dares to approach it, for fear of death or battery, such entry, in law, shall execute the livery in law." And as a proof

that even in his time, the common law had begun to untrammel itself of the rigorous rule, that livery of seisin, or entry, was indispensable to vesting a freehold, the fact may be cited, that livery of seisin was held unnecessary to a fine, devise, surrender, release or confirmation to lessee for years. The mode of conveyance, by lease and release, and some other modes, it is well known, arose out of an effort to disembarrass the transfer of titles of an idle form, which had survived the feudal system.

As it relates to the tenure by the curtesy, the necessity of entry grew out of the rule, which invariably existed, that an entry must be made, in order to vest a freehold (Co. Litt. 51) ; and out of that member of the definition of the tenure by curtesy, which requires that it should be inheritable by the issue. When a descent was cast, the entry of the mother was necessary, or the *heir made title direct from the grandfather, or other
*508] person last seised. But in Kentucky, we understand, the livery of seisin is unheard of. Freeholds are acquired by patent, or by deed, or by descent, without any further ceremonies ; and in tracing pedigree, the proof of entry, as successive descents are cast, is never considered as necessary to a recovery ; or in any mode affecting the course of descent.

If a right of entry, therefore, exists, it ought, by analogy, to be sufficient to sustain the tenure acquired by the husband, where no adverse possession exists ; as it is laid down in the books relative to a seisin in law, "he has the thing, if he has a right to have it." Such was not the ancient law ; but the reason of it has ceased. It has been shown, that in the most remote periods, exceptions had been introduced on the same ground ; and in the most modern, the rule has been relaxed upon the same consideration. We ought not to be behind the British courts in the liberality of our views, on the subject of this tenure. A husband, formerly, could not have curtesy of a use ; that is, where his wife was *cestui que use* (Perkins, Curtesy, fo. 89), and this continued to be the law, down to the time of Baron Gilbert (Law of Uses and Trusts 239); at present, it is fully settled in equity, that the husband shall have curtesy of a trust, as well as of a legal estate (2 Vern. 536 ; 1 P. Wms. 108 ; Atk. 606); of an equity of redemption ; a contingent use ; or money to be laid out in lands. The case made out in the bill of exceptions, is one in which there could not possibly have been any default in the husbands, since the disseisin by defendants, did not take place until after the death of George Mason, jr., and of consequence, after the transfer of title by the husbands, and after the devise took effect in favor of the plaintiff's lessor.

These points being disposed of, it only remains to consider the questions raised upon the introduction of the will of George Mason, jr., or rather of the codicil, under which the lessor of the plaintiffs makes title. Under a law of the state of Kentucky, and the decision of their courts upon it, a will with two witnesses, is sufficient to pass real estate ; and the copy of such a will, duly proved and recorded in another state, is good evidence of the execution of the will. The objection here is, that it does not appear from the exemplified copy, that this codicil was duly proved ; because the probate does not go to that codicil, but to another ; and secondly, because it appear to have been admitted to record, on the testimony of a single witness.
*509] *The probate purports "that the two codicils were proved by the oath of Daniel McCarty." From the exemplification, it appears, that

at three several dates, the testator added to his will, what he calls codicils, but as there is no signature to the first, we are satisfied, that the first and second were well considered as making but one ; and therefore, that the probate, although purporting to go to two codicils only, was well considered as going to this ; which but for the want of the signature to the first, could have been the third codicil. What is decisive on this subject, is, that the first two codicils have no subscribing witness, distinct from the last ; and the name of McCarty, the witness sworn, is subscribed to the second, or as the defendants contend it should be considered, to the third codicil.

With regard to the second exception to the sufficiency of the proof of this codicil, it can only be necessary to resort to adjudged cases, as they seem conclusive to this point. There were two witnesses to this codicil, to wit, Thompson Mason and McCarty. McCarty only was sworn, and the probate upon which it was ordered to be recorded, imports, that the two codicils were proved by the oath of Daniel McCarty. In the case of *Harper et al.* v. *Wilson et al.*, decided in the court of appeals of the state of Kentucky, in 1820, in which the right to lands was in controversy, the probate was in these words, "this will was produced in court, proved by the oath of Sarah Harper, a subscribing witness thereto, and ordered to be recorded." There was another subscribing witness to the will, and exception was taken to the sufficiency of the proof. The language of the court in that case was : "As to the proof of the execution of the will, it need only be remarked, that its admission to record, is sufficient to show that the witness by whom it was proven in that court, established every fact essential to its due execution ; and it is a settled rule, that although more than one witness is required to subscribe a will disposing of lands, the evidence of one may be sufficient to prove it." 2 A. K. Marsh. 467. The same doctrine has been since fully recognised in the case of *Turner* v. *Turner*, 1 Litt. 103, adjudged in the same court, in 1822 ; and the identity of the certificate and facts in this case with those in the case of *Harper* v. *Wilson*, leaves nothing for this court to deliberate upon.

There is spread upon the record, a considerable body of testimony, taken by the court by which the will had been previously admitted to record, and which, upon its face, appears to have been taken in order to remove all doubt on the sufficiency of the will, and authenticity of the attestations to it. But as it does not appear to have been followed up by any order *of that court, it was not taken into view in the bill of exceptions, and [*510 made no part of the evidence in the court below. It, therefore, only required this remark, in order to prevent any misapprehension on this point. We are of opinion, that there was no error in the judgment below, and that it be affirmed, with costs.

Judgment affirmed.

*American Insurance Company and Ocean Insurance Company (of New York), Appellants, *v.* 356 Bales of Cotton: David Canter, Claimant and Appellee.

Cession of territory by treaty.—Territorial legislation.—Jurisdiction.—Tenure of judicial office.

The constitution of the United States confers, absolutely, on the government of the Union, the power of making war, and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty. p. 542.

The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace; if it be ceded by treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed; either on the terms stipulated in the treaty of cession, or on such as its new master shall impose. On such transfer of territory, it has never been held, that the relations of the inhabitants with each other undergo any change; their relations with their former sovereign are dissolved, and new relations are created between them and the government which has acquired their territory; the same act which transfers their country, transfers the allegiance of those who remain in it, and the law which may be denominated political, is, necessarily, changed; although that which regulates the intercourse and general conduct of individuals, remains in force, until altered by the newly created power of the state.[1] p. 542.

The treaty with Spain, by which Florida was ceded to the United States, is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, right and immunities of the citizens of the United States; they do not, however, participate in political power; they do not share in the government, until Florida shall become a state; in the meantime, Florida continues to be a territory of the United States, governed by virtue of that clause in the constitution, which empowers "congress to make all needful rules and regulations, respecting the territory or other property belonging to the United States." p. 542.

The power of the territorial legislature of Florida extends to all righful objects of legislation; subject to the restriction, that their laws shall not be "inconsistent with the laws and constitution of the United States." p. 543.

All the laws which were in force in Florida, while a province of Spain, those excepted, which were political in their character, which concerned the relations between the people and their sovereign, remain in force, until altered by the government of the United States; congress recognises this principle, by using the words "laws of the territory now in force therein." No law could then have been in force, but those enacted by the Spanish government; if, among them, there existed a law on the subject of salvage, and it is scarcely possible there should not have been such a law, jurisdiction over it was conferred by the act of congress, relative to the territory of Florida, on the superior court; but that jurisdiction was not exclusive; a territorial act, conferring jurisdiction over the same cases, on an inferior court, would not have been inconsistent with the seventh section of the act, vesting the whole judicial power of the territory "in two superior courts, and in such inferior courts and justices of the peace, as the legislative council of the territory may from time to time establish." p. 544.

*512] *The eleventh section of the act declares, "that the laws of the United States relating to the revenue and and its collection, and all other public acts not inconsistent or repugnant to the act, shall extend to and have full force and effect in the territory of Florida." The laws which are extended to the territory, by this section, were either for the punishment of crimes, or for civil purposes; jurisdiction is given in all criminal cases, by the seventh section, but in civil cases, that section gives jurisdiction only in those which arise under and are cognisable by the laws of the territory; consequently, all civil cases arising under the laws which are extended to the territory by the eleventh section, are cognisable in the territorial courts, by virtue of the eighth section: and in those cases, the superior courts may exercise the same jurisdiction as is exercised by the court for the Kentucky district. p. 544.

The constitution and laws of the United States give jurisdiction to the district courts over all cases in admiralty; but jurisdiction over the case, does not constitute the case itself. p. 545.

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[1] United States *v.* Percheman, 7 Pet. 51; Leitensdorfer *v.* Webb, 20 How. 176; Palmer *v.* Low, 98 U. S. 15.

American Insurance Co. v. Canter.

The constitution declares, that "the judicial power shall extend to all cases in law and equity arising under it, the laws of the United States, and treaties made, or which shall be made, under their authority, to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction." The constitution certainly contemplates these as three distinct classes of cases, and if they are distinct, the grant of jurisdiction over one of them does not confer jurisdiction over either of the other two; the discrimination made between them, is conclusive against their identity. p. 545.

A case in admiralty does not, in fact, arise, under the constitution or laws of the United States; these cases are as old as navigation itself, and the law, admiralty and maritime, as it existed for ages, is applied by our courts to the cases, as they arise. It is not, then, to the eighth section of the territorial act, that we are to look for the grant of admiralty and maritime jurisdiction in the territorial courts of Florida; consequently, if that jurisdiction is exclusive, it is not made so by the reference, in the act of congress, to the district court of Kentucky. p. 545.

The judges of the superior court of Florida hold their offices for four years; these courts, then, are not constitutional courts, in which the judicial powers conferred by the constitution on the general government can be deposited; they are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty which exists in the government; or in virtue of that clause which enables congress to make laws regulating the territories belonging to the United States; the jurisdiction with which they are invested, is not a part of that judicial power, which is defined in the third article of the constitution, but is conferred by congress, in the exercise of its powers over the territories of the United States. p. 546.

Although admiralty jurisdiction can be exercised in the states, in those courts only which are established in pursuance of the third article of the constitution, the same limitation does not extend to the territories; in legislating for them, congress exercises the combined powers of the general and state governments. p. 546.

The act of the territorial legislature of Florida, erecting a court which proceeded, under the provisions of the law, to decree, for salvage, the sale of a cargo of a vessel, which had been stranded, and which cargo had been brought within the territorial limits, is not inconsistent with the laws and constitution of the United States, and is valid; and consequently, a sale of the property, made in pursuance of it, changed the property.[1] p. 546.

*Appeal from the Circuit Court of South Carolina. The libel filed in this cause, in the district court of South Carolina, on the 18th April 1825, alleged, that 584 bales of cotton, insured by the libellants, were shipped on board the ship Point à Petre, on a voyage from New Orleans to Havre de Grace, in France, and was, in February 1825, wrecked on the coast of Florida; from which it was saved, and carried into Key West, in the territory of Florida, where it was sold, without any previous adjudication by a court of competent jurisdiction, for the ostensible purpose of satisfying a claim for salvage, amounting to seventy-six per cent. of the property saved. That the cotton thus insured, was abandoned to the underwriters, the libellants, and the abandonment was accepted by them, on the 10th March 1825. That part of the cargo, amounting to 140 bales, subsequently arrived in the port of New York, and was there proceeded against by the libellants, as their property, under the abandonment. That another part of the cargo, amounting to between 300 and 356 bales, had arrived in the port of Charleston, within the jurisdiction of the court, in the possession of one David Canter, and was fraudulently sold in Charleston, at auction, on the 13th of April 1825. Restitution of this last-mentioned part was, therefore, prayed by the libellants, and process was issued against the said Canter *in personam*. The marshal returned to the warrant, that he had taken 160 [*513

[1] See Clinton *v.* Englebrecht, 13 Wall. 447; Reynolds *v.* United States, 98 U. S. 154; The City of Panama, 101 Id. 459. The jurisdiction of the territorial courts entirely ceased, by the admission of the territory of Florida into the Union as a state. Benner *v.* Porter, 9 How. 235.

bales of cotton, and the person of Canter ; 54 bales of the cotton, specifically brought into court, were ordered to be sold and the proceeds paid into the registry ; and the supposed value of the remainder in dispute, to be secured by stipulation.

David Canter filed his answer, claiming 356 bales of cotton, as a *bonâ fide* purchaser, under a sale at public auction, at Key West, by virtue of the decree of a certain court, consisting of a notary and five jurors, proceeding under an act of the governor and legislative council of Florida, passed the 4th of July 1823, which decree awarded to the salvors seventy-six per cent. on the net proceeds of sale.

The testimony of witnesses was taken, and other evidence produced, relating to the title of the libellants, under the insurances and abandonments thereon, and to the proceedings in the court at Key West. The district judge pronounced the proceedings in the court at Key West a nullity ; but decreed restitution to the libellants of 39 bales of the cotton only (deducting a salvage of *fifty per cent.); considering the evidence of the identity *514] of the residue, as insufficient to establish their proprietary interest. The libellants and claimant both appealed from this decree to the circuit court.

Further testimony was taken in the circuit court ; and at the hearing, the decree of the district court was reversed, and the entire cotton decreed to the claimant, with costs ; upon the ground, that the proceedings of the court at Key West were legal, and transferred the property to the alleged purchaser under them. From this decree, the libellants appealed to this court.

The documents exhibited, and evidence taken in the case, showed that 333 bales of the cotton, on board the Point à Petre, were insured by the American, and 351 by the Ocean office. The whole cargo of the ship consisted of 891 bales, but to whom the other 317 bales belonged, did not appear. The ship sailed on the voyage insured, on the 17th February 1825, and was wrecked on Carysford reef, on the east coast of West Florida, about eight miles from the shore ; she filled with water, and was abandoned by the master and crew.

In the depositions taken in the cause, it was stated, that when the vessel was first seen, she was filled with water, abandoned, bilged, and lying on her broad-side. The cotton was taken out of her, hove into the sea, rafts made of it, towed inside of the reef, and then put on board the vessels. The master of the ship was picked up on the shore, with his men, about fourteen miles from the wreck, and he went with the salvors to Key West, where the property saved was carried ; and the proceedings for salvage were, at Key West, carried on, as was alleged, with the co-operation and concurrence of master of the ship. The danger in saving the property was said to have been very great, the weather to have been stormy, some of the men were injured, and the saving was done during the night as well as the day ; most of the cotton was much injured. After the sale, the agent of the appellants, Mr. Ogden, came on from New York to Key West, for the purpose of attending the sale, and he expressed his willingness to pay to the purchasers of the cotton, a considerable sum, beyond what had been paid for it at the sale.

It was also in evidence, that the marks on the cotton were defaced, and that the efforts to ascertain the particular marks on that imported into Charleston by the appellee, were, to great extent, without success. A large por-

tion of the cotton brought to Charleston by the claimant, was sold at auction, as *damaged cotton. An agreement between the two insurance companies, the appellants, was made previous to the institution of the [*515 suit, that the same should be for their joint benefit. David Canter, the appellee, claimed 356 bales of the cotton, as a *bonâ fide* purchaser under the decree of the court of Key West, instituted by, and proceeding under a law of the legislative council of Florida, passed 4th July 1823; which decree awarded seventy-six per cent. to the salvors, of the net proceeds of the sale.

The appellants filed the following "reasons of appeal." That the decision of the circuit court is erroneous, inasmuch as the said tribunal at Key West was not legally organized, nor of competent jurisdiction in the premises. 1st. Because the constitution and laws of the United States are of full force and effect within the territory of Florida. 2d. Because the jurisdiction of salvage was not a rightful subject of legislation, with the Floridian government; and the wrecking law enacted by the same, is, in various respects, inconsistent with the said constitution and laws. 3d. Because the superior courts of the said territory are vested with plenary and exclusive jurisdiction over all admiralty and maritime cases; and this was a case of that description. 4th. Because, even if the jurisdiction of the said courts were confined to "cases arising under the constitution and laws of the United States," this was a case of that class. 5th. Because the said superior courts were vested with original cognisance, in all cases where the amount in issue exceeded the value of one hundred dollars.(*a*)

(*a*) The reporter acknowledges with pleasure, his obligations to Mr. Justice Johnson, by whom he has been furnished with a copy of the opinion delivered by him on the decision of the case.

Johnson, Justice.—This case comes up on a cross-appeal from a decision of the district court, adjudging a part of the *res subjecta* to the libellants, and the residue to the claimants. The decree establishes the right of the parties libellant to recover, but dismisses the libel as to a great proportion of the cotton, on the ground of a defect of evidence to identify it.

From the pleadings and testimony, it appears, that the libellants were insurers to a large amount, on a quantity of cotton shipped by certain individuals, in the French ship Point à Petre, on a voyage from New Orleans to Havre. That the ship was stranded and lost on the coast of Florida, and the cotton abandoned to these underwriters. That the cotton libelled, was a part of the cargo of the Point à Petre, is admitted; but it appears, that after being saved from the wreck, it was deposited at Key West, where it was sold and purchased by Canter, the claimant, under the order of a municipal court, constituted under a law of Florida, with jurisdiction over cases of salvage. The preliminary question alone has now been argued, to wit, whether the sale by that court was effectual to divest the interest of the underwriters.

The general principle is not denied, as to the mutations of property, which takes place through the intervention of courts of justice; but it was argued, that the constitution of the United States vests the admiralty jurisdiction exclusively in the general government; that no state can exercise a concurrent jurisdiction over admiralty and maritime causes; and that salvage was of that description. Wherefore, the legislature of Florida had, in organizing this court, exercised a power not legally vested in it, and the act constituting it, being a void act, it was as though no such court existed. That, moreover, the nullity of that court did not rest merely on an inherent want of power to constitute it, but on positive prohibition contained in the acts organizing the government of the territory, to pass any laws contrary to the laws and constitution of the United States.

*David Canter claimed all the cotton except thirty-nine bales, on the
*517] ground : *1st. That he was in the possession of it, not tortiously, but as a *bonâ fide* purchaser, and that that possession, thus

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That the act organizing this court, was an act of this nature, inasmuch as jurisdiction of causes, admiralty and maritime, was expressly vested in the superior courts of Florida; and that, without the right of exercising a concurrent power over the subject vesting this jurisdiction in an inferior court, *quoad hoc*, divesting the superior court of its jurisdiction, and rendering null the act of congress, which vests the admiralty jurisdiction in that alone.

On the other hand, it has been contended, that salvage is a subject of municipal and common-law cognisance, not exclusively belonging to the admiralty; that although the constitution may vest the exclusive cognisance of admiralty and maritime causes in the United States, in those instances in which the admiralty, at the adoption of the constitution, had exclusive jurisdiction of the subject, yet, in those cases, in which the common law exercised a concurrent jurisdiction with the admiralty, there is no reason for carrying the grant beyond a concurrent jurisdiction with the common-law courts of the states. That the court which ordered this sale, was properly a municipal court and a court of a separate and distinct jurisdiction from the courts of the United States, and as such, its acts are not to be reviewed in a foreign tribunal; of which description it was contended, were the courts of the United States for South Carolina district. That the district of Florida was no part of the United States, but only an acquisition or dependency, and as such, the constitution, *per se*, had no binding effect in or over it; and finally, that the argument drawn from the assumed fact, that the admiralty and maritime jurisdiction was, by law, expressly vested in another court, originates in a misconstruction of the law, inasmuch as no act of congress vests in the superior court any other portion of the jurisdiction of the Kentucky court, than that of causes arising under the laws of the United States; that this is not a cause of that description, it is one arising under a casualty in which no law of the United States came necessarily under review.

To this it was replied, that it was a cause arising under a law of the United States, and the case of Osborn *v.* Bank of United States, was quoted and insisted on as furnishing a decision in point. That if the cause there was one of that description, because the bank was incorporated by a law of the United States, for the same reason was this a cause of that description, because the body politic here was, like the body corporate there, created by a law of the United States; and if, at every step there, the court was met by the law which made the one a bank, gave it power to make by-laws, and to act under those by-laws, so was it equally met here, by the laws which made this a state, gave it power to legislate, and legalized this transfer of property, under laws which, without the laws of the United States, were mere nullities.

It becomes indispensable to the solution of these difficulties, that we should conceive a just idea of the relation in which Florida stands to the United States; and give a correct construction to the second section of the act of congress of May the 26th, 1824, respecting the territorial government of Florida; correct views on these two subjects, will dispose of all the points that have been considered in argument. And first, it is obvious, that there is a material distinction between the territory now under consideration, and that which is acquired from the aborigines (whether by purchase or conquest), within the acknowledged limits of the United States, as also that which is acquired by the establishment of a disputed line. As to both these, there can be no question, that the sovereignty of the state or territory within which it lies, and of the United States, immediately attach, producing a complete subjection to all the laws and institutions of the two governments, local and general, unless modified by treaty. The question now to be considered, relates to territories previously subject to the acknowledged jurisdiction of another sovereign; such as was Florida to the crown of Spain. And on this subject, we have the most explicit proof, that the understanding of our public functionaries, is, that the government and laws of the United States do not extend to

*acquired, is good against all but the person who proves a better title to this identical cotton. *2d. That the salvors had a rightful lien upon the cargo saved; that the master of the Point à Petre was agent for [*519

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such territory by the mere act of cession. For, in the act of congress, of March 30th, 1822, § 9, we have an enumeration of the acts of congress, which are to be held in force in the territory; and in the 10th section, an enumeration, in nature of a bill of rights, and of privileges and immunities, which could not be denied to the inhabitants of the territory, if they came under the constitution, by the mere act of cession. As, however, the opinion of our public functionaries is not conclusive, we will reveiw the provisions of the constitution on this subject.

At the time the constitution was formed, the limits of the territory over which it was to operate were generally defined and recognised. These limits consisted in part of organized states, and in part of territories, the absolute property and dependencies of the United States. These states, this territory, and future states to be admitted into the Union, are the sole objects of the constitution; there is no express provision whatever made in the constitution for the acquisition or government of territories beyond those limits. The right, therefore, of acquiring territory is altogether incidental to the treaty-making power, and perhaps to the power of admitting new states into the Union; and the government of such acquisitions is, of course, left to the legislative power of the Union, so far as that power is uncontrolled by treaty. By the latter, we acquire either positively, or *sub modo*, and by the former, dispose of acquisitions so made; and in case of such acquisitions, I see nothing in which the power acquired over the ceded territories, can vary from the power acquired under the law of nations, by any other government, over acquired or ceded territory. The laws, rights and institutions of the territory so acquired remain in full force, until rightfully altered by the new government. In the present instance, however, the laws of Florida were not left to derive their force from general principles alone; for, by the 13th section of the same act it is declared, "that the laws in force in the said terrritory at the commencement of this act, and not inconsistent with the provisions thereof, shall continue in force, until altered, modified or repealed by the legislature."

From these views of the subject, it results, 1st. That whatever may be the correct idea of the distribution of the admiralty jurisdiction, as between the states and United States, it can have no application here, since this territory does not stand in the relation of a state to the United States. 2d. That whether salvage be of admiralty jurisdiction exclusively, or not, it is immaterial to this cause, since the whole power of legislation over the subject, in Florida, existed exclusively in the general government. 3d. That the general principles of international law, on the immunities of foreign courts and foreign decisions, have no application here, since the courts of Florida have a common origin with this court—our authority flows from the same source—we are connected with the fountain head, governed by the same legislative power, and have equal access to the laws which constitute and govern us. It follows, that neither can regard the decisions of the other, if acting without authority derived through the legislature of the Union.

The act entitled, "an act for the establishment of a territorial government in Florida," and the acts *in pari materia*, of the 3d March 1323, and the 26th May 1824, constitute what may be properly termed the constitution of Florida. The first provides for the appointment of an executive, with powers not material here to be considered. It constitutes a legislature, organizes a judiciary, and imposes upon the one and the other some general restrictions, subject to which they are empowered to exercise the legislative, judicial and executive powers which belong generally to an organized government. The act of March 1823 goes over the same ground, and repeals the preceding act, so far as the provisions of the latter are inconsistent with those of the former act. And with regard to both, or either, so far as the latter remains unrepealed, the position is incontrovertible, that the legislative power could enact nothing inconsistent with what congress has made inherent and permanent in the form of government

the *underwriters, and had authority to settle the amount of that claim,
*521] either by agreement, or an award of third persons; that *he applied to these third persons, and agreed to their proceedings, and to the sale;

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of the territory. Therefore, if the admiralty jurisdiction is made inherent in the superior court, it was not in the power of the territorial legislature to transfer it to any inferior tribunal.

To determine this question, we must examine the provisions of the several acts, touching the exercise of legislative and judicial power. In defining the legislative power, the words of the act of 1822 are these, "they shall have power to alter, modify or repeal the laws, which may be in force at the commencement of this act. These legislative powers shall also extend to all the rightful subjects of legislation; but no law shall be valid, which is inconsistent with the constitution and laws of the United States, or which lay any person under restraint, burden or disability, on account of his religious opinions, professions or worship; in all which he shall be free to maintain his own, and not to be burdened with those of another." The language of the act of 1823 is, "they shall have legislative power over all rightful subjects of legislation; but no law shall be valid, which is inconsistent with the constitution and laws of the United States; or, which lays any person under restraint, &c." That jurisdiction of salvage is a rightful subject of legislation, is not to be questioned. The jurisdiction then vested by the legislature in this municipal court, must be sustained, unless inconsistent with the laws or constitution of the United States. But with the constitution, in legislating on the subject of salvage, there can be no incongruity; it is only, therefore, the supposed inconsistency with the act of congress of May 1824, that can impugn it.

The provisions of that act upon this subject are these:—"Each of the said courts (meaning the superior courts of the district of Florida) shall moreover have and exercise the same jurisdiction, within its limits, in all cases arising under the laws and constitution of the United States, which, by an act to establish the judicial courts of the United States, approved the 24th day of September 1789, and 'an act in addition to the act, entitled an act to establish the judicial courts of the United States, approved the 2d March 1793,' was vested in the court of Kentucky district." The question, then, is reduced to this—in what cases, arising under the laws and constitution of the United States, is jurisdiction vested in the court of Kentucky district, by the two acts of the 24th September 1789, and the 2nd of March 1793?

It has been erroneously assumed, that all the jurisdiction vested by those acts in the Kentucky court, was vested by this law in the superior court of Florida; it is expressly confined to cases arising under the laws and constitution of the United States; and the reason is obvious. In all cases arising under the laws of the district, jurisdiction is given by the preceding section of the same act; but as most of the laws of the United States had been made of force in the territory, as before observed, the 2d section is intended to extend the jurisdiction of the court to cases arising under the latter laws, and further, if necessary, to all cases arising under laws of the United States, over which jurisdiction had been given to the Kentucky court—a practice in defining jurisdiction, that had been pursued by congress, with regard to all the territories, subsequent to the time when the Kentucky court was established. In the original organization of the judiciary of the United States, Kentucky and Maine were excluded from the arrangement of circuits. And as no circuit court was required in law to be held there, the district court was vested with circuit court jurisdiction. This is the whole purport of the act of 1789, referred to in the Florida act of 1824. The other act there referred to, to wit, that of 1793, has no other operation as to the Kentucky court, besides vesting in it the power given to the circuit courts to hold special sessions.

If the Florida act were as broad in its operation as the two acts referred to, it would indeed be a serious question, whether the legislature of Florida could divest its superior

that the sale was afterwards ratified by Ogden, the special agent of the underwriters. *3d. He claims the whole 356 bales, on the ground of a sale by a court of the territory of Florida. *4th. That was a [*523

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court of any part of its admiralty jurisdiction, as existing in and exercised by the district courts of the United States. But I think it incontestable, that the jurisdiction here given is explicitly restricted to so much of the jurisdiction of the Kentucky court only, as comes within the description of cases arising under the laws and constitution of the United States. Now, excepting in the single instance of the present Bank of the United States, congress never has vested a jurisdiction, even in its circuit courts, generally, over causes arising under the constitution and laws of the United States. It has given an appellate jurisdiction, and that only to the supreme court, over causes of that description, when such causes arise in the state courts, but we look in vain through the law defining the jurisdiction of the Kentucky court, for any general claim to jurisdiction under the description of "cases arising under the laws and constitution of the United States." Yet, very ample operation must be given to these words of the Florida act, considered in reference to the jurisdiction actually possessed and exercised by the Kentucky court, under the two laws of 1789 and 1793. The land laws, revenue laws, laws of trade, criminal laws, and many other public laws, were all laws of the United States, under which, cases might arise, and over which the Kentucky court was undoubtedly vested with jurisdiction. Nor do I doubt, that the admiralty jurisdiction over revenue cases, as exercised by the Kentucky court, is rightfully vested (and that beyond the control of the Florida legislature) in the superior court of this district. But here, it appears to me, the grant of jurisdiction terminates. The admiralty jurisdiction, beyond this limit, is left to be administered under the laws of the territory, for this simple reason, that other causes, occuring in the admiralty, cannot be brought within this description of causes, arising under the laws of the United States—at least, this appears incontrovertible, when applied to questions of salvage arising on wreck of the sea—to questions of salvage, on captures as prizes of war, I am inclined to think, it would extend, at least, to all causes, in which the distribution of prize money depends upon laws of the United States.

But it is argued, that this is a cause arising under the laws of the United States, within the reason of the decision of the supreme court, in the case of Osborn *v.* Bank of the United States; that the validity of the sale, divesting the interests of these libellants, depends upon the legality of the powers, exercised by the court of Key West, which depends upon the powers vested in the legislature of Florida, which finally depends upon the acts of congress, which created the body politic of Florida; that creating a body politic, is only creating a body corporate on a larger scale, but essentially, the exercise of one and the same power; that whether the one or the other sues or defends, legislates or acts, by itself or its agents, all must be done with reference to the law that creates and organizes it; and in fine, in the language of the court, in the case cited, "the charter not only creates it, but gives every faculty that it possesses. The power to acquire rights of every description, to transact business of every description, to sue on those contracts, is given and measured by its charter, and that charter is a law of the United States. This being can acquire no right, make no contract, bring no suit, which is not authorized by a law of the United States. It is not only itself the mere creature of the law, but all its actions and all its rights are dependent on the same law," &c.

I have taken a week to reflect upon this question alone, and I cannot withhold from the gentleman who argued the cause for the libellants, an acknowledgment, that I have not been able to draw any line of discrimination, between this and the decided cause, which satisfies my mind. Yet, I am thoroughly persuaded, that the learned men who decided that cause, never contemplated that such an application would have been given of their decision. I am happy in the propect that this cause will finally be disposed of elsewhere, not doubting, that the mental acumen of those who decided the

foreign court, acting under a municipal law, and having the property within its reach; its jurisdiction cannot be inquired into. 5th. If the jurisdiction of that court can be inquired into, they contend, that jurisdiction was con-

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other, will be found fully adequate to distinguish or reconcile the two cases, on grounds which have escaped my reflections. At present, I must content myself with observing, that it is too much to require of a court, upon mere analogy, to sustain an argument, that not only proves too much, if it proves anything, but which leads, in fact, to positive absurdity.

It will be recollected, that it is not only in the territories, that we find bodies politic created by the laws of the United States, but that near one-half the states derive their origin and admission into the Union, under laws of the United States. But will it be contended, that all the causes arising under their laws, are causes arising under laws of the United States? It is true, that in the district of Columbia, the appellate jurisdiction given to the supreme court, can be maintained only on the ground that the laws of that district are laws of the United States; and that all the laws of the district of Florida derive directly, or indirectly, their force from the same origin. But in the case of the district of Columbia, this power is expressly given to the supreme court, and we are not now inquiring whether congress might not have vested this jurisdiction in the superior court of Florida, but whether they have so vested it. The simple inquiry is, what force and operation is to be given to those words, in the second section of the act of 1824, "jurisdiction in all cases, under the laws and constitution of the United States?" And what could be more absurd, than to decide, that the same force is to be given to those words as if they were not there. Expunge that sentence altogether, and the construction of the clause will be necessarily and precisely that contended for by the libellants, to wit, an unrestricted grant of the jurisdiction vested by law in the Kentucky court. It not unfrequently happens, that in the construction of a whole law, or a section or a clause of a law, words or even sentences are declared surplusage, or irreconcilable with other words or sentences; but here we are called upon to give a meaning to words, which deprives them of all meaning, and that, without any incongruity with other words, or want of distinct meaning in themselves, but from an analogy with another case, in which similar words have received a construction which produces that consequence, when applied to these words. Until better advised, I must maintain, that these words have a definite meaning and bearing in their place in this law, and amount to a restriction of the jurisdiction of the superior court of Florida, to a class of cases which does not comprise salvage on wreck of the sea.

Some minor grounds have been dwelt upon in argument, of which it is proper to take a brief notice. It has been argued, that the superior court of Florida acquired jurisdiction in another way, to wit, that the 9th section of the Florida act, of 1822, makes of force in the territory, all public laws of the United States, not repugnant to the provisions of that act. That the judiciary acts are acts of that description, and therefore, are laws of the territory. But this argument is without point, until such an organization of circuit and district courts of the United States takes place in that territory, as will admit of the application of this law to the jurisdiction of its courts. Or rather, it takes effect as to the subject now under consideration, only through those clauses which relate to the jurisdiction of the Kentucky court, and thus returns, in a circle, to the argument which we have been before considering.

It has also been contended, that the Florida act, under which the court at Key West was organized, is void; 1st. because never ratified by congress; and 2d, because inconsistent with that provision of the first section of the act of 1824, which gives original jurisdiction to the superior courts of the territory, in all cases of $100 value. To the first of these reasons, the 5th section of the act of 1822 furnishes an unequivocal answer. It is only the right of repealing that congress retains over the laws of Florida. That clause which requires the governor to report the laws of the territory

ferred upon it: 6th. With the 8th section of the act of congress of the 3d March 1823, which is in these words: "that each of the said superior courts shall moreover have and exercise the same jurisdiction within its limits, in all cases arising under the laws and constitution of the United States, which by an act to establish the judicial courts of the United States, approved the 27th September 1789, and an act in addition to said act, approved the 2d of March 1793, was vested in the court of Kentucky district.

The case was argued by *Ogden*, for the appellants; and by *Whipple* and *Webster*, for the claimants.

Ogden.—The great question in this case is the validity of the proceedings of the territorial court; und upon the threshold of this inquiry, it is asked, how far it is competent for this court to examine the constitutionality of the court at Key West, and the legality of its proceedings? The libel filed in the district court sought the restoration of the cotton, subject to a reasonable salvage. The claimant asserts his right to it under a sale, and the inquiry is, whether the property was changed by the proceedings directing the sale? The decision upon this inquiry, rests upon the right of the court to take jurisdiction of the subject-matter. The common-law rule is, that

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to the president, to be laid before congress, is merely directory, but has no bearing upon the validity of those laws, until repealed. The words are, "which, if disapproved by congress, shall thenceforth be of no force;" necessarily implying their previous operation. With regard to the second, I have no doubt, but that the individual who chooses to resort to his common-law remedy, of an action for work and labor, instead of libelling for salvage, may maintain an original suit in the superior court of the territory. But I see nothing in the act which makes that jurisdiction exclusive, in a case in which both remedies are open to the choice of the parties. The language of the 6th section is, "that the judicial power shall be vested in two superior courts, and in such inferior courts, and justices of the peace, as the legislative council of the territory may, from time to time, establish." The 7th section of this act, and the 2d of the subsequent act, confine to the superior courts exclusively, the jurisdiction over the cases arising under the laws, &c., of the United States, of which the Kentucky court had jurisdiction; but as to all others, I perceive nothing in the law, which precluded the Florida legislature, from making any distribution of jurisdiction, consistent with preserving to the superior court a concurrent jurisdiction, to be exercised according to its own terms.

It is proper to remark here, that whatever may be the fact, as to the integrity and propriety which regulate the proceedings of the court at Key West, there is nothing novel or unprecedented in the organization of the court. The model of it is of great antiquity, and throughout the civilized world, some such summary mode of adjusting salvage, in cases of wreck of the sea, is to be found. We had just such a court here, and, I believe, in most of the states, when the constitution was adopted; and although jurisdiction of the subject has been everywhere abandoned to the district courts of the United States, where it is adjusted with great solemnity and discretion, and I believe, very much to the satisfaction of all the commercial world, there exists no reason to preclude the congress of the United States from constituting similar summary tribunals, whenever and wherever it may become necessary. The establishment of this tribunal, therefore, however justice may be distributed in it, is no unwarrantable exercise of the legislative or judicial power vested in Florida. Finally, I am of opinion, that there is error in the decision of the district court, and adjudge that it be reversed, and the goods restored to the claimant, with costs.

H. N. Cruger, for libellant; *King* and *Gadsden*, for claimant.

when a court acts within its powers, its acts are binding on all the world; but if beyond them, they are entirely void. It is therefore necessary to look into the constitution of the court. Abbott on Ship. (11th ed.) 16 n.; Stark. 215; 9 Mass. 462; 3 Wheat. 234.

The next inquiry is, into the nature of the case, of which the court took cognisance; and then, whether it was within its jurisdiction? It was a case of salvage, and salvage is of admiralty jurisdiction. 1 Wheat. 335; Sergeant's Constitutional Law 207. In England, there was a great contest upon this question, but it was finally settled in favor of the jurisdiction of the admiralty, by the statute of Richard III. Abbott on Ship. 433.

It is now to be inquired, could the court of Key West lawfully exercise admiralty jurisdiction? The constitution was made for the whole people of the United States, without reference to their being within the original thirteen states. The 3d article, 2d section, defines "the judicial powers," and declares, "it shall extend to all cases of admiralty and maritime jurisdiction." *The treaty with Great Britain of 1783, ceded a large tract
*524] of country to the United States, a great portion of which, if not the whole, was within the limits of the thirteen states, and was claimed by several of the states, but was afterwards ceded to the United States. Thus, the United States became possessed of all these territories by cession, all of which, except that ceded by Georgia, having been acquired under the confederation, the people upon those territories became citizens of the United States by those cessions, and were entitled to all the rights and privileges of citizens. In the articles of confederation, there is no provision for acquiring rights to lands; but on the contrary, the lands within the territories of the several states, were considered as belonging to those states. By what authority did the confederation acquire a right to the lands ceded to them? Whence, then, did the confederation draw the capacity to take and hold those lands? Not from any municipal regulations, or from the laws of the states; or from the express terms of the articles of confederation; but from the great principles of public law. The powers of congress were to make war and peace, and to make treaties; and in those and the other powers, were included those under which territories were acquired and governed. That congress considered themselves possessed of those powers, is shown by the resolutions of 6th September 1780, and 10th October 1780, recommending to the states to cede their unappropriated lands; and also by the ordinance for the government of the territory north-west of the river Ohio, passed 13th July 1787.

That the inhabitants of the territories thus acquired, were citizens of the United States, is manifest, from the fact, that as soon as they were sufficiently numerous to protect themselves, and to form a state government, they became a part of the Union. The territories to which these observations apply, were not part of the nation, at the time of the establishment of the constitution. The circuit court, in delivering their opinion, draw a distinction between territories so situated, and those which were afterwards acquired. Is there any foundation for this distinction? The rights of the United States to hold territories, not a part of the nation, at the time of the confederation, in the same manner as the right to all those within the original thirteen states, is derived from the same universal principle of general law; from the powers of making peace and war, and of making treaties, &c.

It is necessary for the peace of the Union, that they should possess those powers.

In what relation, then, do the inhabitants of an acquired territory, *stand to the United States? Are they citizens or subjects? This is a grave question, and merits the serious consideration of the court. [*525 The first territory acquired by the United States, was Louisiana; and by the third article of the treaty, as well as by subseqent legislative acts, the inhabitants of the country became entitled to the privileges of citizens. The acquiescence of the people of the United States fully establishes, that the powers exercised in reference to Louisiana, were properly exercised. The third section, fourth article, of the constitution, authorizes the admission of new states into the Union. This section of the constitution gives to congress a power a power, only limited by their own discretion, to admit as many states as they may think proper, in what manner soever the territory composing those new states may have been acquired. After the acquisition of Louisiana, congress considered and treated the people of the country in the same manner they considered the inhabitants of every other territory of the United States,—as a part of the nation, at the time of the confederation. The various legislative acts in reference to Louisiana establish this position.

The next great acquisition of the United States by cession from a foreign government, was that of Florida from Spain. The sixth article of the treaty declares, "the inhabitants of the territories which his Catholic Majesty cedes to the United States by this treaty, shall be incorporated into the Union of the United States, as soon as may be consistent with the principles of the federal constitution, and admitted to the enjoyment of all the privileges, rights and immunities of citizens of the United States." The provisions of this article, in all respects similar to that on the Louisiana treaty, stipulating for the privileges of the inhabitants of the country, authorize the belief, that the government of the United States doubted their power, under the constitution, to receive a cession upon any other terms than that the people inhabiting the country should be citizens of the United States.

The act of congress, entitled "an act for the establishment of a territorial government in Florida," followed this treaty, and was passed 20th March 1802. The fifth section of this act constitutes a legislative body for the territory, and declares, that their legislative powers shall extend to all the rightful subjects of legislation; but no law shall be valid, which is inconsistent with the constitution and laws of the United States. The sixth section establishes the judicial power, and appoints a superior court, and gives the territorial *legislature power to establish inferior courts. [*526 The seventh section prescribes the jurisdiction of the superior court, and declares, that the said superior court shall have and exercise the same jurisdiction, within its limits, in all cases arising under the laws and constitution of the United States, which was vested in the court of the Kentucky district, by the judiciary act of 1789; and the act in addition thereto, of 2d March 1793; and writs of error and appeal from the decisions in the said superior court, authorized by this section of the act, shall be made to the supreme court of the United States, in the same cases, and under the same regulations, as from the circuit courts of the United States. By the eighth section, the judges of the superior courts, and other officers, are to

be appointed by the president, by and with the advice and consent of the senate; and all the judges are to take an oath to support the constitution of the United States, before they enter on the duties of their office; and the salaries of the governor, judges, &c., are to be paid out of the treasury of the United States. The 9th section declares, that certain acts of congress which are enumerated in the section, "and all other public laws of the United States, which are not repugnant to the provisions of this act, shall extend to, and have full force and effect, in the territory aforesaid." The 14th section provides for the appointment of one delegate to congress, for the territory.

The circuit court, in their opinion in this case, say, "they have the most explicit proof, that the understanding of the public functionaries, is, that the government of the United States does not extend to such territories, by the mere act of cession. For, in the act of congress of March 1822, section 9th, we have an enumeration of the acts of congress, which are to be held in force in the territory, and in the 10th section, an enumeration in the nature of a bill of rights and privileges, and which could not be denied to the inhabitants of the territory, if they came under the constitution, by the mere act of cession." An examination of the act will show that it does not warrant this construction. The 5th section declares, no law shall be passed by the territorial legislature, which is inconsistent with the constitution and laws of the United States. This shows that congress did consider the constitution and laws as extending there. Why prohibit the passage of a law inconsistent with them, if they had no operation there? The 7th section gives the supreme court jurisdiction in all cases, under the laws and constitution of the United States. Those laws must, therefore, have been con-
*527] sidered to extend *there, or why empower their enforcement by the supreme court? The 8th section provides for the appointment of the officers of the government, including the judges of the supreme court, by the president, by and with the advice of the senate. This manifests the admission, that the constitution extends there; as, by the constitution, this mode of appointment is established. The law also provides, that the officers of the territory, appointed according to its purposes, shall take an oath to support the constitution of the United States. Why take this oath, if that constitution does not extend to the territory? The payment of the officers of the territory, out of the treasury of the United States, which could not be constitutionally authorized by congress, unless the constitution operated there, may also be referred to, as evidence of the principles contended for by the appellants.

Because congress have enumerated certain laws as extending to the territory, in the 9th section of the act, it is inferred, that congress desired none other should extend there, and that, without such enactment, none would have been in operation there. The language of the section disaffirms this position. After enumerating certain acts, it closes with a provision, "that all the other public laws of the United States, which are not repugnant to the provisions of this act, shall extend to, and have full force in the territory." By the enumeration of "some laws," it is, therefore, evident, that congress did not mean to exclude those not enumerated. But it is said, the 10th section contains an enumeration in the nature of a bill of rights and privileges, which, if the constitution extended there, could not be denied,

This is not admitted. The introduction of this provision was necessary, for the purpose of controlling the powers granted to the local legislature, and to secure to the inhabitants rights which they had under the constitution, but which might have been otherwise infringed, unless provisions were made to carry the principles of the constitution into effect.

It has been shown: 1. That the people in the territories of the United States are citizens of the United States, entitled to all the benefits derived from the laws and constitution of the United States, and subject to all the provisions of the constitution, and the laws passed under it. 2. That in principle, there can be no difference between a territory formed out of a country, within the old limits of the United States, and a territory in newly-acquired country. 3. And that, therefore, the people of Florida, immediately *upon its cession, or at any rate upon the passing of the act instituting the territorial government, became citizens of the United [*528 States, to whom the laws and constitution extended.

The inquiry now is, whether, in establishing the court or tribunal by which the cotton claimed in this case was ordered to be sold, the legislature of Florida have not violated the constitution of the United States, and the laws of congress passed under it. If they have, then the court is an illegal court, and all its acts are void. It is not only upon general principles, that the act of establishing the court is invalid, but also by the provision of the act of congress, which prohibits the passing any law, inconsistent with the laws and constitution of the United States. In the article of the constitution relative to the judicial power of the government, it is declared, that it shall extend to all cases of admiralty and maritime jurisdiction. It has been shown, that the provision applies to territories as well as states; the constitution being necessarily paramount, within the limits of the United States. The constitution having vested the judicial power in a supreme court, and such inferior courts as congress may, from time to time, establish, the legislative power under this provision has been exercised by the acts of March 1822 and 1823. Superior courts has been erected, to which, in addition to the powers of territorial courts, jurisdiction is assigned within its limits, in all cases arising under the laws and constitution of the United States, which, by the judicial acts of the United States, was vested in the court of Kentucky district, with a right of appeal, and a writ of error to this court. By the same acts, authority is given to the territorial legislature, to establish inferior courts, strictly territorial, and the jurisdiction of which extends to subjects not within the cognisance of the tribunals of the Union.

What are the powers of the court of the Kentucky district? Among other subjects of jurisdiction in the district court of the United States, it is declared, by the ninth section of the judiciary act of 1799, "that they shall have exclusive original cognisance of all civil causes of admiralty and maritime jurisdiction, including all seizures under the laws of impost, navigation and trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burden." Thus, the Kentucky district had exclusive cognisance of cases of admiralty and maritime jurisdiction, and consequently, it has exclusive control over cases of salvage. The tenth section provides, that the district court of Kentucky shall, besides the jurisdiction aforesaid, have jurisdiction *of all other causes, except of appeals, made cognisable in a circuit court, &c. It [*529

follows, from the provisions of the act relative to the territorial government, and its reference for the jurisdiction of the superior court, to that existing in the court of the Kentucky district, that in the superior court of Florida, there is exclusively jurisdiction over admiralty and maritime causes, and of course, of the claims of the salvors of the cotton, comprising part of the cargo of the Point à Petre. The jurisdiction is exclusive, for it could not be given to the territorial courts by an act of the territorial legislature, they not having the power to give it; the laws of the United States having vested it in the supreme court, having similar powers to the district court of Kentucky, and the powers of the territorial court being limited within the observance of the provisions of the laws of the United States.

Independent of the restriction imposed upon the territorial legislature, by which they were disabled from giving admiralty and maritime jurisdiction to the inferior courts of Florida, the constitution of the United States would have been violated by such legislation. The constitution is the supreme law of the land; and if, without a prohibition in the territorial law, the legislative authority of Florida could not "coin money" or "issue bills of credit," the establishing of a court with admiralty and maritime jurisdiction, would be equally repugnant to the constitution; such jurisdiction being exclusively, by the constitution, in courts established by congress.

It is said, in the opinion of the circuit court, that the jurisdiction in cases of salvage, is not vested by congress in the superior courts of Florida. A reference to the laws establishing the court of the district of Kentucky, and to the act relative to Florida, authorizes a different position. Jurisdiction is given, by those laws, "in cases arising under the constitution and laws of the United States." What is such a case? Is not the extent of the judicial power of the courts of the United States, a question arising under the constitution? The constitution having declared, that the judicial power shall extend to cases of admiralty and maritime jurisdiction, is not a case of admiralty jurisdiction, a question of this character? A prohibition in a state court in a case of admiralty jurisdiction, and a plea interposed, that exclusive cognisance of admiralty cases is in the courts of the United States, would at once raise a question under the constitution. The principle seems to be, that whenever a case arises, in which the question is, as to the jurisdiction of the courts of the United States, it is necessarily and always a question arising under the constitution and laws of the United States.

*A case of salvage does not, strictly speaking, arise under the laws and constitution of the United States, as the right to salvage [*530
depends on the principles of maritime law; but the amount of salvage, depends on the decision of a court, guided by the circumstances of the case, and exercising admiralty and maritime jurisdiction. Thus, as the jurisdiction over the case is given by the constitution, the decision upon it, becomes a case arising under the constitution. Whether a man is bound to pay a promissory note, is not a question of this description, and yet in cases of promissory notes held by the Bank of the United States, this court have always decided, that the courts of the United States have jurisdiction; because all actions brought by the bank, are cases arising under the constitution and laws of the United States. Congress could give this court jurisdiction of such cases, on no other principle. If, then, under a clause in

the constitution extending the judicial power of the United States to all cases arising under the constitution and laws of the United States, this court will sustain jurisdiction upon a promissory note, with the making of which, and the extent of the liability of the parties thereto, the constitution and laws of the United States have nothing to do; if those liabilities are questions arising under a different law, and the jurisdiction is sustained by the court, only in the particular case of the Bank of the United States, as a case arising under the constitution and laws of the United States; why is a different rule to apply in a case of salvage, of which the exclusive jurisdiction is given by the constitution and law, of the United States, to the district court? Is not the one as much a case arising under the laws of the United States, as the other?

Upon the whole, it is contended, that the superior courts of Florida, having the same jurisdiction in cases arising under the laws and constitution of the United States, as the district court of Kentucky had, under the acts of congress; and as the district court of Kentucky has exclusive jurisdiction in all civil cases of admiralty and maritime jurisdiction; that, therefore, the superior courts in Florida have exclusive jurisdiction in all civil, admiralty and maritime cases; that salvage is a case of admiralty and maritime jurisdiction; and that, therefore, any law of Florida, giving jurisdiction in a case of salvage to any other court, is unconstitutional; and all the acts of the court under it, are void.

Whipple and *Webster*, for the claimant.

Whipple contended:—1. That Canter was a purchaser at Key West of the property in question, which was sold by the consent of the owners. After the disaster and abandonment, the master of the Point *à Petre, [*531
acted as agent to the underwriters. When the cotton arrived at Key West, the salvors and the master were owners of it, as tenants in common. The master had a legal right to sell the proportion that belonged to the underwriters, or to consent to a division of it, through the agency of a court. He chose the latter mode. He himself, with the salvors, applied to the justice to issue process; and he co-operated in all the subsequent proceedings, and he received his proportion of the sale of the part of the cargo which was saved. These acts were subsequently ratified by the agent, who, it is in evidence, offered the claimant $7500 for his bargain. Upon these facts, it is contended, that the consent of the party operates as a change of title to the property. It will not supply a defect of power in the court, acting as a court, but the court is the mere organ of the will of the party. As between the original parties, the plaintiff may take advantage of the want of jurisdiction of the court to which he has resorted. But can he obtain judgment, proceed to execution, obtain a sale, under which a third person purchases; and then dispute the title of that third person, for an alleged want of jurisdiction in the court?

The court at Key West had jurisdiction, and its decree cannot be questioned. It may be proper to consider, in the first place, whether the jurisdiction of the Key West court, can be be inquired into by this court? Was it not the judge of its own jurisdiction? It was a muicipal court, acting *in rem*, under a municipal law. 2 Dall. 273; 2 W. Bl. 977; 4 T. R. 191; 2 H. Bl. 410; 4 Cranch 271, 268, 275–6, 293; 3 Wheat. 236, note; 15 Johns.

144 ; 1 Stark. 215–16 ; 9 Mass. 46 ; 9 East 192. In *Rose* v. *Himely*, 4 Cranch 268, it is said, "but of their own jurisdiction, so far as it depends on municipal laws, the courts of every country are the exclusive judges."

Can the Key West court be considered a foreign court ? It was constituted by congress, or by a power derived from congress ; yet it may be considered, that the United States has two sovereignties, one over the people of the United States, the other over the territories ; and that they are as foreign to each other, as the parliament of England, and the legislature of Jamaica ; and that the courts of each are as foreign as the courts of Westminster and Kingston. Perhaps, a distinction may be also taken between the power of this court, to inquire into the jurisdiction of another court, in a case in which a third person, not a party to the original suit, defends his right to the property purchased under that judgment, and a case where a party to the original judgment seeks to enforce that judgment in this court, and thereby to acquire new rights under it. Another *distinction
*532] may be taken, between a defect of jurisdiction, in consequence of the absence of some fact necessary to confer jurisdiction, and that want of jurisdiction, which arises from the different construction put upon a municipal law by this court, from the construction adopted by the municipal court.

Instead of considering the territorial court of Florida, a strictly foreign court, suppose the same right to inquire into the jurisdiction of a state court is admitted. As a general principle, it is true, that the proceedings of a court are void, unless it has jurisdiction over the subject-matter. This, however, like all general rules, has its limits and its qualifications. Whether the subject-matter (the person or property) is within the power of the court, is a question of fact, to be decided, generally, by the return of an officer. The court may be supposed to act upon the existence of that fact. When it is proved in another court, that the court whose jurisdiction is questioned had been deceived as to that essential fact, it does not impugn its judgment, to say, that it acted without jurisdiction. But the construction of the statutes of the states, is peculiarly the province of the courts of the state ; and a uniform construction becomes the settled law of the state. The jurisdiction cannot be settled in any other way, than by the courts of the state. It presents a question of law, and the decision of that question, though it relates to jurisdiction, is as binding upon the parties, as though it related to the merits of the case. The question as to the extent of the power of the court, under a statute, is a question of law, and the decision conclusive on the parties.

The courts of Florida alone, are to construe the acts of congress in relation to the jurisdiction of Florida. Had the justice, at Key West, jurisdiction of the question of salvage ? By the territorial act of 1823, called the "wreckers' act," it is admitted, that sufficient authority was given to the justice over this subject. The question arises out of the act of congress of March 1823, and is this—does that act of congress grant sufficient power to the legislature of Florida to pass such a law ? The act of congress of March 1823, authorizes the territorial legislature, "to legislate upon all rightful subjects of legislation." It makes it the duty of the governor to lay before congress, annually, all the acts passed by the legislature. If either of those acts are disapproved of by congress, it is, from thenceforth, to be of no effect. The act concerning wreckers was laid before *congress, in
*533] December 1823, and its attention particularly pointed to that subject,

by a memorial in which the necessity of such a law was enforced. Congress did not disapprove or annul that law, until 1826. In the opinion of congress, then, this law did not violate the provisions of the constitution, or of any general law of the United States. It ought to be noticed, that the right conferred on the territorial legislature "to legislate upon all rightful subjects of legislation," was qualified by the condition, that no law should be valid "if inconsistent with the constitution or laws of the United States."

Much argument has been used, in order to show that the constitution and laws of the United States are, *per se*, in force in Florida, and that the inhabitants are citizens of the United States. How the constitution became of force in Florida, has not been shown. Was it by the act of cession? Is there any principle in the law of nations, which, upon the act of cession or conquest, gives to the ceded or conquered country a right to participate in the privileges of the constitution of the parent country? The usages of nations, from the period of Grecian colonization, to the present moment, are precisely the reverse. Such a right never was asserted. The constitution was established by the people of the United States, for the United States. It provides for the future admission of territories into the Union, and expressly confers upon congress the power of governing them as territories, until they are admitted as states. If the constitution is in force in Florida, why is it not represented in congress? Why was it necessary to pass an act of congress extending several of the laws of the United States to Florida? Why did congress designate particular laws, such as the crimes act, the slave-trade and revenue acts, and introduce them as laws into Florida? Why enumerate particular rights secured to the people of the United States, if the inhabitants of Florida were entitled to them upon the act of cession?

It is denied, that *all* the cases of admiralty and maritime jurisdiction are exclusively vested in the courts of the Union. On the contrary, it is asserted, that many cases within the admiralty are also within the common-law jurisdiction of the state courts. Seamen's wages, salvage, marine torts, collision, &c., are of this description. 2 Doug. 614; Abb. on Ship. 433, 436; 3 Bos. & Pul. 612; 8 East 57; 2 Selw. N. P. 1287; 1 Johns. 175; 1 Nott & McCord 170; 18 Johns. 257; 2 Gallis. 399; 1 Kent's Com, 351–2.

If, however, salvage is admitted to be exclusively vested in *the courts of the United States, as a part of their admiralty jurisdiction, [*534 how does that deprive congress of the power of distributing that jurisdiction among the courts of the territories, as it pleases? It is vested in the courts of the Union, exclusive of the courts of the states. The state courts are constituted by state legislatures, over which congress has no control. They are, in a measure, adverse jurisdictions. If it be admitted, that congress has no power to vest any part of admiralty jurisdiction in the state courts, over which it has *no* control, how does it follow, that it has no power to vest it in a territorial court, over which it *has* control?

Congress can constitute new courts within the states, and confer portions of admiralty jurisdiction upon them. It can confer that jurisdiction upon the superior or inferior courts of the territory, or it can authorize the territorial legislature to do it. And this, whether the constitution is, or is not, in force in Florida. The power of congress over the territory is the same in the one case as in the other. The constitution authorizes congress to provide for the government of the territories. It has all the power over them

that congress and the legislature of the state have over a state. Its power to appoint courts of admiralty jurisdiction, can be as legally delegated, as its power to appoint any other courts. All the courts of Florida, whether appointed by congress, or by the territorial legislature, are dependent upon congress, and are courts of the United States. They are, therefore, upon the admission of the opposite counsel, capable of receiving grants of admiralty jurisdiction. It is only state courts, which are independent of congress, that cannot be clothed with such power. If the power of congress to distribute admiralty jurisdiction among the courts of the territory, as it pleases, is denied, its power to distribute it among the courts of the United States as it pleases, must be denied. Of what consequence is it, then, whether the constitution is, or is not, in force in Florida, since the constitution excludes the state courts alone from the exercise of admiralty jurisdiction?

The ground assumed is this, that congress authorized the territorial legislature "to legislate upon all rightful subjects of legislation," unless inconsistent with the constitution. That salvage is a rightful, and in Florida, a necessary subject of legislation; that the necessary import of the words of this grant includes the exercise of the power in question; that the exercise of that power, by enacting the wreckers' act, was not inconsistent with the constitution or laws of the United States; and that, consequently, it must be supported, unless it can be clearly shown, that it is inconsistent with some other parts of the act of congress of March 1823. *This
*535] is attempted, by resorting to the 8th section, which confers jurisdiction upon the superior courts of Florida. These superior courts were appointed by congress, and jurisdiction was conferred by congress, and the argument is, that as congress have conferred exclusive admiralty jurisdiction upon these courts of its own appointment, that the power given to the legislature in the same act, to appoint other inferior courts, and "to legislate upon all rightful subjects of legislation," was not intended to include the power over subjects of admiralty jurisdiction.

As the necessary import of the terms of the grant to the legislature does include the power in question, it must be shown, that the necessary import of the grant of jurisdiction to the superior courts excludes it. Words of a clear import are not to be controlled by other words in the same statute, unless their import is equally clear; for doubtful words shall not limit the operation of clear and precise ones. Two propositions must be established, as the necessary result of these words of the 8th section. 1st. That an exclusive admiralty jurisdiction is conferred upon the superior courts. 2d. That that exclusive jurisdiction extends to all cases.

The words are the "same jurisdiction." And it is argued, that because the jurisdiction of the Kentucky court was exclusive, that these terms, necessarily, vest an exclusive jurisdiction in the superior courts. The grant is "the same jurisdiction." Must it necessarily be exclusive in Florida, because it was exclusive in Kentucky? Are the terms, exclusive or concurrent, parts or qualities of the jurisdiction, so that a grant of the principle carries them along with it, as incidents? Or are they, in fact, no part of the jurisdiction itself, but terms used to express the relation which that court has to some other court? Is not the term "exclusive," intended to prohibit other courts from exercising the same jurisdiction? Is a jurisdiction

more extensive, when *exclusive*, or less so, when *concurrent?* Is it not precisely the same, in the one case as in the other? The power of the court over the parties, the subject-matter and the process, is the same in the one case as in the other. A grant, then, of the "same jurisdiction," does not necessarily carry with it the same relation to other jurisdictions. It may be concurrent in Kentucky, and exclusive in Florida. Suppose, two courts in Florida, whose jurisdiction extended over the same district. Congress confers upon these two courts the "same jurisdiction," that the Kentucky court possessed. It was exclusive in Kentucky, but as it was conferred on two courts, would it not be concurrent in Florida?

These terms, then, do not necessarily import an exclusive jurisdiction, *and ought not to limit the grant of power to the legislature. The intention of congress might have been one way or the other; it is [*536 probable, they did not intend an exclusive jurisdiction. In Kentucky, this admiralty power is exclusive of the state courts, over which congress has no control. Why, in Florida, should it be exclusive of the territorial courts, over which congress had a control? The libellants, then, fail to establish the first proposition, that the necessary import of the terms confers an exclusive jurisdiction on the superior courts. The second proposition, it is apprehended, cannot be established, which is, that jurisdiction over all cases, to which the jurisdiction of the Kentucky court extended, was intended to be conferred. The words of the act are "all cases arising under the laws of the United States."

It is at once perceived, that unless it can be established, that the case of salvage tried before the justice and jury, was a case arising under the law of the United States, that congress have not conferred jurisdiction over it, on the superior courts, and consequently, that the territorial legislature had the right of conferring it upon an inferior court. The reasoning adopted to show, that it was a case arising under the laws of the United States, is somewhat novel. The jurisdiction of the justice depended upon the territorial law; the right of the territorial legislation to enact that law depended on the act of congress; it was, therefore, a case arising under the laws of the United States. And the case of *Osborn* v. *Bank of the United States*, 9 Wheat. 73, is relied upon as an authority.

The case of *Osborn* v. *The Bank*, did not involve the right of the bank to sue in a particular court, nor a mere question of jurisdiction, but the right of the bank to sue in any court; its right to a legal existence. The fact of the legal existence of the bank, depended on a law of the United States. The decision of the question settled the case between the parties; no suit could be afterwards bronght by the bank in another court. But, if the justice in Florida had decided against his own jurisdiction, it would have left the rights of the parties as they were before, to be decided upon in another court. It would have effected the remedy in that court, and that alone. Besides, if every case which involves a question of jurisdiction under a law of the United States, is a case arising under the laws of the United States, then, every case which by possibility can be brought in the Kentucky court, is of that description, because every case involves that question. What meaning then have the words "arising under the laws of the United States?" Why not omit them entirely, and read the section thus, "the same jurisdiction, in all cases, which the Kentucky court

*has." If these words do not limit the grant to cases where some right is claimed under a law, they are wholly inoperative.

It will be found, not only that these words are inoperative, upon the construction of the libellants, but that distinct and independent provisions in the act of congress of 1824, are also inoperative. Immediately following these words conferring jurisdiction upon the superior courts, it is provided, that "all cases arising under the laws of the United States," shall be tried the first six days of the term, and all other cases afterwards; that in such cases, the clerk shall have the same fees that the clerks of the district courts have, but in all other cases, such fees as the legislature shall establish. Now, if every case brought in a territorial court, involves a question of the jurisdiction of the court, and that alone gives it the character of "a case under the laws of the United States," according to the meaning of congress, how can the distinction as to the time of trial, and the amount of fees exist? Congress has established two classes of cases, one under, and the other not under, the law of the United States. The libellants say, there is but one class. All cases brought in the courts of Florida are cases arising under the laws of the United States, because they all involve a question of jurisdiction. This view of the subject appears conclusive.

The whole case results in this, that congress, being the sovereign, *de facto*, or under the constitution of Florida, had a right to provide for its government by a direct or a delegated exercise of power, or by both. That it had the right of distributing all branches of judicial power among the several courts of Florida, as it pleased, and how it pleased, and this, to the same extent, if the constitution is, or if it is not, *per se*, in force in Florida.

That the grant of power to the territorial legislature clearly embraces the exercise of it in question, and that so far from a clear grant of exclusive jurisdiction in all admiralty cases, being conferred upon the superior courts, which could alone limit the grant of power to the legislature, that it is very doubtful, whether any exclusive jurisdiction was intended, and if it was, it was only in relation to cases in which some right or power is claimed under a law of the United States. It is agreed, that salvage is not of that description, unless the possibility of a question of jurisdiction makes it so.

Webster.—This will be a hard case against the claimant of the property, should he lose it, having purchased it in good faith under the decree of a court exercising jurisdiction over the matter, and to which jurisdiction, no objection was made by the parties to the proceeding. *How did the district court of South Carolina obtain jurisdiction in this case? No wrong was done—no tort was committed. That court had not, therefore, jurisdiction of the subject. Salvage is too indefinite a term, to designate jurisdiction. Marine salvage, when the service has been rendered at sea, may form a proceeding in the admiralty, but in this case, the services were after the vessel was a wreck; and therefore, the same principles do not apply. This proceeding is in the nature of an action of trespass; the process was against the *res*, and the person of the claimant; and because there had been a question of salvage in the court under whose decree the *res* is held by the claimant, it does not follow, that there is jurisdiction in the courts of the United States. It is said, the property has not passed by any valid decree, and trespass or trover would lie.

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Has there been such judicial sale, as conveyed the property to the claimant? If not, the insurance companies claim to hold the property. What is Florida? It is no part of the United States. How can it be? how is it represented? do the laws of the United States reach Florida? Not unless by particular provisions. The territory, and all within it, are to be governed by the acquiring power, except where there are reservations by treaty. By the law of England, when possession is taken of territories, the king, *jure coronæ*, has the power of legislation, until parliament shall interfere. Congress have the *jus coronæ* in this case, and Florida was to be governed by congress as she thought proper. What has congress done? she might have done anything—she might have refused the trial by jury, and refused a legislature. She has given a legislature, to be exercised at her will; and a government of a mixed nature, in which she has endeavored to distinguish between state and United States jurisdiction, anticipating the future erection of the territory into a state. Does the law establishing the court at Key West, come within the restrictions of the constitution of the United States? If the constitution does not extend over this territory, the law cannot be inconsistent with the national constitution.

It is said, that the court erected for the territory by the law of the United States, has exclusive jurisdiction over this case, and that the interference of the local legislature is unauthorized. Does the law erecting the superior court of Florida, give this exclusive jurisdiction? The jurisdiction given to the Florida court is the same as that given to the district court of Kentucky; and as the district court of Kentucky has jurisdiction of all cases arising *under the laws of the United States, it is inferred, that the same is vested in the Florida court. But it does not follow, from the language of the acts, that the jurisdiction is exclusive; and thus the power of the court erected by the legislature of Florida, may be and was concurrent. The main point in this case is, whether it is a case arising under the constitution of the United States? What are the cases which are referred to in provision? and is this one? [*539

The principles of those cases have been examined, and enough has been settled, to show that this is one which does not so arise. A case is not one arising under a law of the United States, because, in some part of it, a question may arise under a law of the United States. The meaning of the provision of the constitution cannot be, that when a law of the United States can have any influence in a case, it is to be considered as one arising under the law of the United States. How does the cause before the court arise under a law of the United States? It is a claim for salvage. The goods are brought into Key West, and there is no law of the United States limiting or fixing the amount of salvage. Salvage is not a right arising under a law of the United States; it is a common-law right; and the action for its recovery, or the rate to be allowed, does not depend upon any law of the United States. It cannot be claimed, that any laws operated in the case, unless the general laws which extended over the territory. The case of *Osborn* v. *Bank of the United States*, decided in this court, does not apply to this case. The law giving to the bank their charter, gave to that institution a power to sue in the courts of the United States. But as has been stated, the salvors of the cotton did not claim salvage under any law of the Union. The

salvage might have been sued for, wherever the goods could be found and libelled, in England or in France, or elsewhere.

The argument, that this court should lay its hands on the proceedings of the courts of Key West, because of the great injuries sustained by merchants and underwriters, if it could, at any time, have force here, cannot have it now; as the law establishing the court which is so much complained of, has been repealed.

Ogden, in reply.—The place where the service is done, ascertains the jurisdiction. It is upon this principle, that questions of seamen's wages are subjects of admiralty jurisdiction, and entertained in admiralty courts; and upon this principle, the case before the court is of admiralty cognisance. The whole of the services of the salvors were at sea; the place where the Point à Petre was wrecked, was at a distance from the main-land, and there the goods were saved. *It is admitted, that for the cotton, *540] which is the subject of this suit, an action of trover will lie; but this is a concurrent remedy with that afforded in a court of admiralty.

Territories acquired by conquest, and by cession, stand under different relations to the United States. Where territories are ceded, they become part of the United States; it has been the uniform understanding, that this shall be the case. Those territories obtained by treaties with France and Spain, were so considered, and the provisions in those treaties, relative to the rights and privileges of the inhabitants, were introduced, under the belief that congress would not interfere. The act relative to the territory of Florida provides, that no law shall be passed against the provisions of the constitution of the United States. The officers appointed under it, take an oath to support the constitution, and thus, the full force and operation of the constitution is acknowledged in the territory.

By the constitution, the courts of the United States have jurisdiction in all cases of admiralty and maritime jurisdiction; and it, therefore, follows, that this is exclusive. What courts have congress ordained and established in the territory of Florida, to exercise the jurisdiction assigned by the constitution to the courts of the United States? The law establishes a superior court, with general jurisdiction, similar to the courts established in the states; it then provides, that inferior courts may be erected by the territorial legislature, whose jurisdiction shall not exceed one hundred dollars; and it is afterwards said in the law, that the superior court shall, in addition to the defined powers, exercise all such powers as are granted to the United States court of Kentucky. The court established in Kentucky has given to it admiralty and maritime jurisdiction, and therefore, the superior court of Florida has the same jurisdiction. If, then, it is given by congress to the superior court, it exists nowhere else.

It is said, that congress has given to the territorial legislature all the rights of legislation they have. Legislative powers cannot be delegated: *delegatus non potest delegare.* Whether the territorial court had jurisdiction, is a question arising under the constitution of the United States. How else does it arise? Suppose, a jurisdiction in admiralty cases, assumed by New York, during a war. How can the powers thus assumed be examined before the courts of the United States, but by affirming the acts to be void by the constitution and laws of the United States?

This is a question of salvage ; and had the territorial court jurisdiction of salvage ? If the cotton was not sold under the decree of a court competent to decide such a question, the *property is not changed. [*541
Does the territorial act give the jurisdiction ? The powers of courts formed under the territorial law, being limited to controversies not exceeding one hundred dollars, the limitation has been exceeded ; and the provisions for the establishment of the court are, therefore, void.

Marshall, Ch. J., delivered the opinion of the court.—The plaintiffs filed their libel in this cause, in the district court of South Carolina, to obtain restitution of 356 bales of cotton, part of the cargo of the ship Point à Petre ; which had been insured by them, on a voyage from New Orleans to Havre de Grace, in France. The Point à Petre was wrecked on the coast of Florida, the cargo saved by the inhabitants, and carried into Key West, where it was sold, for the purpose of satisfying the salvors, by virtue of a decree of a court, consisting of a notary and five jurors, which was erected by an act of the territorial legislature of Florida. The owners abandoned to the underwriters, who having accepted the same, proceeded against the property ; alleging that the sale was not made by order of a court competent to change the property.

David Canter claimed the cotton as a *bonâ fide* purchaser, under the decree of a competent court, which awarded seventy-six per cent. to the salvors, on the value of the property saved. The district judge pronounced the decree of the territorial court a nullity, and awarded restitution to the libellants, of such part of the cargo as he supposed to be identified by the evidence ; deducting therefrom a salvage of fifty per cent. The libellants and claimant both appealed. The circuit court reversed the decree of the district court, and decreed the whole cotton to the claimant, with costs ; on the ground, that the proceedings of the court at Key West were legal, and transferred the property to the purchaser. From this decree, the libellants have appealed to this court.

The cause depends, mainly, on the question whether the property in the cargo saved, was changed, by the sale at Key West. The conformity of that sale to the order under which it was made, has not been controverted. Its validity has been denied, on the ground, that it was ordered by an incompetent tribunal. The tribunal was constituted by an act of the territorial legislature of Florida, passed on the 4th July 1823, which is inserted in the record. That act purports to give the power which has been exercised ; consequently, the sale is valid, if the territorial legislature was competent to enact the law.

The course which the argument has taken, will require, that, *in [*542
deciding this question, the court should take into view the relation in which Florida stands to the United States. The constitution confers absolutely on the government of the Union, the powers of making war, and of making treaties ; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty. The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace. If it be ceded by the treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is

annexed; either on the terms stipulated in the treaty of cession, or on such as its new master shall impose. On such transfer of territory, it has never been held, that the relations of the inhabitants with each other undergo any change. Their relations with their former sovereign are dissolved, and new relations are created between them and the government which has acquired their territory. The same act which transfers their country transfers the allegiance of those who remain in it; and the law, which may be denominated political, is necessarily changed, although that which regulates the intercourse, and general conduct of individuals, remains in force, until altered by the newly created power of the state.

On the 2d of February 1819, Spain ceded Florida to the United States. The 6th article of the treaty of cession, contain the following provision: "The inhabitants of the territories, which his Catholic Majesty cedes to the United States by this treaty, shall be incorporated in the Union of the United States, as soon as may be consistent with the principles of the federal constitution; and admitted to the enjoyment of the privileges, rights and immunities of the citizens of the United States." This treaty is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights and immunities of the citizens of the United States. It is unnecessary to inquire, whether this is not their condition, independent of stipulation. They do not, however, participate in political power; they do not share in the government, till Florida shall become a state. In the mean time, Florida continues to be a territory of the United States; governed by virtue of that clause in the constitution, which empowers congress "to make all needful rules and regulations, respecting the territory, or other property, belonging to the United States."

Perhaps, the power of governing a territory belonging to the United States, which has not, by becoming a state, acquired the means of self-government, may result necessarily from the fact, that it is not within the jurisdiction of any particular state, and is within the power and jurisdiction
*543] of the United *States. The right to govern may be the inevitable consequence of the right to acquire territory. Whichever may be the source whence the power is derived, the possession of it is unquestioned. In execution of it, congress, in 1822, passed "an act for the establishment of a territorial government in Florida;" and on the 3d of March 1823, passed another act to amend the act of 1822. Under this act, the territorial legislature enacted the law now under consideration.

The 5th section of the act of 1823, creates a territorial legislature, which shall have legislative powers over all rightful objects of legislation; but no law shall be valid, which is inconsistent with the laws and constitution of the United States. The 7th section enacts, "that the judicial power shall be vested in two superior courts, and in such inferior courts, and justices of the peace, as the legislative council of the territory may, from time to time, establish." After prescribing the place of session, and the jurisdictional limits of each court, the act proceeds to say, "within its limits herein described, each court shall have jurisdiction in all criminal cases, and exclusive jurisdiction in all capital offences; and original jurisdiction in all civil cases of the value of one hundred dollars, arising under and cognisable by the laws of the territory, now in force therein, or which may, at any time, be enacted by the legislative council thereof." The 8th section enacts, "that

each of the said superior courts shall moreover have and exercise the same jurisdiction, within its limits, in all cases arising under the laws and constitution of the United States, which, by an act to establish the judicial courts of the United States, approved the 24th of September 1789, and an act in addition to the act, entitled an act to establish the judicial courts of the United States, approved the 2d of March 1793, was vested in the court of Kentucky district."

The powers of the territorial legislature extend to all rightful objects of legislation, subject to the restriction, that their laws shall not be "inconsistent with the laws and constitution of the United States." As salvage is admitted to come within this description, the act is valid, unless it can be brought within the restriction. The counsel for the libellants contend, that it is inconsistent with both the law and the constitution; that it is inconsistent with the provisions of the law, by which the territorial government was created, and with the amendatory act of March 1823. It vests, they say, in an inferior tribunal, a jurisdiction, which is, by those acts, vested exclusively in the superior courts of the territory.

*This argument requires an attentive consideration of the sections which define the jurisdiction of the superior courts. The 7th section [*544 of the act of 1823, vests the whole judicial power of the territory "in two superior courts, and in such inferior courts, and justices of the peace, as the legislative council of the territory may, from time to time, establish." This general grant is common to the superior and inferior courts, and their jurisdiction is concurrent, except so far as it may be made exclusive in either, by other provisions of the statute. The jurisdiction of the superior courts is declared to be exclusive over capital offences; on every other question over which those courts may take cognisance by virtue of this section, concurrent jurisdiction may be given to the inferior courts. Among these subjects, are "all civil cases arising under and cognisable by the laws of the territory, now in force therein, or which may at any time be enacted by the legislative council thereof."

It has been already stated, that all the laws which were in force in Florida, while a province of Spain, those excepted which were political in their character, which concerned the relations between the people and their sovereign, remained in force, until altered by the government of the United States. Congress recognises this principle, by using the words "laws of the territory, now in force therein." No laws could then have been in force, but those enacted by the Spanish government. If, among these, a law existed on the subject of salvage, and it is scarcely possible there should not have been such a law, jurisdiction over cases arising under it, was conferred on the superior courts, but that jurisdiction was not exclusive. A territorial act, conferring jurisdiction over the same cases on an inferior court, would not have been inconsistent with this section.

The 8th section extends the jurisdiction of the superior courts, in terms which admit of more doubt. The words are "that each of the said superior courts shall, moreover, have and exercise the same jurisdiction, within its limits, in all cases arising under the laws and constitution of the United States, which, by an act to establish the judicial courts of the United States, was vested in the court of the Kentucky district." The 11th section of the act declares, "that the laws of the United States, relating to the revenue

and its collection, and all other public acts of the United States, not inconsistent or repugnant to this act, shall extend to, and have full force and effect, in the territory aforesaid."

The laws which are extended to the territory by this section, were either for the punishment of crime, or for civil *purposes. Jurisdiction is *545] given in all criminal cases, by the 7th section, but in civil cases, that section gives jurisdiction only in those which arise under and are cognisable by the laws of the territory : consequently, all civil cases arising under the laws which are extended to the territory by the 11th section, are cognisable in the territorial courts, by virtue of the 8th section ; and in those cases, the superior courts may exercise the same jurisdiction as is exercised by the court for the Kentucky district.

The question suggested by this view of the subject, on which the case under consideration must depend, is this—Is the admiralty jurisdiction of the district courts of the United States vested in the superior courts of Florida, under the words of the 8th section, declaring that each of the said courts "shall, moreover, have and exercise the same jurisdiction, within its limits, in all cases arising under the laws and constitution of the United States," which was vested in the courts of the Kentucky district? It is observable, that this clause does not confer on the territorial courts all the jurisdiction which is vested in the court of the Kentucky district, but that part of it only which applies to "cases arising under the laws and constitution of the United States." Is a case of admiralty, of this description?

The constitution and laws of the United States give jurisdiction to the district courts over all cases in admiralty ; but jurisdiction over the case, does not constitute the case itself. We are, therefore, to inquire, whether cases in admiralty, and cases arising under the laws and constitution of the United States, are identical. If we have recourse to that pure fountain from which all the jurisdiction of the federal courts is derived, we find language employed which cannot well be misunderstood. The constitution declares, that "the judicial power shall extend to all cases in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority ; to all cases affecting ambassadors, or other public ministers and consuls ; to all cases of admiralty and maritime jurisdiction." The constitution certainly contemplates these as three distinct classes of cases ; and if they are distinct, the grant of jurisdiction over one of them, does not confer jurisdiction over either of the other two. The discrimination made between them, in the constitution, is, we think, conclusive against their identity. If it were not so, if this were a point open to inquiry, it would be difficult to maintain the proposition that they are the same. A case in admiralty does not, in fact, arise under the constitution or laws of the United States. These cases *are as old as *546] navigation itself ; and the law admiralty and maritime, as it has existed for ages, is applied by our courts to the cases as they arise. It is not then to the 8th section of the territorial law, that we are to look for the grant of admiralty and maritime jurisdiction to the territorial courts. Consequently, if that jurisdiction is exclusive, it is not made so by the reference to the district court of Kentucky.

It has been contended, that by the constitution the judicial power of the United States extends to all cases of admiralty and maritime jurisdiction ;

and that the whole of this judicial power must be vested "in one supreme court, and in such inferior courts as congress shall from time to time ordain and establish." Hence, it has been argued, that congress cannot vest admiralty jurisdiction in courts created by the territorial legislature. We have only to pursue this subject one step further, to perceive that this provision of the constitution does not apply to it. The next sentence declares, that "the judges both of the supreme and inferior court, shall hold their offices during good behavior." The judges of the superior courts of Florida hold their offices for four years. These courts, then, are not constitutional courts, in which the judicial power conferred by the constitution on the general government, can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables congress to make all needful rules and regulations, respecting the territory belonging to the United States. The jurisdiction with which they are invested, is not a part of that judicial power which is defined in the 3d article of the constitution, but is conferred by congress, in the execution of those general powers which that body possesses over the territories of the United States. Although admiralty jurisdiction can be exercised in the states, in those courts only which are established in pursuance of the third article of the constitution; the same limitation does not extend to the territories. In legislating for them, congress exercises the combined powers of the general, and of a state government.

We think, then, that the act of the territorial legislature, erecting the court by whose decree the cargo of the Point à Petre was sold, is not "inconsistent with the laws and constitution of the United States," and is valid. Consequently, the sale made in pursuance of it changed the property, and the decree of the circuit court, awarding restitution of the property to the claimant, ought to be affirmed, with costs.

Decree affirmed.

*United States *v.* 422 Casks of Wine: Hazard & Williams, Claimants.

Res adjudicata.—Practice and pleading in revenue causes.

It is not the habit of this court, to consider points again open for discussion, which have been once deliberately decided, and have furnished the ground-work of the judgment already rendered in the same cause, in a former stage of its proceedings.[1] p. 549.

In suits *in rem*, and on the exchequer side of the district courts of the United States, the claimant is an actor, and is entitled to come before the court in that character only, in virtue of his proprietary interest in the thing in controversy: this alone gives him a *persona standi in judicio.*

It is necessary, that he should establish his right to that character, as a preliminary to his admission as a party *ad litem*, capable of sustaining the litigation. p 549.

If the claim be made through an agent, the agent must make oath as to his belief of the verity of the claim, and if necessary, produce proof of his authority, before he can be admitted to put in the claim. p. 549.

Allegations and pleadings to the merits are a waiver of the preliminary inquiry as to proprietary interest, and admission that the party is rightly in court, and capable of contesting the merits. p. 550.

If, after proceeding in a cause, the court finds the claimant has no property, or that it is in another, not represented, the court will retain the *res*, until the real owner shall appear, claim and receive it from the court. p. 550.

Upon a writ of error in an exchequer proceeding, which has been tried by a jury, the evidence given at the time of the trial, is not, in a strict sense, before this court. p. 550.

Error to the District Court of East Louisiana. This case was before this court, at February term 1823, and is reported in 8 Wheat. 391, under the name of *The Sarah.* The cause having been sent back, the libel was changed into an information, charging the seizure to have been made on land, according to the leave given by the decree of the court in that case.

The information charged the wine to have been, in reality, Malaga wine, falsely exported from New York under the name of Sherry, for the benefit of the drawback. To this information, a claim and answer was given and filed by Benjamin Story, as agent for Hazard & Williams, and on the oath of the said Story, claiming the wine as the property of the said Hazard & Williams, making no answer to the specific fact charged by the information, that the wine was Malaga wine, exported under the name of Sherry, for the benefit of drawback; but denying generally the allegations of the information, or that anything had been done to forfeit the wine, under the revenue laws of the United States, and claiming the restoration of the wine to Hazard & Williams. The record set forth the evidence on the *question, whether the wines were Malaga or Sherry.

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The verdict of the jury was for the claimants. The district-attorney moved for a new trial, which was overruled; on which he brought this writ of error, and made the following assignment of errors: 1. That on the 18th of December 1819, this case was tried by jury, and verdict and judgment rendered for the United States. 2. The proceedings under this libel were regular; as the amendment related to matter of form merely, and not of substance; and by the 17th section of the act of congress of 24th September 1789, the courts of the United States may establish all necessary rules for conducting the business of the court; and the 22d section of the same act provides, that "there shall be no reversal for error in ruling any plea in

[1] Wright *v.* Sill, 2 Black 544; Minnesota Mining Co. *v.* National Mining Co., 3 Wall. 332.

abatement," &c. The proceedings in this case were in conformity with the rules of the court in which they were instituted. No answer and claim was filed and sworn to, by, or in the name and behalf of, Charles Hall, the real owner of the said 422 casks of wine, at the time of the seizure and forfeiture thereof to the United States.

Wirt, Attorney-General, on the part of the United States, submitted the case, on the errors assigned by the district-attorney.

Ogden and *Hall*, on the part of the claimants, made the following points: 1. That there is no error upon the record, for the causes assigned by the attorney for the United States; the same points having been already before this court, and after due consideration, conclusively settled, upon the first trial of this cause. (See *The Sarah*, 8 Wheat. 391.) 2. That there was no necessity for the said Charles Hall to file a claim and answer in his own name, since his title to said wine (if proved) accrued after the seizure thereof; and after a claim and answer had been duly filed by Hazard & Williams, the parties having the legal title to said property. 3. That the objection, "that no answer and claim hath been filed and sworn to by or in the name and behalf of Charles Hall, the real owner of said 422 casks of wine," were it valid, cannot now prevail; because the same should have been taken, when the claim was filed, or, at all events, at the time of the trial of the cause in the court below. 4. That from the whole record it appears, that judgment ought not to be for the United States of condemnation of said wine; but ought, of right, to be for the claimants. 5. "That from the whole of the evidence apparent upon the record, and taken for the purpose of review, &c.," it is manifest, that restitution of said wine ought to be decreed to the claimants.

*Story, Justice, delivered the opinion of the court.—This is the same cause which came before this court at February term 1823, and [*549 is reported in 8 Wheat. 391. The cause having been remanded to the district court of Louisiana for further proceedings, the libel or information was there amended, so as to become, technically, an exchequer information of seizure; and the parties being at issue upon the question of forfeiture, the jury returned a verdict for the claimants, upon which judgment was rendered in their favor. Upon the writ of error now brought upon this last judgment, two grounds for reversal have been asserted, in the assignment of errors spread upon the record, and the attorney-general has now submitted them, after a brief exposition, to the consideration of the court.

The first is, in substance, the same question which was decided by this court, upon the former appeal, and is presented in the shape of a re-argument, by the district-attorney. Upon this, it is unnecessary to say more, than that we adhere to the opinion formerly expressed, and can perceive no reason for changing it. It is not the habit of this court to consider points again open for discussion, which have been once deliberately decided, and have furnished the ground-work of the judgment already rendered in the same cause, in a former stage of its presentation here.

The second ground is, that Messrs. Hazard & Williams, in whose behalf the claim in this case was interposed, are not the real owners of the wine under seizure, but the same was owned by one Charles Hall; so that the

claimants are not entitled to any judgment of restitution. The objection is founded upon a mistaken view of the time, nature and order of the proceedings proper in suits *in rem*, whether arising on the admiralty or exchequer side of the court. In such suits, the claimant is an actor, and is entitled to come before the court in that character only, in virtue of his proprietary interest in the thing in controversy ; this alone gives him *persona standi in judicio*. It is necessary that he should establish his right to that character, as a preliminary to his admission as a party *ad litem*, capable of sustaining the litigation. He is, therefore, in the regular and proper course of practice, required, in the first instance, to put in his claim, upon oath, averring in positive terms his proprietary interest ; if he refuses so to do, it is a sufficient reason for a rejection of his claim. If the claim be made through the intervention of an agent, the agent is, in like manner, required to make oath to his belief of the verity of the claim ; and if necessary, he may also be required to produce and prove his authority, before he *can be admitted to put in the claim. If this be not done, it furnishes matter of exception, and may be insisted upon by the adverse party, for the dismissal of the claim. If the claim be admitted, upon his preliminary proof, it is still open to contestation, and by a suitable exceptive allegation in the admiralty, or by a correspondent plea, in the nature of a plea in abatement to the person of the claimant, in the exchequer, the facts of proprietary interest, sufficient to support the claim, may be put in contestation, and formally decided. It is in this stage of the proceedings, and in this only, that the question of the claimant's right is generally open for discussion. If the claim is admitted, without objection, and allegations or pleadings to the merits are subsequently put in ; it is a waiver of the preliminary inquiry, and an admission that the party is rightly in court, and capable of contesting the merits. If, indeed, it should afterwards appear, upon the trial, even after the merits have been disposed of in favor of the claimants, that the claimant had, in reality, no title to the property ; but that the same was the property of a third person, who was not represented by the claimant, or had an adverse interest, or whose rights had been defrauded, it might still be the duty of the court to retain the property in its own custody, until the true owner might have an opportunity to interpose a claim, and receive it from the court. But such cases can rarely occur, and are applications to the discretion of the court, for the furtherance of justice ; and in no shape, matters which the original *promovent* could have a right to require at its hands.

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From this review of the practice, as to claims in proceedings *in rem*, it is obvious, that the objection now relied on, however apparent it might be from the evidence disclosed upon the record, could not be insisted on as matter of error. In a strict sense, however, this being a writ of error upon an exchequer information, tried by a jury, the evidence given at the trial is not properly before us ; and as a common-law proceeding, the affidavit of Mr. Henner constitutes no part of the record. But even if that affidavit were admissible, and the objection were now open, it is by no means clear, that it would be available. The property was, by the consent of Hall, sold and conveyed to Messrs. Hazard & Williams, in trust for himself. If that conveyance was fraudulant as to creditors, it was not absolutely void, and only voidable by them. And at all events, we cannot but see, that they had

full authority to interpose this claim, by the consent of the real owner; and the irregularity, if any, prejudices no adverse right, and interferes with no rule of justice.

The judgment of the district court must, therefore, be affirmed. But a certificate of probable cause of seizure will be *granted, as such probable cause is not denied to exist, and indeed, is apparent from the verdict of the first jury. [*551

This cause came on, &c.: On consideration whereof, it is considered and adjudged by this court, that there is no error in the judgment of the said district court of Louisiana in the premises, and that the same be and hereby is affirmed: And it is further ordered and adjudged, that there was a reasonable cause of seizure of the wines and premises set forth in the information, and that a certificate thereof be entered of record accordingly; and that the cause be remanded, with directions to the district court of Louisiana to make restitution to the claimants, and otherwise proceed in the premises, according to law.

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*Robert Steele's Lessee, Plaintiff in error, *v.* Jesse Spencer and others, Defendants in error. [*552

Recording of deeds.—Erasures and interlineations.

A decree of the supreme court of Ohio, ordered that the patentee of a certain tract of land, should, within six months, make a deed, &c., with covenants of warranty, conveying a portion of the land held under a patent, to the complainants in that suit, and on the failure of A. to make the said deed, &c., "that then and in that case, the complainant shall hold, possess and enjoy the said portion of land, in as full and ample a manner, as if the same had been conveyed to him:" The decree of the supreme court of Ohio, by which a conveyance of lands is directed to be made, the decree being according to the laws of Ohio, vested in those to whom the deed was ordered to be made, such a legal title to the land to have been conveyed by the deed as would have been vested by a deed of equal date; and the registry act of Ohio applies as well to a title under such a decree, as it would do, if the party held under a *bonâ fide* deed of the same date with the patent of the land; and the decree gives a legal title as ample as a deed. p. 558.

The registry act of Ohio directs that all deeds made within the state shall be recorded within six months from the time of the actual execution thereof, and declares, that if any such deed shall not be recorded in the county where the land lies, within the limits allowed by the law, "the same shall be deemed fraudulent and void, against any subsequent purchaser for a valuable consideration, without notice of such deed." p. 559.

In the construction of the registry act of Ohio, the term "purchasers," is usually taken in its limited legal sense; it means, a complete purchaser; or, in other words, a purchaser clothed with a legal title. p. 559.

It is not necessary, that a deed made to the subsequent *bonâ fide* purchaser, without notice, shall be recorded, to give it operation against a prior unrecorded deed, as by the provisions of the registry acts, the prior deed is declared, in itself, absolutely void, as against such purchaser. p. 560.

Whether erasures and alterations in a deed are material, or not, is a question of law, to be decided by the court.[1] p. 590.

The construction of words belongs to the court, and the materiality of an alteration in a deed, is a question of construction. p. 561.

Error to the Circuit Court of Ohio. This was a writ of error to the circuit court of the United States for the district of Ohio, to reverse the

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[1] See Burgwin *v.* Bishop, 91 Penn. St. 336.

judgment of that court, in favor of the defendant in error, in an action of ejectment, instituted by the plaintiff in error, to recover a tract of land in Perry county, in the state of Ohio.

The title claimed and exhibited by the plaintiff in the ejectment, was originally derived under a patent from the United States to Jesse Spencer, dated November 15th, 1811; who, with George Spencer and others, were the heirs-at-law of Thomas Spencer, deceased; and in order to show the title acquired by the patent, he offered in evidence a deed from Jesse Spencer, the patentee, and Catharine his wife, to William Steele, *purporting to bear
*553] date the 20th of January 1818; and which appeared on that day by the certificate on the deed, to have been acknowledged before a justice of the peace. "William Fulton, one of the subscribing witnesses, proved, that he attested the deed, in the office of Jesse Spencer, but could not state when; that William Steele was not present; that he knew nothing of the purchase of the land by William Steele from Jesse Spencer; and that he saw no more of the deed, until about one year ago, when Spencer and Steele were together, and Spencer produced the deed to see, if the witness would recognise his signature." Wherever the name of William Steele appeared, either in the body of the deed, or the label thereon, it manifestly appeared to have been written on an erasure, and with ink of a different color, as did the words "Ross" and "Ohio," in describing the place of residence of said Steele. The alterations on the face of the deed were not accounted for by any testimony. The deed was not recorded in the county where the land lies, or elsewhere. The plaintiff further offered in evidence a deed from William Steele, and Sarah his wife, to Robert Steele, the lessor of the plaintiff, bearing date the 7th of July, A. D. 1821. Also, the deposition of John Daragh, to prove the execution of said deed; which deed and the certificate and acknowledgment thereon, and also the deposition of John Daragh, were also not recorded.

The defendants in the ejectment were in possession of the land, and they claimed to hold it, under a decree of the supreme court of the state of Ohio, for Ross county, sitting in chancery, rendered on the 3d of January 1820, in a proceeding by a bill filed in Perry county, and, under advisement, in Ross county, by the heirs of Thomas Spencer, deceased, against Jesse Spencer and others, by which decree, Jesse Spencer was ordered to convey the land in controversy, to certain of the parties in the said bill, upon their full compliance with the terms and conditions stated in the said decree. The decree then proceeded as follows: "It is further ordered and decreed, that if the complainants shall, within the time specified, deposit and pay to the clerk of Perry county aforesaid, the several sums of money aforesaid, and interest thereon, as aforesaid, and the defendant, Jesse Spencer, shall fail to make out, execute and deliver to said clerk, a deed for nine-tenths of the land aforesaid, within the times aforesaid, in manner aforesaid, that then and in that case, the heirs-at-law aforesaid, to whom the land aforesaid is decreed to be conveyed, in manner aforesaid, shall hold, possess and enjoy nine-tenths of the half-section aforesaid, to them, their heirs and assigns for ever, in as full and ample a manner as though the same were conveyed to them by the said Jesse Spencer, defendant, in manner aforesaid." "It is
*554] further ordered, that Jesse Spencer, *the defendant, pay the costs of the suit, in seven months from the date of this decree; and if he fail

so to do, that then execution or executions issue in the same manner as executions issue on judgments at law. It is further ordered and decreed, that the bill, as to the other two defendants, to wit, William Spencer and James Spencer, is dismissed, without costs, and that the clerk of the supreme court for Ross county, enter this decree of record in the said supreme court of Ross county, and that he transmit a copy of this decree to the clerk of the supreme court of Perry county, it being in the same county from which this cause was removed here for decision, and that the same be entered of record in the supreme court of the said county of Perry, in the same manner as if the cause had been there heard and decreed. It is further ordered and decreed, that if the money is not paid and deposited in manner aforesaid, and within the time aforesaid, that then these complainants shall pay all the costs of the suit." The defendants also exhibited evidence of their having fully complied with all the requisites of the said decree, by the payment of the sum of $524, the amount decreed to be paid ; and also that the decree was duly recorded in the proper office for recording of deeds of the county of Perry, on the 24th July 1822.

After the evidence was closed, the court, on the motion of the counsel for the defendants, instructed the jury as follows : 1. That the decree of the supreme court of the state of Ohio, given in evidence in this cause by the defendants, vested in them such a legal title to the land in question, as would have been conveyed by deed of equal date from Jesse Spencer, the patentee, and that the registry act of Ohio applies as well to the title of the defendants under the said decree, as it would do if they held under a *bonâ fide* deed, of the same date, from the said patentee. 2. That if the elder deed be not recorded within the time specified by the registry act of Ohio, it is wholly void, as to subsequent *bonâ fide* purchasers, without notice of the existence of such deed. 3. That if the deed from Jesse Spencer to William Steele, was altered in a material part, after it was sealed, attested and acknowledged, such alterations absolutely avoid the deed, and it can convey no title to the lessor of the plaintiff.

The counsel of the defendant objected to those parts of the instructions contained in the first and second specifications. They submitted to this court the following points : 1. The court below erred in charging the jury, that the registry act of Ohio applies as well to the title of the defendants, *under the decree set forth in the bill of exceptions, as if they held under a *bonâ fide* deed of the same date. [*555

2. The court below erred in charging the jury, that if the deed from Jesse Spencer to William Steele, was altered in a material part, after it was sealed, attested, and acknowledged ; such alteration absolutely avoids the deed, and it can convey no title to the lessor of the plaintiff. Because— 1st. Such an alteration, if made without the consent of the grantee, would not avoid the deed, and divest the estate vested by the execution of the deed in the grantee. 2d. An alteration of the deed, made with the consent of the grantee, could not divest the estate conveyed by the deed, and revest the same in the grantee.

The case was argued by *Leonard*, for the plaintiff in error ; and by *Ewing*, for the defendants.

For the *plaintiff*, it was insisted, that the registry act of Ohio applies

exclusively to purchasers by deed, and does not include and protect those who hold in virtue of decrees in chancery. Under the statute regulating proceedings in chancery, a suit may be instituted to obtain a conveyance, either in the county in which the land is situated, or where the defendant may be found. The action, and the counts in the declaration, are *in rem vel personam*, and jurisdiction is acquired by the possession and control of the subject-matter, or of the person. As the registry act does not require decrees made in the courts of one county to be recorded in the county where the land is situate, neither does it extend its protection to purchasers under such decrees; or if it embraces other purchasers than those by deed, it protects all subsequent purchasers, and subsequent purchasers alone.

Those cannot be considered subsequent purchasers, who were, before the execution of unrecorded deeds, vested with equitable titles, which afterwards were enforced by suits in chancery. Such purchasers by decree, do not come within the mischief of the registry act. Such a construction would be forced and inconvenient; as the purchaser by deed, on recording his deed, or by giving notice, *pendente lite*, in chancery; and even after decree rendered, and before the expiration of the time limited for the execution of the conveyance, although after the lapse of six months; would bring his deed within the protection of the act, and defeat purchasers by decree. If the chancery suit had been instituted against Steele, as well as Spencer, the complainants could not have obtained a decree. A party might in this way obtain a good title, by his omission to embrace proper parties in his bill in equity. A defective title might thus be made good, during the progress of
*556] the suit, and indeed, a *title invalid at the rendition of the decree, valid in a month after—*vires acquirit eundo.*

This construction would make the statute penal; punishing the party for his *laches*, in omitting to record his deed, instead of simply a protection of the rights of others. All the mischief to be guarded against by the statute, was effected by the execution of the deed; and the omission seasonably to record the deed, could not injure one who had a good equitable title, which is subsequently enforced by a bill in equity.

It was also insisted, that the court erred in charging the jury, that a material alteration in the deed from Spencer to Steele, after its execution, could defeat the title thereby vested in Steele. It was apparent, on the plaintiff's bills of exception, the court erred in thus charging the jury, and the court could not look to the bill of exceptions of the defendants in error, for any purpose; or if they could, the error was not rectified by a comparison of the facts there stated with the charge. *Marshall* v. *Fisk*, 6 Mass. 32.

Ewing, for the defendants.—The registry act of Ohio protects subsequent *bonâ fide* purchasers against unregistered deeds. A party entitled under a decree of a court of chancery, is a purchaser, in the legal signification of the term, and is, therefore, within the letter of the statute. There can be no reason to except him from its operation; he is as much injured by the concealment of a prior deed, as any other purchaser. Whenever a party is entitled, in equity, to a specific performance of a contract; if the defendant had put it out of his power to perform it, it is important, that the fact should be made known to the party interested, that he may seek other and

more effectual relief. A purchaser under such a decree, is, therefore, within the spirit as well as the letter of the act.

The court did not err in charging the jury, that the defendant's title took effect from the date of the decree. Courts of equity, in Ohio, in settling the title to real property, proceed *in rem*, not *personam*. It is true, they direct the party to execute a deed, but they do not compel him by attachment, to do so. If he refuses, the decree operates a deed, and the *res sita* gives jurisdiction to the court. The decree of the court fixes the title to the property. The time allowed for the conveyance relates merely to the transfer of the evidences of title, and the possession and the deed, if made pursuant to the decree, relate to the date of the decree itself. If no deed be made, the title by the decree relates. Thus, if the party against whom a decree is rendered should die, or being a *feme sole*, should marry, before the period fixed for the *execution of a title; it is believed, that the decree would operate, without further proceeding, to vest the title. [*557

2. Deeds for the conveyance of real estate in Ohio, derive their validity solely from statutory provisions. No common law mode of transferring real estate (except by operation of law) is recognised. *Lindsley* v. *Coats*, 1 Ohio 243. Neither is the statute of uses, which in England gives validity to the deed of bargain and sale, in force in Ohio. Deeds, therefore, to be valid, must be executed according to the provisions of the statute of that state; and if they are deficient in any of the requisites pointed out by that statute, they create no legal title. That act (Ohio Laws, vol. 22, p. 218) requires the grantor to seal and acknowledge the deed, in the presence of two witnesses, who subscribe their names, and also his solemn acknowledgment before a judicial officer. The deed in question was not proved to have ever been executed, with all these formalities. But if, after this due execution, it were altered in a material part, no matter by whom, or with whose consent; it was no longer the same deed. *Pigot's Case*, 11 Co. 27.

Trimble, Justice, delivered the opinion of the court:—This writ of error is prosecuted to reverse a judgment of the circuit court for the district of Ohio, rendered in favor of the defendants, in an action of ejectment, instituted by the plaintiff in error against the defendants, in the court below, to recover a tract of land in Perry county.

On the trial of the general issue, which was joined between the parties, the plaintiff gave in evidence a patent from the president of the United States to Jesse Spencer, dated the 15th of November 1811, for the land in controversy; a deed of conveyance for the land, from Jesse Spencer to William Steele, purporting to bear date the 20th of January 1818, and also a deed from William Steele to Robert Steele, dated the 7th of July 1821, prior to the institution of the suit. It appeared, from a certificate on the deed from Jesse Spencer to William Steele, that it had been acknowledged, on the day of its date, before a justice of the peace; and it was attested by two subscribing witnesses. The deed from Jesse Spencer to Steele, had never been recorded, either in the county where the lands lie, or elsewhere. Wherever the name of William Steele appeared in the body of the deed, or in the label thereon, it appeared to have been written over an erasure, and with ink of a different color, as did the words "Ross" and "Ohio," in describing the

place of residence of Steele. This was unaccounted for, by any testimony in the cause.

*558] *The defendants gave in evidence, a record and decree of the supreme court of the state of Ohio, in a cause in which the heirs of Thomas Spencer and the defendants in this cause were complainants, and Jesse Spencer, the patentee of the land, was defendant. This decree was rendered by the supreme court, on the 3d of January 1820, while sitting in Ross county, having heard the cause in Perry county, where the suit was instituted, and where the land lies; and having held it under an advisement, as is the practice in Ohio, the decree was pronounced in the cause, at Ross county, and was certified from thence to Perry county, to be there entered on record in the suit, in the same manner as if rendered while the supreme court was sitting in Perry county; and it was so entered on record accordingly. The decree was also recorded in the office of the recorder of deeds, on the 24th of July 1822, in Perry county.

The decree, *inter alia*, ordered Jesse Spencer, the patentee of the land, "within six months from the date of the decree, to make out a deed, with covenants of general warranty, conveying to the complainants in that cause, and defendants in this, an undivided nine parts out of ten, or nine-tenths, of the tract of land in controversy; and to deposit said deed, duly executed, acknowledged and attested, with the clerk of the supreme court of the county of Perry, within the said term of six months; and by the clerk to be delivered to the complainants, upon their paying and depositing with the clerk, within the said term of six months, certain sums of money, with interest, as specified in the decree; and that, upon the failure of the said Jesse Spencer to make out and deposit a deed, as above directed, within the said term of six months; that then and in that case, the complainants shall hold, possess and enjoy nine-tenths of the said tract of land, in as full and ample a manner as if the same were conveyed to them by the said Jesse Spencer." The defendants paid and deposited with the clerk the money required by the decree, within the six months, and took his receipt for the same.

It appears by a bill of exceptions tendered by the plaintiff's counsel, that after the evidence was closed, the counsel of the defendants moved the court to instruct the jury: 1. That the decree of the supreme court of the state of Ohio, given in evidence by the defendants, vested in them such a legal title to the land in question, as would have been vested by a conveyance from Jesse Spencer, of equal date; and that the registry act of Ohio applies as well to the title of the defendants, under the said decree, as it would do, if they held under *bonâ fide* deed, of the same date, from the patentee.

*559] *2. That if the elder deed be not recorded within the time specified by the registry act of Ohio, it is wholly void as to subsequent *bonâ fide* purchasers, without notice of the existence of such deed. 3. That if the deed from Jesse Spencer to William Steele, was altered in a material point, after it was sealed, attested and acknowledged, such alteration absolutely avoids the deed; and it can convey no title to the lessor of the plaintiff: which instructions the court gave, and the plaintiff excepted.

The counsel for the plaintiff relies on the following points for a reversal of the judgment. 1. The court below erred in charging the jury, that the registry act of Ohio applies as well to the title of the defendants, under the

decree set forth in the bill of exceptions, as if they held under a *bonâ fide* deed of the same date. 2. That the court below erred in charging the jury, that if the deed from Jesse Spencer to William Steele was altered in a material part, after it was sealed, attested and acknowledged ; such alteration absolutely avoids the deed, and it can pass no title to the lessor of the plaintiff.

The propriety of the first instruction, given by the court to the jury, admits not of a doubt. The statute of Ohio, entitled "an act directing the mode of proceeding in chancery," declares, "that where a decree shall be made for a conveyance, release or acquittance, &c., and the party against whom the decree shall pass, shall not comply therewith by the time appointed, then such decree shall be considered and taken in all courts of law and equity, to have the same operation and effect, and be as available, as if the conveyance, release or acquittance had been executed conformably to such decree." Land Laws of Ohio, p. 296. The registry act of Ohio directs, that all deeds made within the state, shall be recorded, "within six months from the actual time of signing and executing of such deeds ;" and declares, that if any such deed shall not be recorded, in the county where the land lies, within the time allowed by the act, "the same shall be deemed fraudulent against any subsequent *bonâ fide* purchaser, for valuable consideration, without notice of such deed."

In the construction of registry acts, the term "purchaser" is usually taken in its technical legal sense. It means a complete purchaser, or, in other words, a purchaser clothed with the legal title. The meaning of the statute is, that an unrecorded deed, shall, after the expiration of the time limited by the statute, be deemed fraudulent and void, as against all subsequent purchasers, who may have obtained the legal title, for valuable consideration, without notice. The case of the *defendants is then within the terms of the registry act. They obtained their decree, [*560 and paid the purchase-money directed by the decree, without notice ; and the decree had obtained, by operation of the statute, all the attributes of a perfect legal title.

The argument for the plaintiff on this branch of the case, was founded on a supposition, that, to bring the defendants' case within the terms of the registry act, it must be shown, that their title has been recorded, as a deed, and their title being not a deed, but a decree, it is insisted, they are not within the terms of the statute. This is a mistake. The plaintiff's deed not being recorded, the statute avoids it in terms, as against all subsequent purchasers for valuable consideration, without notice, whether their titles be recorded or not. If the defendants had held under a conveyance executed by Jesse Spencer, in obedience to the decree, their title deed, although not recorded, would, by the terms of the statute, prevail against the plaintiff's prior unrecorded deed. A deed not being recorded, avoids it as against subsequent, but not as against prior purchasers. By the laws of the state of Ohio, the decree obtained by the defendants clothes them with the legal title in as ample a manner as a deed. They are purchasers for valuable consideration, without notice ; and are, therefore, not only within the words, but also within the spirit and intention of the statute.

This reasoning has been indulged, upon a supposition that the title of the defendant has not been sufficiently recorded, which is not admitted.

The decree, which is their title, is of record in the chancery suit, in the proper county where the land lies, and it was recorded in the office of the recorder of deeds. Whether this last mode of recording the decree is usually practised in Ohio or not, we are not informed. But we suppose the defendants had done all they could do, to commit their title to record in the proper county.

The third instruction given by the court to the jury, which forms the second ground relied on by the plaintiff's counsel for a reversal of the judgment, cannot be sustained. Although the proposition may be true, that a material erasure or alteration in a deed, after its execution, may avoid the deed, yet, the instruction ought not to have been given in the terms used by the court. Whether erasures and alterations had been made in the deed or not, was a question of fact, proper to be referred to the jury; but whether the erasures and alterations were material or not, was a question of law which ought to have been decided by the court. The instruction given refers the question of materiality to the jury, as well as the fact of alteration and erasure.

*561] *If the name of William Steele was inserted in the deed as grantee, after its full execution and attestation, instead of the name of some other grantee, which was stricken out, no doubt, the alteration was very material, and nothing could in that case pass by the deed to William Steele, The two other alterations supposed, in the words "Ross" and "Ohio," in the description of the grantee's residence, may have been either material or immaterial, as, upon a sound construction of the whole instrument, they would or would not alter or change its operation and effect.

The court ought to have decided the question of materiality in each instance, leaving the fact of alteration to the jury for their decision. The instruction given, was calculated to mislead the jury, by impressing on them the belief that they were warranted in finding either of the supposed alterations to be material, however it may have been in point of law. The construction of deeds belongs to the province of the court; the materiality of an alteration in a deed, is a question of construction; and in this case, the court committed an error, by giving an instruction to the jury, which imposed on them a difficult question of construction, upon which the jury ought to have been enlightened by the decision of the court. The judgment of the circuit court must be reversed, and the cause remanded, with instructions to award a *venire facias de novo*.

Judgment reversed.

*William S. Nicholls and others, Appellants, *v.* Thomas Hodges, Executors of Thomas L. Hodgson, deceased.

Decedents' estates.—Executors' commissions.—Claims against the estate. Issue.—Jurisdiction.

The orphans' court, by the testamenary laws of Maryland, has a general power to administer justice in all matters relative to the affairs of deceased persons, according to law. The commission to be allowed to an executor or administrator, is submitted to the discretion of the court, and is not to be under five per cent., nor exceeding ten per cent., on the amount of the inventory. p. 565.

If the executor has a claim on the estate of the deceased, it stands on an equal footing with other claims of the same nature. p. 565.

On a plenary proceeding, if either party require it, the court will direct an issue or issues to be made up and sent to a court of law to be tried, and any person conceiving himself aggrieved by any judgment, decree, decision or order, may appeal to the court of chancery, or to a court of law, and in Maryland, the decision of the court, to which the appeal is made, is final. p. 565.

The supreme court of the United States has jurisdiction of appeals from the orphans' court, through the circuit court for the county of Washington, by virtue of the act of congress, of February 13th, 1801, and by the act of congress subsequently passed, the matter in dispute, exclusive of costs, must exceed the value of $1000, in order to entitle the party to an appeal. p. 565.

The commission to be allowed to an executor or administrator is submitted by law to the discretion of the court, upon a consideration of all the circumstances; it was obviously the intention of the legislature, that the decision of the orphans' court should be final and conclusive. p. 565.

The court being satisfied, by an examination of the evidence contained in the record of the proceedings of the orphans' court of the county of Washington, relative to a claim made upon the estate of the testator, by the executor, that such evidence was too loose and indefinite to sanction the claim, disallowed the same, and reversed the decree of the orphans' court which allowed the claim.[1] p. 566.

Nicholls *v.* Hodges, 2 Cr. C. C. 582, reversed, in part.

Appeal from the Circuit Court of the District of Columbia, for the county of Washington.

The defendant obtained letters testamentary on the estate of Thomas C. Hodges, deceased, and passed his accounts in the orphans' court of Washington county, in which he was allowed ten per cent. commission on the inventory of the deceased's estate, amounting to $2358.70, and $1200 for services rendered by him to the deceased.

The testamentary law of Maryland, under which this commission was allowed, is in these words :—" His commission, which shall be at the discretion of the court, not under five per cent. nor exceeding ten per cent. on the amount of the inventory." Act of Maryland, ch. 101, sub. ch. 10, § 2.

*The appellants, creditors of the deceased's estate, filed their petition in the orphans' court, objecting to the allowance of these claims; [*563 and upon the answer of the appellee, and the testimony taken in the cause, the judge of the orphans' court decided in favor of the appellee, and allowed these claims. From this decision, an appeal was prayed to the circuit court for Washington county, where the judgment of the orphans' court was affirmed. From this decision, this appeal was made.

[1] Where a family relationship exists, the law does not imply a promise to pay for services rendered in such relation. Neel *v.* Neel, 59 Penn. St. 347; Neel *v.* Gilmore, 79 Id. 421; Van Kuren *v.* Saxton, 3 How. 547; Cooper *v.* Turner, 2 Id. 515. To establish such claim, an express contract must be shown. Zerbe *v.* Miller, 16 Penn. St. 488; Hertzog *v.* Hertzog, 29 Id. 465; Mosteller's Appeal, 30 Id. 473; Kelly's Estate, 1 Tucker 28.

The depositions of William W. Corcoran, Philip T. Berry, John S. Hare, James A. Magruder and Isaac S. Nicholls were taken, and were sent up with this record. These depositions were intended to prove, that the board and expenses of Thomas C. Hodges were paid by the deceased, by whom he was employed in his store as an assistant. That when the executor was spoken to about the account he had raised against the estate of the testator, he stated, he was sorry he had brought forward the account, and that he should not have done so, but by the advice of another. That he had said, that his uncle, the testator, did not agree to give him wages ; a share of the property was promised, but no agreement was made. The depositions also stated, that some six months before the death of the testator, the defendant applied for wages, which were refused, and he was told to take money from the drawer, and goods from the store, and if not satisfied, he might return to his father. That it was understood, the appellee was in the store of the testator as a clerk. The testator observed, at the time of making his will, that he had given the defendant, his nephew, a legacy, as a consideration for his services ; he had always intended to give him something ; he gave him the legacy for his services, because he had not been paid for them. It was also testified, that the executor had a good deal of trouble in settling the estate.

The counsel for the appellants endeavored to maintain, 1. That the claims of the executor had been improperly allowed by the court below. 2. That the evidence shows the commission allowed is unjust and unreasonable. 3. The appellee had no legal claim for services rendered to the deceased.

Key, for the appellant.—The evidence does not establish any claim to the compensation claimed by the appellee. On the contrary, he himself acknowledged he had no claim. But if any debt was due to him, the amount thereof could not be ascertained by the course adopted in this case. It must become the subject of proof, like all other demands on the estate.

*564] *It is contended, that no appeal is allowed in this case, because the provisions of the law of Maryland leave to "the discretion" of the court, the determination of the amount of commissions. What is the meaning of the assertion, that no appeal can be maintained in such a case? It is only when the exercise of discretion by the court is matter of favor or indulgence, that the rule applies ; but when there are legal rights, the discretion of the court applies to those rights, and its exercise is a matter of law, and like all others, when exercised, is examinable.

Coxe, for the appellee.—This is an application to have an examination of an account which has been passed upon by the orphans' court. It is denied, that a matter to be determined by the discretion of the court, can be the subject of appeal. The party must point out an error in law, and if the allowance by the court is not beyond the per-centage authorized by the statute, there cannot be such error. These accounts having been passed by the orphans' court, before whom were all the facts, the only remedy which remains is upon the bond given by the executor ; and in such an action, all the matters are open for examination.

Nicholls v. Hodges.

DUVALL, Justice, delivered the opinion of the court.—The appellee in this case obtained letters testamentary on the estate of Thomas C. Hodges, deceased, and passed accounts in the orphans' court for Washington county, in which he was allowed ten per cent. commission on the inventory of the deceased's estate, amounting to $2358.70, and $1200 for services rendered to the deceased in his lifetime. The appellants, creditors of the deceased, finding that the estate would probably be insufficient to pay the full amount of their claims, filed their petition in the orphans' court, objecting to the allowance of the claims of the executor, alleging that the property of the deceased consisted only of a store of goods in Georgetown, and a few debts due to him; and that the settlement of the estate was made without much labor or expense. Upon the answer of the executor, and the testimony taken in the cause, the judge of the orphans' court decided in favor of the executor, and decreed, that both claims be allowed. From this decree, an appeal was prayed and granted to the circuit court for Washington county, in which the judgment of the orphans' court was affirmed. From this decision, the cause is brought up, by appeal, to this court, for final hearing and decree.

Several questions have been raised in arguing this cause. On the part of the appellants, it is contended, 1st, that the *allowance of ten per cent. on the inventory, circumstanced as this case appears to be, is [*565 unjust and unreasonable: 2d, that there is no foundation for the claim of $1200, made by the executor, for services rendered the testator in his lifetime.

The counsel for the appellee contends, 1st, that the whole allowance made by the orphans' court was no more than a moderate compensation for the attention and prompt settlement of the accounts of the deceased, by the executor, and for his services for several years as a clerk in the store of the deceased; and 2d, that the decision of the orphans' court was final and conclusive, and from which there ought to have been no appeal.

The power and authority of the orphans' court is derived from the testamentary laws of Maryland. The last general act upon the subject, is that passed in the year 1798, ch. 101. The orphans' court has a general power to administer justice in all matters relative to the affairs of deceased persons, according to law. The commission to be allowed to an executor or administrator, is submitted to the discretion of the court, "not under five per cent. nor exceeding ten per cent. on the amount of the inventory." If the executor has a claim against the deceased, it shall stand on an equal footing with other claims of the same nature. On a plenary proceeding, if either party shall require, the court will direct an issue or issues to be made up and sent to a court of law to be tried, and any person conceiving himself aggrieved by any judgment, decree, decision or order, may appeal to the court of chancery, or to a court of law. And in Maryland, the decision of the court to which the appeal is made, is final and conclusive. But in the case under consideration, this court has jurisdiction, by virtue of the act of congress of February 1801, by which the circuit court for the district of Columbia was created, which provides that "any final judgment, order or decree in the said circuit court, wherein the matter in dispute, exclusive of costs, shall exceed the value of $100, may be re-examined, and reversed or affirmed in the supreme court of the United States, by writ of error or appeal." By an act of congress, subsequently passed, the matter in dispute,

exclusive of costs, must exceed the value of $1000, in order to entitle the party to an appeal.

With respect to the commission to be allowed to the executor or administrator, it is submitted by law to the discretion of the court, not less than five, nor more than ten per cent. They may allow the lowest, or highest rate, or any intermediate proportion between the *minimum* and *maximum*, to which, in their discretion, they may adjudge the party to be entitled, *upon a consideration of all circumstances, according to the services rendered, and the trouble and expense in completing the administration. Upon a just construction of this act, it was obviously the intention of the legislature, that such the decision of the orphans' court should be final and conclusive, and is the opinion of this court.

*566]

The claim of $1200 for services rendered in the lifetime of the testator, rests upon different ground. The law places it "on an equal footing with other claims of the same nature." The legality and equity of the claim, must be examined in the same manner as the claim of any other creditor. Of course, it is a claim, on the trial of which either party might have required a trial by jury, in the manner prescribed by law. But this was not asked, and the claim was submitted in gross to the decision of the orphans' court, and was decided on, in like manner, by the circuit court; and it is now brought in the same shape before this court.

To support a claim of this nature, it is incumbent on the party making it to prove some contract, promise or agreement, expressed or implied, in relation to it. The testimony contained in the record may be summed up in a few words. It is admitted by the appellee, that there was no agreement to pay him wages. It is in proof, that he lived with his uncle three or four years in the capacity of a clerk, and that for more than half the time, he was the only clerk in the store, his uncle having great confidence in him. That it was distinctly understood between them, that the testator had agreed to pay his board, to find him in clothing, and to pay his expenses generally; that it was customary among merchants to take young men, of a certain age, for their board and clothes; that the uncle had said, that at a future day, he intended to take him into partnership with him; and it was proved, that the testator, at the time of making his will, observed, that he had given his nephew a legacy as a consideration for his services, and that he had always intended to give him something. It is not denied, that the testator had fully complied with his engagement to pay his board, supply him with clothes, and pay his expenses. On this testimony, the claim rests. The evidence is too defective to require comment. It is the opinion of this court, that it is too loose and indeterminate, to sanction the claim, and it cannot be allowed.

The decree of the circuit court, affirming the decree of the orphans' court, as to this claim, is reversed; in all other respects, it is affirmed.

*Bank of Columbia *v.* George Sweeny.

Mandamus.

The court refused to issue a *mandamus* to the circuit court for the county of Washington, commanding the court to strike off a plea which the court had permitted the defendant to put in, and to compel the defendant to enter another plea, which the plaintiff's counsel deemed the proper plea, under the provisions of an act of the legislature of Maryland, upon which the proceedings were founded, incorporating the Bank of Columbia.[1]

Motion for *Mandamus.*

Jones and *Key* moved the court for a *mandamus*, to be directed to the Circuit Court of the United States, for the county of Washington in the District of Columbia; commanding them to have a certain issue joined, which issue had been tendered in a proceeding in that court against George Sweeny, and in which the Bank of Columbia were plaintiffs.

George Sweeny being indebted to the Bank of Columbia, upon a promissory note, the president of the bank, in conformity with the provisions of the statute of Maryland, incorporating the bank, passed in 1793 (Acts of 1793, vol. 20), instituted proceedings in the circuit court, under which, by virtue of a *capias ad satisfaciendum*, he was arrested by the marshal; and he applied to the court to be allowed, under the authority of the 14th section of the act incorporating the bank, to "dispute" the debt claimed by the bank. The court, thereupon, ordered an issue to be joined, and the attorney of the bank being directed to draw a declaration, offered one tendering an issue upon the allegation that the debt mentioned in the execution was due. To this issue, the attorney for the defendant objected, and he claimed the right to put in issue the plea of the statute of limitations. The circuit court held, that the defendant was entitled to avail himself of the statute, and that the attorney of the bank should file a declaration, in the common form, on the promissory note mentioned in the execution, to which the defendant might plead the statute of limitations, as running from the time of payment mentioned in the note; and that the bank should reply, so as to make up the issue under the statute of limitations. The court refused to make up the issue offered by the bank, or to make up the issue in any other way than as stated.

The plaintiffs claimed, and by this motion sought to maintain their claim, to have an issue joined, as offered by the bank, upon the debts being due, as provided in the statute. The following are the provisions of the 14th section of the charter, upon which the proceedings were had, and by which *the plaintiffs insisted, they had a right to the proceedings they had adopted: "And whereas, it is absolutely necessary, that debts due to [*568 the said bank should be punctually paid, to enable the directors to calculate with certainty and precision on meeting the demands that may be made upon them: Be it enacted, that whenever any person or persons are indebted to the said bank for moneys borrowed by them, or for bonds, bills or notes, given or indorsed by them, with an express consent in writing that they may be made negotiable at the said bank, and shall refuse or neglect to make

[1] A *mandamus* cannot be made a substitute for a writ of error. Commonwealth *v.* Common Pleas of Philadelphia, 3 Binn. 273.

payment at the time the same becomes due, the president shall cause a demand in writing on the person of the said delinquent or delinquents, having consented as aforesaid, or if not to be found, have the same left at his place of abode ; and if the money so due shall not be paid within ten days after such demand made, or notice left at his last place of abode as aforesaid, it shall and may be lawful for the president, at his election, to write to the clerk of the general court, or of the county in which the said delinquent or delinquents may reside, or did, at the time he or they contracted the debt, reside, and send to the said clerk the bond, bill or note due, with proof of the demand made as aforesaid, and order the said clerk to issue a *capias ad satisfaciendum*, *fieri facias*, or attachment by way of execution, on which the debt and costs may be levied, by selling the property of the defendant for the sum or sums of money mentioned in the said bond, bill or note ; and the clerk of the general court, and the clerks of the several county courts, are hereby respectively required to issue such execution or executions, which shall be made returnable to the court whose clerk shall issue the same, which shall first sit after the issuing thereof, and shall be as valid, and as effectual in law, to all intents and purposes, as if the same had issued on judgment regularly obtained in the ordinary course of proceeding in the said court ; and such execution or executions shall not be liable to be stayed or delayed by any *supersedeas*, writ of error, appeal, or injunction from the chancellor : provided always, that before any execution shall issue as aforesaid, the president of the bank shall make an oath (or affirmation, if he shall be of such religious society as allowed by this state to make affirmation), ascertaining whether the whole or what part of the debt due to the bank on the said bond, bill or note, is due ; which oath or affirmation shall be filed in the office of the clerk of the court from which the execution shall issue ; and if the defendant shall *dispute* the whole or any part of the said *debt*, on the return of the execution, the court before whom it is returned shall and may order an issue to be joined, and trial to be had in the same court at which the return is made, and shall make such other proceedings that justice may be done in the speediest manner."

*569] *The case was argued by *Jones* and *Key*, for the plaintiffs, at great length, upon the meaning and objects of the section, and that it authorized the demand make by the bank to exclude the plea of the statute of limitations ; and *contrà*, by *Swann* and the *Attorney-General*, for the defendant. The court, in their decision, did not take notice of the arguments of counsel, as they considered the case not such as entitled it to the summary proceeding demanded.

Marshall, Ch. J., delivered the opinion of the court :—This case arose under the provision of the act of the legislature of Maryland incorporating the bank of Columbia, which authorizes summary process for the collection of debts due to the bank. That act allows an execution against the person of the debtor, to issue in the first instance, upon the application of the president of the bank ; but it also authorizes the court, if, upon the return of the execution, the defendant "dispute the debt," to order an issue to be made up, &c., to try the action. In the present case, the circuit court did not refuse to direct such an issue to be made up ; which had they refused

to do, a *mandamus* would have been the proper process to compel that to be done, which the act requires. But the circuit court did direct an issue, and allowed a plea of the statute of limitations. The application now is, that the circuit court be ordered to withdraw that issue, and to direct a different issue to be made up, according to what the counsel for the bank supposes to be the proper construction of the act.

We think, this is not a proper case for a *mandamus*. It does not differ in principle from any other case in which the party should plead a defective plea, and the plaintiff should demur to it; in which case, there is no doubt, that the revising power of this court could be exercised only by a writ of error. If this motion could now prevail, it would be a plain evasion of the provision of the act of congress, that *final* judgments only should be brought before this court for re-examination. This case might still be brought before this court by a writ of error, notwithstanding any opinion expressed upon the *mandamus*, and the same question again be discussed upon the final judgment. The effect, therefore, of this mode of interposition, would be to retard decisions upon questions which were not final in the court below, so that the same cause might come before this court many times, before there would be a final judgment. The court is, therefore, of opinion, that this is not a case for a *mandamus*, and the motion is denied.

Motion denied.

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*Stephen Waring, Plaintiff in error, *v.* James Jackson, *ex dem.* Medcef Eden and another, Defendants in error. [*570

The Same *v.* The Same.

Executory devise.—Adverse possession.—Lex loci rei sitæ.

The testator devised to his son, Joseph Eden, certain portions of his estate in New York, among which were the premises sought to be recovered in this suit, to him, his heirs, executors and administrators, for ever; in like manner, he devised to his son, Medcef, his heirs and assigns, certain other portions of his property, and added the following clause: "It is my will, and I do order and appoint, that if either of my said sons should depart this life, without lawful issue, his share or part shall go to the survivor; and in case of both their deaths, without lawful issue, I give all the property aforesaid to my brother, John Eden, of Lofters, in Cleveland, in Yorkshire, and my sister, Hannah Johnson, of Whitby, in Yorkshire, and their heirs:" Medcef Eden died without issue, having devised his estate to his widow, and other devisees named in his will. According to the established law of New York, both passed under the ulterior devise over to John Eden and Hannah Johnson; Medcef Eden, on the death of his brother, Joseph Eden, became seised of an estate in fee-simple absolute. p. 571.

Adverse possession taken and held under a sheriff's sale, by virtue of judgments and executions against Joseph Eden, will not, according to the decisions of the courts of New York, prevent the operation of a devise, by another, in whom the title to the estate was vested by the death of the defendant in the executions. p. 571.

It has been the uniform course of this court, with respect to titles to real property, to apply the same rule that is applied by the state tribunals in like cases. p. 571.

Wilkes *v.* Lion, 2 Cow. 333, followed.

Error to the Circuit Court for the Southern District of New York.

Thompson, Justice, delivered the opinion of the court.—These cases come up from the circuit court of the United States for the southern district of New York, upon writs of error. The question in the court below turned

upon the construction of the will of Medcef Eden, the elder, dearing date the 29th August 1798, by which the testator devised to his son Joseph, certain portions of his estate, among which were the premises in question in this cause, "to him, his heirs, executors, and administrators for ever." In like manner, he devised to his son Medcef, his heirs and assigns, certain other portions of his property, and added the following clause: "Item. It is my will, and I do order and appoint, that if either of my said sons should depart this life, without lawful issue, his share or part shall go to the survivor; and in case of both their deaths, without lawful issue, then I give all the property aforesaid to my brother John Eden, of Lofters, in Cleveland, in Yorkshire; and my sister Hannah Johnson, of Whitby, in Yorkshire, and their heirs."

*571] *The case of *Jackson* v. *Chew* (12 Wheat. 153), decided at the last term, brought under the consideration of this court the construction of this same clause in the will, and the records in the present cases have been submitted to the court, without argument, to see whether the decision in that case will govern the cases now before us. The facts disclosed in the case of *Jackson* v. *Chew*, did not require of the court to decide any other question, than whether Joseph Eden took under the will an estate-tail, which, by operation of the statute of New York, abolishing entails, would be converted into a fee-simple absolute. The court decided, that he did not take an estate-tail, but an estate in fee, defeasible in the event of his dying without issue, in the lifetime of his brother (which event happened), and thereupon, his interest in the land became extinct, and the limitation over to his brother Medcef was good, as an executory devise.

In the cases now before the court, it appears, that Medcef Eden has died without issue, having, by his last will and testament, devised his estate to his widow, and certain other devisees therein named; which has given rise to two other questions; viz., whether John Eden and the heirs of Hannah Johnson (she being dead) took any estate in the premises, under this clause in the will, on the death of Medcef Eden, without issue? And whether the possession taken and held under the sheriff's sale, by virtue of the judgments and executions against Joseph Eden, was such an adverse holding, as to prevent the operation of the will of Medcef Eden, the younger.

In deciding the case of *Jackson* v. *Chew*, we did not enter into an examination of the construction of this clause in the will, considered as an open question; but adopted the construction, which appears to be well settled in the two highest courts of law in the state of New York, not only upon this very clause, but in numerous other analogous cases; and has thereby become a fixed rule of landed property in that state. And this was in conformity with what has been the uniform course of this court, with respect to the titles to real property, to apply the same rule that we find applied by the state tribunals in like cases.

The additional questions presented in the cases now before us, have likewise undergone a very full examination in that state, and been decided, both by the supreme court, and the court for the correction of errors. In the case of *Wilkes* v. *Lion*, 2 Cow. 333, the decision turned upon these very points, and the court of errors, affirming the decision of the supreme court, held, with only one dissenting voice, that nothing passed under the ulterior devise

over to John Eden and Hannah Johnson, but that Medcef Eden had become seised of an estate in fee-simple *absolute.

No opinion appears to have been directly expressed by the court, [*572 with respect to the effect of the adverse possession, upon the operation of the devise in the will of Medcef Eden, the younger. But this was a question necessarily involved in the result. And the decisions of the courts in that state are very satisfactory to show, that such an adverse possession will not there prevent the operation of a devise. The doctrine in the case of *Doe* v. *Thompson*, 5 Cow. 374, warrants this conclusion. And it is understood, that this precise question, arising on the construction of the statute of wills in that state, has recently been decided in the supreme court, in a case, the report of which is not to be found here.[1]

We are, accordingly, of opinion, that the judgment of the circuit court in these cases must be affirmed.

Judgment affirmed.

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*United States, Plaintiffs in error, *v.* Nicholas Stansbury and [*573 Edward Morgan.

Discharge of surety.

The discharge, by the secretary of the treasury, of a principal in a bond to the United States, who is imprisoned under a *ca. sa.* issued against him, and who has assigned all his property for the use of the United States, does not impair or affect the rights of the United States to proceed against his sureties, for the amount due upon the judgment, and unpaid. p. 575.

At common law, the release of a debtor, whose person is in execution, is a release of the judgment itself; the law will not permit proceedings by a creditor, at the same time, against the person and estate of his debtor, and where an election has been made to take the person, it presumes satisfaction, if the person be voluntarily released. p. 575.

Error to the Circuit Court of the United States for the district of Maryland. This was an action of debt, brought in the circuit court of the United States for the district of Maryland, at May term 1825, to recover $3067, being the debt, damages, costs and charges, contained in a certain judgment between the same parties, recovered by the United States, in the district court of Maryland, at March term 1819. The original judgment was rendered upon a joint and several bond of these defendants, given for duties, on an importation by Sheppard, and was rendered for $3050 debt, and $17 damages, costs and charges.

The declaration in this case was in the usual form, containing averments that the said judgment still remained in full force and effect, not in any wise annulled, reversed or vacated; that the said United States had not obtained any satisfaction of, or upon, the said judgment, and that the said defendants had not yet paid the sum of $3067, or any part thereof; but to pay the same or any part thereof, they had, and each of them had, hitherto wholly refused, &c.

The writ in this case was served upon Stansbury and Morgan only, and

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[1] Eden *v.* Varick, 7 Cow. 238; s. c. 2 Wend. 166.

[2] S. p. Hunt *v.* United States, 1 Gallis. 32; United States *v.* Sturges, 1 Paine 526. And the discharge from arrest of one of two sureties in a joint and several bond, does not affect the liability of the other. United States *v.* Beattie, Gilp. 92.

not upon Sheppard. The former appeared, and pleaded in bar of this action that they were sureties for Sheppard in the bond upon which the said judgment was recovered; that after the said judgment was recovered, and before this suit was commenced, Sheppard was taken and imprisoned by virtue of a *capias ad satisfaciendum*, issued upon said judgment, and discharged from prison by order of the secretary of the treasury, under the act of congress passed on the 6th June 1798, on condition that he should pay the costs, and assign and convey to the use of the United States, all his property, real, personal and mixed, by an instrument approved by the
*574] *then district-attorney of the United States for that district; which order of the secretary was set forth literally in the plea. The plea then averred, that the said Sheppard did assign and convey all his estate, &c., by an instrument approved by the district-attorney, and did pay the costs, according to the conditions imposed by the secretary, and was thereupon voluntarily released and discharged from the said execution, by the said secretary, without the consent and against the will of them the said Stansbury and Morgan; therefore, they prayed judgment, &c. To this plea, there was a general demurrer and joinder, and judgment was rendered for the defendants, *pro formâ*, in the circuit court; upon which judgment, the United States brought a writ of error to this court.

For the United States, it was contended, that the judgment ought to be reversed, and judgment rendered for the United States.

The defendants in error claimed—1. That the discharge of Sheppard from the execution of the plaintiff, operated as a release to all the defendants. 2. That the defendants, as sureties, were exonerated by the compromise made with the principal, without their concurrence. 3. That at all events, the plaintiff cannot have judgment upon the pleadings in this cause, as the demand embraces the whole amount of the judgment in the district court.

The case was argued by *Wirt*, Attorney-General, for the United States, no counsel attending on the part of the defendants in error. The following cases were cited by Mr. *Wirt*, in the course of his argument: *Dean* v. *Newhall*, 8 T. R. 168; *Rowley* v. *Stoddard*, 7 Johns. 207; 5 Co. 86 *b*; *Foster* v. *Jackson*, Ibid. 52; *Vigers* v. *Aldrich*, 4 Burr. 2482; *Jaques* v. *Withy*, 1 T. R. 557; *Tanner* v. *Hague*, 7 Ibid. 420; *Blackburn* v. *Stupart*, 2 East 243; *Clark* v. *Clement*, 6 T. R. 526; *McLean* v. *Whiting*, 8 Johns. 339; *Hayling* v. *Mullhall*, 2 W. Bl. 1235; 2 Show. 394; 2 Ld. Raym. 1072; 5 East 147; *Hunt* v. *United States*, 1 Gallis. 32; 1 Saund. 330; 1 Chit. 107–8.

Marshall, Ch. J., delivered the opinion of the court.—This was an action of debt, on a judgment which had been rendered in favor of the United States, against Thomas Sheppard and the two defendants in error. The marshal returned, as to Sheppard, *non est inventus*. The other two defendants pleaded, that they were sureties to Sheppard, in the bond on which the
*575] former judgment was rendered; that the United *States took out a *ca. sa.* on that judgment, against Sheppard, by virtue of which he was imprisoned; whereupon, William H. Crawford, the secretary of the treasury of the United States, released the said Sheppard from execution, on his paying costs, and conveying all his property, real, personal and mixed.

to the United States; with which condition, it is admitted, Sheppard complied. The United States demurred, and the circuit court gave judgment on the demurrer, *pro formâ*, for the defendants; which judgment is now before this court on a writ of error.

It is not denied, that at common law, the release of a debtor whose person is in execution, is a release of the judgment itself. Yet the body is not satisfaction, in reality, but is held as the surest means of coercing satisfaction. The law will not permit a man to proceed, at the same time, against the person and estate of his debtor; and when the creditor has elected to take the person, it presumes satisfaction, if the person be voluntarily released. The release of the judgment is, therefore, the legal consequence of the voluntary discharge of the person by the creditor.

This being the positive operation of the common law, it may, unquestionably be changed by statute. The United States contend, that it is changed, by the act providing for the relief of persons imprisoned for debts due to the United States. That act authorizes the secretary of the treasury, on receiving a conveyance of the estate of a debtor confined in jail, at the suit of the United States, or any collateral security, to the use of the United States, to discharge such debtor from his imprisonment under such execution; and he shall not be again imprisoned for the said debt; "but the judgment shall remain good and sufficient in law, and may be satisfied out of any estate, which may then, or at any time afterwards, belong to the debtor." The sole duty of the court is, to construe this statute, according to its words and the intent of the legislature. Did congress design to discharge the sureties, or to release the judgment?

The act is "for the relief of persons imprisoned for debts due to the United States," not for the relief of their sureties; and does not contain a single expression conducing to the opinion, that the mind of the legislature was directed towards the sureties, or contemplated their discharge. The only motive for the act being to relieve debtors who surrender all their property, from the then useless punishment of imprisonment; there can be no motive for converting this act of mere humanity into the discharge of other debtors, whose condition it does not in any measure deteriorate. If the act produces this *effect, it is an effect contrary to its intention, occasioned by a technical rule, originating in remote ages; which has never been applied to a statutory discharge of the person. [*576

But the language of the statute has guarded against this result. It has expressly declared, that the judgment shall remain good and sufficient in law. How can this court say, that it is not good, and is not sufficient? If it be good and sufficient, for what purpose is it so? Certainly, for the purpose for which it was rendered—to enable the United States to proceed regularly upon it, as upon other judgments; with the single exception made by the act itself. The voluntary discharge of a debtor, by his creditor, is a release of the judgment, because such is the law. But in this case, the legislature has altered the law. It has declared, that the discharge of a debtor, in the forms prescribed, shall amount solely to a liberation of the person—not to a release of the judgment; that shall remain good and sufficient. Were courts to say, that notwithstanding this provision, the judgment is released, it would amount to a declaration, that a technical rule of the common law, founded on a presumption growing out of the simplicity of ancient

times, and not always consistent with the fact, is paramount to the legislative power, It would, in fact, be to repeal the statute. It would, unquestionably, be to defeat the object of the legislature ; since it would be no very hardy assertion to say, that, if the discharge of the person in custody discharged the other obligors, the imprisoned debtor would never be released, while the debt remained unpaid ; unless the insolvency extended to all the obligors.

The second point made by the counsel for the defendants, that the sureties are exonerated by the compromise made with the principal, without their concurrence, is the same in principle with that which has been considered. No compromise of the debt has been made ; the course prescribed by the law has been pursued ; the whole property of the imprisoned debtor has been surrendered, and on receiving it, his person has been discharged. The act of congress declares, that the judgment shall still remain in force. If the creditor had entered into a compromise, not prescribed by law, or had given any discharge, not directed by statute, the question might have been open for argument. But while the whole transaction is within the precise limits marked out by law, it cannot produce a result directly opposite to that intended by the statute. The only doubt which can be suggested respecting the intent of the legislature, is created by the last words of the sentence, declaring, that the judgment shall remain good and sufficient in law. They are " and may be satisfied out of any estate which may then, or at any time afterwards, belong to the debtor." These words are *certainly *577] useless ; and may be supposed to indicate an idea, that it could be satisfied out of the estate of the debtor only ; that as they are not required, to render that estate liable, they may be understood to limit the right of the creditor to obtain satisfaction from the estate of any other person. We do not, however, think this the correct construction. The words are considered as mere surplusage, not as limiting the rights of the United States to proceed against all those who are bound by the judgment.

We think, then, that the circuit court ought to have sustained the demurrer ; and that the judgment which overrules it, ought to be reversed. But considering the plea, and the manner in which the cause has been brought up, the court will not direct an absolute judgment to be entered for the United States ; but will reverse the judgment and remand the same for further proceedings, that the circuit court may give leave to the defendants to plead.

This cause came on &c. : On consideration whereof, it is adjudged and ordered, that the judgment of said circuit court in this cause be and the same is hereby reversed and annulled ; and that the cause be remanded, that the said circuit court may give leave to the defendants to plead.

*Bank of Columbia, for the use of the Bank of the United States, v. John Lawrence.

Promissory notes.—Notice of non-payment.—Question of due dilgence. Notice by mail.

A promissory note was made at Georgetown, payable at the Bank of Columbia, in that town; the defendant, the indorser of the note, living in the county of Alexandria, within the district of Columbia, and having, what was alleged to be, a place of business in the city of Washington; and the notice of the non-payment of the note, inclosed in a letter, and subscribed with his name, was put into the post-office, at Georgetown, addressed to him at that place: *Held*, that this notice was sufficient.[1] p. 582.

In cases where the party entitled to notice resides in the country, unless notice sent by the mail is sufficient, a special messenger must be employed for the purpose of sending it; but this case is not one which required such a duty. p. 582.

If the defendant had a place of business in the city of Washington, and the notice served there would be good, yet it by no means follows, that service at his place of residence in another place, would not be equally good; parties may be, and frequently are, so situated, that notice may well be given at either of several places. p. 582.

That is not properly a place of business, in the commercial understanding of the term, which has no public notoriety as such, no open or public business carried on at it, by the party, but only occasional employment by him there, two or three times a week, in a house occupied by another person, the party being only engaged in settling up his old business. p. 582.

The general rule is, that the party whose duty it is to give notice of the dishonor of a bill or note, is bound to use due diligence in communicating the same; but it is not required of him to see that the notice is brought home to the party; he may employ the usual and ordinary modes of conveyance; and whether the notice reaches the party or not, the holder has done all that the law requires of him. p. 582.

It seems to be well settled, that when the facts are ascertained and undisputed, what shall constitute due diligence is a question of law.[2] p. 583.

The rules relative to diligence ought to be reasonable, and founded in general convenience, and with a view to clog, as little as possible, consistently with the safety of the parties, the circulation of paper of this description. p. 583.

When a person has a dwelling-house, and a counting-room, in the same city or town, a notice sent to either place is sufficient; if parties live in different post-towns, notice through the post-office is sufficient. Notice to a party living at another place than the holder, sent by mail to the nearest post-office, is good, under common circumstances, and in such cases, where notice is sent by mail, it is distance alone, or the usual course of receiving letters, which must determine the sufficiency of the notice. p. 583.

Some countenance has lately been given in England, to the practice of sending a notice by a special messenger, in extraordinary cases, by allowing the holder to recover of the indorser the expenses of serving the notice in this manner. The holder is not bound to use the mail, for purpose of sending the notice; he *may* employ a special messenger, if he pleases, but it has not been decided that he *must;* to compel the holder to the expense of a special messenger, would be unreasonable. p. 584.

Bank of Columbia *v.* Lawrence, 2 Cr. C. C. 510, reversed.

*Error to the Circuit Court of the United States for the District of Columbia, county of Washington. [*579

The plaintiffs in error instituted a suit on a promissory note, against the defendant in error, who was the indorser thereof, and which was discounted at the Bank of Columbia, and protested for non-payment. The note was

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[1] See Jones *v.* Lewis, 8 W. & S. 14; Browning *v.* Armstrong, 9 Phila. 59; Spalding *v.* Krutz, 1 Dill. 414. The sufficiency of the notice in this case appears to depend on the fact that the post-office at Georgetown was the one at which the indorser usually received his letters.

[2] Bank of Alexandria *v.* Swann, 9 Pet. 33; Rhett *v.* Poe, 2 How. 457; Harris *v.* Robinson, 4 Id. 336.

dated at Georgetown, where the banking-house of the plaintiffs at that time was located, and was payable at the Bank of Columbia. The evidence on the part of the plaintiffs established all the facts relative to the note, which were proper to be proved, except the notice of the non-payment to the defendant, the indorser; and the bill of exceptions tendered by the plaintiff presented the evidence at length, upon which the question arose, whether due notice of the dishonor of the note had been given, and due diligence had been used by the plaintiffs to convey such notice to the defendants. The opinion of the court, as delivered by Mr. Justice THOMPSON, contains a full exhibition of all the evidence, from which the conclusions of the court were drawn.

The case was argued by *Key* and *Dunlop*, for the plaintiffs; and by *Jones* and *Taylor*, for the defendant.

For the *plaintiff*, it was urged, that the distance of the actual residence of the defendant from Georgetown, created a difficulty in giving him a personal notice; and it is not incumbent on the holder of a note to follow the indorser, or to resort to other than the ordinary modes of conveyance; the post-office has always been deemed this mode, and it was the usage of this bank, as well as of all other banks in the District of Columbia, to proceed in this manner. It was claimed, that the defendant knew of this usage. This usage, therefore, became a part of the contract; and that an agreement to comply with the usage is binding, has been decided at the present session of this court, in *Brent's Executors* v. *Bank of the Metropolis* (*ante*, p. 89), *Renner* v. *Bank of Columbia*, 9 Wheat. 590; *Mills* v. *Bank of the United States*, 11 Ibid. 431. These cases show that a departure from the general law relative to a demand of payment, when according to established custom, was sustained.

The evidence showing that the defendant transacted business at his former residence in Washington, does not establish that as his established place of business, and if it did, the bank was not obliged to give a notice there, as it was not in the place where the note was dated, and where the note was payable. Objections of equal, perhaps, of greater validity, would have been made, had any other mode been employed; and therefore, the notice through the post-office, which gave the opportunity to find it where the defendant was accustomed to receive his letters, was the most proper.

*580] The reasonableness of notice is a *question to be decided by the court; the time of giving notice and the place where, are questions of law. *Tindal* v. *Brown*, 1 T. R. 167; Chitty on Bills 292. Where the holder and indorser reside in the same town, the rule is, that the notice must be personal, or left at the indorser's residence, or place of business. When the indorser's residence or place of business is in a different town, the holder is not bound to follow him there, but may give notice through the post-office. Chitty on Bills 288; *Ireland* v. *Kipp*, 10 Johns. 490; *Same* v. *Same*, 11 Ibid. 231.

What constitutes a place of business, is a question of law, although the facts in reference thereto may be for the decision of the jury, and in this case, the court below had the right to say, and should have said, the evidence was not sufficient, supposing it uncontradicted, to make the house of

the former residence of the defendant his place of business. Chitty on Bills 285–86 ; *Bank of Utica* v. *Smith*, 18 Johns. 230 ; *Reid* v. *Payne*, 16 Ibid. 218.

Jones and *Taylor*, for the defendant.—The claim to maintain the rights of the plaintiffs, by showing a usage relative to notice of the dishonor of notes or bills may, if it shall be admitted, establish a principle of great danger in reference to the subject matter. The usage will operate in favor of an indorser, who, by residence or other circumstances, may be supposed to be acquainted with it, and another, a distant indorser, will not be within its influence. A waiver of the regular mode of giving notice of the dishonor of a bill cannot be implied, it must be proved to have been expressly declared. Chitty 308.

2. The notice should have been sent to the place of the defendant's business, and this was in Washington ; and the holder of a bill must adopt the usual means to convey or give the notice. 11 Johns. 490. The nearest post-office may not always be the proper post-office ; as cases may exist, in which, for convenience, a party is in the practice of going to and using a more distant post-office. 10 Johns. 411. Nor is a post-office the proper place to leave a notice not intended to be conveyed from it ; as post-offices are places from which letters are to be forwarded, and it is not their duty to receive, nor are they responsible for letters which are to be left in them.

The expense of sending a special messenger is to be paid by the party to whom he is sent, and as the defendant was not a resident of Georgetown, such a messenger should have been employed to give the notice. Chitty on Bills 276, 278.

Thompson, Justice, delivered the opinion of the court.—This case comes before the court upon a writ of error to the circuit court of the district of Columbia. *The defendant was sued as indorser of a promissory note for $5000, made by Joseph Mulligan, bearing date the 15th of [*581 July 1819, and payable sixty days after date, at the Bank of Columbia. The making and indorsing the note, and the demand of payment, were duly proved ; and the only question upon the trial was, touching the manner in which notice of non-payment was given to the indorser ; no objection being made to the sufficiency of the notice in point of time.

The material facts before the court, upon this part of the case, as shown by the bill of exceptions were : That the banking-house of the plaintiffs was in Georgetown, at which place the note appears to be dated ; that some time before the note fell due, the defendant had lived in the city of Washington, and carried on the business of a morocco leather-dresser, keeping a shop, and living in a house of his own, in the said city ; that about the year 1818, he sold his shop and stock in trade, and relinquished his business, and removed with his family to a farm, in Alexandria county, within the district of Columbia, and about two or three miles from Georgetown ; that the Georgetown post-office was the nearest post-office to his place of residence, and the one at which he usually received his letters. The notice of non-payment was put into the post-office at Georgetown, addressed to the defendant at that place. It was proved, on the part of the defendant, that at the time of his removal into the country, and from that time until after the note in

question fell due, he continued to be the owner of the house in Washington where he formerly lived; and which was occupied by his sister-in-law, Mrs. Harbaugh. That he came, frequently and regularly, every week, and as often as two and three times a week, to his house; where he was employed in winding up his former business and settling his accounts, and where he kept his books of account, and where his bank notices, such as were usually served by the runner of the bank on parties who were to pay notes, were sometimes left, and sometimes at a shop opposite to his house; and where also his newspapers and foreign letters were left. That his coming to town and so employing himself, was generally known to persons having business with him; tnat his residence in the country was known to the cashier of the bank; that there was a regular daily mail from Georgetown to the city of Washington, and that the defendant's house was situated in Washington, less than a quarter of a mile from Georgetown.

There was also some evidence given, on the part of the plaintiffs, tending to show that the usage of the bank in serving notices in similar cases, was conformably to the one here pursued, and that the defendant was apprised of such usage. But *that testimony may be laid out of *582] view; as this court does not found its opinion in any measure upon that part of the case. Upon this evidence, the plaintiffs prayed the court to instruct the jury, that it was not incumbent on them to have left the notice of the non-payment of the note at the house occupied by Mrs. Harbaugh, as stated in the evidence; but that it was sufficient, under the circumstances stated, to leave the notice at the post-office in Georgetown; which instructions the court refused to give, but instructed the jury, that their verdict must be governed according to their opinion and finding on the subject of usage which had been given in evidence. The jury found a verdict for the defendant.

From this statement of the case, it appears, that the note was made at Georgetown, payable at the Bank of Columbia, in that town. That the defendant, when he indorsed the note, lived in the county of Alexandria, within the district of Columbia, and having what is alleged to have been a place of business, in the city of Washington; and the notice of non-payment was put into the Georgetown post-office, addressed to the defendant at that place, by which it is understood, that the notice was either inclosed in a letter, or the notice itself, sealed and subscribed with the name of the defendant, with the direction "Georgetown" upon it; and whether this notice is sufficient, is the question to be decided.

If it should be admitted, that the defendant had what is usually called a place of business, in the city of Washington, and that notice served there would have been good; it by no means follows, that service at his place of residence, in a different place, would not be equally good. Parties may be, and frequently are, so situated, that notice may well be given at either of several places. But the evidence does not show that the defendant had a place of business in the city of Washington, according to the usual commercial understanding of a place of business. There was no public notoriety of any description given to it as such. No open or public business of any kind carried on, but merely occasional employment there, two or three times a week, in a house occupied by another person; and the defendant only engaged in settling up his old business. In this view of the case, the inquiry

is narrowed down to the single point, whether notice through the post-office at Georgetown was good; the defendant residing in the country, two or three miles distant from that place, in the county of Alexandria.

The general rule is, that the party whose duty it is to give notice in such cases, is bound to use due diligence in communicating such notice. But it is not required of him, to see that the notice is brought home to the party. He may employ the *usual and ordinary mode of conveyance, and whether the notice reaches the party or not, the holder has done all [*583 that the law requires of him.

It seems at this day to be well settled, that when the facts are ascertained and undisputed, what shall constitute due diligence is a question of law. This is certainly best calculated to have fixed or uniform rules on the subject, and is highly important for the safety of holders of commercial paper. And these rules ought to be reasonable, and founded in general convenience, and with a view to clog, as little as possible, consistently with the safety of parties, the circulation of paper of this description; and the rules which have been settled on this subject have had in view these objects. Thus, when a party entitled to notice, has, in the same city or town, a dwelling-house and counting-house or place of business, within the compact part of such city or town, a notice delivered at either place is sufficient, and if his dwelling and place of business be within the district of a letter-carrier, a letter containing such notice, addressed to the party and left at the post-office, would also be sufficient. All these are usual and ordinary modes of communication, and such as afford reasonable ground for presuming that the notice will be brought home to the party, without unreasonable delay. So, when the holder and indorser live in different post-towns, notice sent by the mail is sufficient, whether it reaches the indorser or not. And this, for the same reason, that the mail being a usual channel of communication, notice sent by it, is evidence of due diligence. And for the sake of general convenience, it has been found necessary to enlarge this rule. And it is accordingly held, that when the party to be affected by the notice, resides in a different place from the holder, the notice may be sent by the mail to the post-office nearest to the party entitled to such notice. It has not been thought advisable, nor is it believed that it would comport with practical convenience, to fix any precise distance from the post-office, within which the party must reside, in order to make this a good service of the notice. Nor would we be understood, as laying it down as a universal rule, that the notice must be sent to the post-office nearest to the residence of the party to whom it is addressed. If he was in the habit of receiving his letters through a more distant post-office, and that circumstance was known to the holder, or party giving the notice, that might be the more proper channel of communication, because he would be most likely to receive it in that way; and it would be the ordinary mode of communicating information to him, and therefore, evidence of due diligence.

In cases of this description, where notice is sent by mail to a party living in the country, it is distance alone, or the usual *course of receiving [*584 letters, which must determine the sufficiency of the notice. The residence of the defendant, therefore, being in the county of Alexandria, cannot affect the question. It was in proof, that the post-office in Georgetown was the one nearest to his residence, and only two or three miles distant, and

through which he usually received his letters. The letter containing the notice, it is true, was directed to him at Georgetown. But there is nothing showing that this occasioned any mistake or misapprehension with respect to the person intended, or any delay in receiving the notice. And as the letter was there, to be delivered to the defendant, and not to be forwarded to any other post-office, the address was unimportant, and could mislead no one. No cases have fallen under the notice of the court, which have suggested any limits to the distance from the post-office, within which a party must reside, in order to make the service of the notice in this manner good. Cases, however, have occurred, where the distance was much greater, than in the one now before the court, and the notice held sufficient. (16 Johns. 218.)

In cases where the party entitled to notice resides in the country, unless notice sent by mail is sufficient, a special messenger must be employed for the purpose of serving it. And we think, that the present case is clearly one which does not impose upon the plaintiffs such duty. We do not mean to say, no such cases can arise, but they will seldom, if ever, occur, and at all events, such a course ought not to be required of a holder, except under very special circumstances. Some countenance has lately been given to this practice, in England, in extraordinary cases, by allowing the holder to recover of the indorser the expenses of serving notice by a special messenger. The case of *Pearson* v. *Crallan* (2 Smith 404 ; Chitty 222 note) is one of this description. But in that case, the court did not say, that it was necessary to send a special messenger, and it was left to the jury to decide, whether it was done wantonly or not. The holder is not bound to use the mail for the purpose of sending notice ; he may employ a special messenger, if he pleases; but no case has been found, where the English courts have directly decided that he must. To compel the holder to incur such expense, would be unreasonable, and the policy of adopting a rule that will throw such an increased charge upon commercial paper, on the party bound to pay, is at least very questionable. We are accordingly of opinion, that the notice of non-payment was duly served upon the defendant, and that the court erred in refusing so to instruct the jury.

Judgment reversed, and a *venire facias de novo* awarded.

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*John Archer and John W. Stump, executors of John Stump, Complainants and appellants, *v.* Mary Deneale, widow and executrix of George Deneale, deceased, Charles T. Stuart and Ann Lucretia, his wife, Mary Catharine and Nancy P. Deneale, children and representatives of the said George Denale, Defendants and appellees.

Charge of debts by will.

A testator, residing and owning real and personal estate in the county of Alexandria, district of Columbia, by his will, gave "all his estate, real and personal, to his wife, during her life, for the use and purpose of raising and educating his children," each child, at the age of twenty-one, to be entitled to an equal portion of his estate, real and personal; subject, each, to a deduction of one-third for the maintenance of his wife; he recommended his wife to sell the negroes for a term of years, and directed "an appraisement" only of "his estate" should be made, that no sale of the furniture should be made; and then stated, that he was indebted to "no one, and proposes to continue so," that he was surety for his brother, for which he held a deed of trust on his property, sufficient, he hoped, to pay the same, and directed, that his "estate shall not be sold to pay these debts, until the property so divided shall be sold," when his "estate must be charged with any deficiency, and directed, that his executors should not give security, as his own debts did not require it:" This will does not charge the real estate of the testator with his debts. p. 588.

The word "estate" is sufficiently comprehensive to embrace property of every description, and will charge lands with debts, if used with other words which indicate an intention to charge them; but if used alone, without such intent, they will not have such operation. p. 589.

Under the laws of Virginia, relative to the estates of deceased persons, lands are never appraised. p. 589.

Stump *v.* Deneale, 2 Cr. C. C. 640, affirmed.

Appeal from the Circuit Court of the District of Columbia. This was an appeal, by the complainants in a bill filed in the circuit court for the county of Alexandria, from a decree rendered in favor of the defendants, appellees in this court.

The complainants, by their bill, sought to make the real estate of George Deneale liable for the payment of their debt. They set forth, that they had a subsisting judgment against the executrix of George Deneale, for the sum of $7957.58, besides interest and costs. That this judgment was founded on a contract between James Deneale and George Deneale, and the testator of the complainants. That $2913.65 of this judgment was satisfied by a sale of the property of James Deneale, the principal, leaving a balance due on the judgment, of $5000. The bill charged that George Deneale left a considerable estate, real and personal. That the personal estate had been exhausted in the payment of the debts of the said George Deneale, in a regular course of administration; and that there was *nothing left to pay their debt but the real estate, which the bill alleged was expressly [*586 charged by his will with the payment of it, in a certain event; which event it was alleged had happened, to wit, that the property of James Deneale had been sold, and the deficiency of it to pay the debt ascertained. The bill prayed an account of the personal estate, and of the balance due to the complainants on their said judgment, and that so much of the real estate of the said George Deneale as would be necessary to pay what was due them, might be decreed, in pursuance to his will, to be sold, and the proceeds applied to pay that balance; and for general relief.

Mary Deneale, the executrix, in her answer, admitted the judgment

against the testator, as surety for James Deneale; that the said James Deneale had reduced the claim considerably below what was demanded by the bill. That her testator died possessed of a large personal estate, consisting principally of bank and other stocks, standing in his name, which had been claimed by Conway Whittle and others, as specifically belonging to them, by a suit depending in the court of Alexandria county. She stated, if the bank and other stock, claimed as before stated, should be decided to belong to the estate of her testator, there would be personal estate sufficient to pay his debts. If they should be decided to belong to the said Whittle and others, then there would not be a sufficiency of personal estate to pay all his debts, if his estate was bound to pay this demand of the complainants. She denied, that the real estate of her testator was charged, in any event, with the payment of the debt due to the complainants. That he never intended to make any such charge upon it, and that, upon a fair construction of the will, no such charge was authorized by it.

The defendant, Nancy P. Deneale, by her guardian *ad litem*, answered substantially as the executrix had. To their answers, there was a general replication and issue. The other defendants being non-residents, there was an order of publication against them, and the bill taken for confessed.

The commissioner made his report, which showed that he had charged the executrix with the appraised value of the personal estate, including the stocks, instead of the *actual* value, as proved by the sale of all the personal estate, except the stocks which were claimed by others. It would appear from the circumstances detailed by the commissioner, if the stocks were excluded, that the executrix had paid more than the value of the personal estate, including debts due to her testator and received by her.

The will, which was made an exhibit, was dated 13th of February 1815, and was admitted to record, 11th July 1818. By his will, the testator gave to his wife, "all his estate, real *and personal, during her life, for the *587] use and purpose of raising and educating his children, until they respectively are twenty-one." He directed, that each child should, at that age, become entitled to an equal portion of his estate, both real and personal, "subject each to a deduction of one-third of the same," to be retained for the support and maintenance of his wife. He recommended to his wife, to sell the negroes for a term of years. He directed, that an appraisement only of his "estate" should be made; that no sale of furniture should take place. He then stated, that he was indebted to "no one, and proposes to continue so." He stated, that he was security for his brother James for two sums, for which he had a deed of trust on his property, sufficient he hoped to pay the same. He then directed, that his "estate shall not be sold to pay these debts, until the property so deeded shall be sold," when his "estate must be charged with any deficiency." He directed, that his executrix and executor should not give security, alleging that his own debts did not require it. He closed his will, by giving a gold ring of $50 value to a friend, and a bank-share to the Masonic Lodge.

After a hearing on the bill, answer, the will of George Deneale, and the report of the commissioners, the circuit court dismissed the bill with costs. The only question for the decision of the supreme court was, whether George Deneale had, by his will, charged his real estate with the payment of the debt due to the complainants below, the appellants to this court?

Swann, for the appellants—The testator charges his estate with the residue of the debt which may remain due to the executor of Stump. The words are—"I direct that my estate shall not be sold to pay these debts, until the property so deeded shall be sold, when my estate must be charged with any deficiency." The term "estate," includes real as well as personal property, and where there is nothing to qualify the word "estate," it will carry real as well as personal property. 8 Ves. jr. 608.

Having then said, his "estate" must be charged, we must look into the will, and see whether there is anything there to qualify the term. The testator devises to his wife "all his estate," both real and personal, during her life. The reversionary interest is left to take its legal course. He then directs "that an appraisement only of my estate be made, and that no sale of furniture shall take place." The meaning of this would depend upon extraneous circumstances. Estate, here, was intended to be the personal estate. Then comes the clause, "my estate must be charged with *the deficiency." What was his meaning? The term estate is competent [*588 to effect this intent. In making a construction, the court will make a man do what is morally just. 3 Ves. 551. Whenever a testator wills that his debts shall be paid, that rides over every disposition, whether against heir or devisee. Ibid. 379.

Lee, for the appellees.—The first question is, what was the real intention of the testator? That intention must prevail. 2d. It is alleged that the direction—that on a certain contingency his "estate must be charged with any deficiency," was to pay the particular debt of the plaintiff; and that the word "estate" included his real estate. It is true, that there are many cases in which the word "estate" in a will, has been held to convey "real estate," even in fee-simple. But these words, and every form of expression, whereby a testator declares his will in respect to the disposition of his property, must submit to the rule, which requires a will to be construed agreeably to the intention of the testator, where it can be collected from the whole will. 2 Roper on Wills 619.

The case of *Woollam* v. *Kenworthy*, 9 Ves. 137, is very analogous to the present case. The general principle decided in that case, was, that under the general word "estate," in a will, real estate will pass, unless restrained, as was in that instance, by the intention collected from the whole will. Then, construe the will of Mr. Deneale, by this rule and by these cases; it is plain, that he has not charged his real estate, in any event, with the payment of this debt. *Shaw* v. *Bull*, 12 Mod. 592.

Marshall, Ch. J., delivered the opinion of the court:—This suit was brought in the circuit court for the district of Columbia, sitting in the county of Alexandria, to subject the lands of George Deneale to the payment of a debt for which he was surety. The sole question arises on the construction of his will. The complainants contend, that it charges his lands with his debts.

By his will, the testator gives to his wife "all his estate, real and personal, during her life, for the use and purpose of raising and educating his children, until they respectively are twenty-one." He directs, that each child shall, at that age, become entitled to an equal portion of his estate,

both real and personal, "subject each to a deduction of one-third of the same," to be retained for the support and maintenance of his wife. He recommends to his wife, to sell the negroes for a term of years. He directs
*589] that an appraisement only of his *estate "shall be made, that no sale of furniture shall take place." He then states, that he is indebted to no one, and purposes to continue so; he states, that he is surety for his brother James, for two sums, for which he has a deed of trust on his property, sufficient, he hopes, to pay the same. He then directs that his estate shall not be sold to pay these debts, until the property so deeded shall be sold, when his estate must be charged with any deficiency. He directs that his executor and executrix should not give security, as his own debts did not require it.

That the word "estate" is sufficiently comprehensive to embrace property of every description, and will charge lands with debts, if used with other words which indicate an intention to charge them, is a proposition which cannot be controverted. A little is it to be denied, that the word alone, if not used with an intent to subject the lands of the testator to the payment of his debts, cannot have that effect. In the will under consideration, the testator alludes, in two instances, to his property, generally; in both, he uses the words "estate," both "real and personal." In the next instance, the word estate is introduced alone, in the clause which follows: "Item, I do hereby direct, that an appraisement only of my estate be made, and that no sale of furniture shall take place." In Virginia, lands are never appraised, and the law directs a sale of all perishable articles. When, therefore, the testator directs that an appraisement only of his estate be made, and that no sale of furniture shall take place, he obviously applies the term, exclusively, to that kind of property, the appraisement of which is directed by law, and is usual; and by adding the word "only," restrains his executors from selling that property which is directed by law to be sold. In this clause, the word estate is plainly confined to personalty. He then speaks of the debts for which he is surety for his brother James, and directs that his "estate" shall not be sold to pay these debts, until the property conveyed to him in trust shall be exhausted. This direction is obviously restrictive; it restrains the executors from using a power they possess under the law. That power is to sell the personal estate for the payment of debts, but it does not extend to the sale of lands; consequently, the word estate in this place, also designates only personal estate. After this prohibition to sell his estate, until the trust property should be all applied to the object, he adds, "when my estate must be charged with any deficiency." There is no foundation for the opinion, that the testator has used the word estate, in this part of the sentence, in a different sense from that in which it was used in the same sentence,
*590] *immediately before, while treating of the same subject. The same estate, the sale of which he had just forbidden, until a particular event should take place, must, he says, be sold, when that event shall take place. He means only his personal estate.

It would, we think, be an entire perversion of the language used by the testator, to construe these words a charge upon his estate. He does not intend to create any liability, which the law had not created. When the trust property shall be exhausted, his estate, he says, "must be charged with the deficiency;" he can no longer prevent its sale.

We think, there is no error in the decree, which declares, that the will of George Deneale does not charge his real estate with his debts, and that the bill of the complainants be dismissed with costs, and that the said decree be affirmed.

Decree affirmed.

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*JOHN TAYLOE, Plaintiff in error, *v.* ELISHA RIGGS, Defendant in error. [*591

Evidence.—Lost papers.—Testimony of party.

The rule of law is, that the best evidence must be given, of which the nature of the thing is capable; that is, that no evidence shall be received, which pre-supposes greater evidence behind, in the party's possession or power;[1] the withholding of that better evidence, raises a presumption, that, if produced, it might not operate in favor of the party who is called upon for it. For this reason, a party who is in possession of an original paper, is not permitted to give a copy in evidence, or to prove its contents. p. 596.

The affidavit of a party to the cause, of the loss or destruction of an original paper, offered, in order to introduce secondary evidence of the contents of the paper, is proper; if such affidavit could not be received of the loss of a written contract, the contents of which are well known to others, or a copy of which can be proved, a party might be completely deprived of his rights, at least, in a court of law.[2] p. 596.

It is a sound general rule, that a party cannot be a witness in his own cause; but many collateral questions arise in the progress of a cause, to which the rule does not apply; questions which do not involve the the matter in controversy, but matter which is auxiliary to the trial, and which facilitates the preparation for it, often depends on the oath of the party. An affidavit of the materiality of a witness, for the purpose of obtaining a continuance, or a commission to take depositions, or an affidavit of his inability to attend, is usually made by the party, and received without objection. On incidental questions, which do not affect the issue to be tried by the jury, the affidavit of the party is received. p. 596.

That testimony which establishes the loss of a paper, is addressed to the court, and does not relate to the contents of the paper; it is a fact which may be important, as letting the party in to prove the justice of the cause, but does not itself prove anything in the cause.[3] p. 597.

The action being upon a written contract, said to have been lost or destroyed, and not for deceit or imposition, the plaintiff's right to recover is measured principally by the contract; and the secondary evidence must prove it as laid in the declaration. The conversation which preceded the agreement forms no part of it, nor are the propositions or representations which were made at the time, but not introduced into the written contract, to be taken into view, in construing the instrument itself. Had the written paper, stated to be lost or mislaid, been produced, neither party could have been permitted to show the party's inducements to make it, or to substitute his understanding for the agreement itself. If he was drawn into it by misrep-

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[1] United States *v.* Laub, 12 Pet. 1; McPhaul *v.* Lapsley, 20 Wall. 264; United States *v.* Gibert, 2 Sumn. 21; De Tastett *v.* Crousillat, 2 W. C. C. 132; Romayne *v.* Duane, 3 Id. 246. It is sufficient for the admission of secondary evidence of a lost record, that it appears to be the best which the party has it in his power to produce. Cornett *v.* Williams, 20 Wall. 226.

[2] The affidavit of a party of the loss of a paper, and his inability, after the use of due diligence, to find or produce it, is sufficient to admit secondary evidence of its contents. De Lane *v.* Moore, 14 How. 253; Boyle *v.* Arledge, Hempst. 620; Nicholls *v.* White, 1 Cr. C. C. 58. If account books have been destroyed by fire, secondary evidence of their contents may be given. Insurance Co. *v.* Weide, 9 Wall. 677; s. c. 14 Id. 375. And see Hedrick *v.* Hughes, 15 Id. 123.

[3] See Hemphill *v.* McClimans, 24 Penn. St. 367; Graff *v.* Pittsburgh and Steubenville Railroad Co., 31 Id. 489; Livingston *v.* Frier, 16 Johns. 193; Graham *v.* Chrystal, 2 Keyes 21. Very slight proof is required of the loss of a paper, of only transitory interest, where there is no rational motive for keeping it. American Life Ins. Co. *v.* Rosenagle, 77 Penn. St. 507; Bond *v.* Root, 18 Johns. 60.

resentation, that circumstance might furnish him with a different action, but cannot affect this. p. 598.

When a written contract is to be proved, not by itself, but by parol testimony, no vague uncertain recollection concerning its stipulations ought to supply the place of the written instrument itself; the substance of the agreement ought to be proved satisfactorily; and if that cannot be done, the party is in the condition of every other suitor in court, who makes a claim which he cannot support.[1] p. 600.

When parties reduce their contracts to writing, the obligations and rights of each are described by the instrument itself; the safety which is expected from them would be much injured, if *592] they could be established upon * uncertain and vague impressions, made by a conversation antecedent to the reduction of the agreement. p. 600.

Riggs *v.* Tayloe, 2 Cr. C. C. 687, reversed.

Error to the Circuit Court for the district of Columbia and county of Washington. This suit was instituted by the defendant in error, in the circuit court for the county of Washington, for the recovery of a sum paid by him to the plaintiff in error, on a purchase of 7462 shares of stock in the Central Bank of Georgetown and Washington; the plaintiff in the suit alleging, that he had paid to the extent of three *per centum* on the said stock, upon a contract, that if the bank should not declare a dividend which would repay him the said three per cent., the same should be refunded to him. The contract had been reduced to writing, and had afterwards been lost, mislaid or destroyed by the plaintiff.

The declaration contained three counts: 1. Stating a conversation between the plaintiff and the defendant, concerning the sale of the stock, held by the defendant in the bank; and that in the conversation, it was agreed, that the defendant should sell to the plaintiff the shares held by him, at par; that the defendant represented that a dividend would be made on the same, of four per cent., and stated that the plaintiff should advance and pay to the defendant, so much of the dividend as had then been earned by the bank; and that confiding in the said representations, and believing the dividend would be made, he, the plaintiff, agreed to advance the supposed earnings of the stock, which, according to a calculation, amounted to three per cent., and a memorandum in writing of the agreement was then made; the stock was then transferred to the plaintiff, and he paid the defendant the par price of the same, and advanced or paid to him the sum of $1902, being the supposed earnings of the bank, at the time of the contract; that at the time of the contract, the bank had made no profits on which a dividend could be declared, nor did the bank, on the regular day of declaring the dividend, make any dividend upon the said stock; by means of which, the defendant became bound to refund the sum so advanced for the supposed earnings of the bank. 2d count, *indebitatus assumpsit*, for money had and received. 3d count, *indebitatus assumpsit*, for money laid out, &c.

On the trial of the cause, William Hebb was offered and examined, subject to exceptions to his testimony, as a witness on the part of the defendant in error, in relation to the contract between the parties. This evidence is fully stated in the opinion of the court. The defendant below requested of the court certain instructions which, were refused, and a bill of exceptions to

[1] There must be clear proof of the operative parts of a lost deed, in order to establish it against a perfect paper title. Metcalf *v.* Van Benthuysen, 3 N. Y. 424. And there must be positive poof of the genuineness of the instrument. Slone *v.* Thomas, 12 Penn. St. 209; Burke *v.* Hammond, 76 Id. 172.

this refusal was allowed by the court. A verdict and judgment having *been given for the plaintiff below, the case was brought by writ of error from this court. [*593

Charles Carter Lee and *Jones*, for the plaintiff in error.—1. The plaintiff below had not laid a sufficient ground for the introduction of the secondary evidence, which he afterwards produced. The written contract described in his affidavit, is not that proved by the parol evidence, but differs from it essentially; as the contract described was an executed contract, that proved by parol testimony, was executory.

2. The contract described in the affidavit, was one upon which an action for a tort might be sustained, and that proved was in contract.

3. If the secondary evidence was admissible, William Hebb was not competent to prove the contract; he does not recollect the terms of the contract, and is not, therefore, a witness to prove it. *Fox's Lessee* v. *Palmer*, 2 Dall. 214. He had not read it, but had heard it read, which, as has been decided, was equivalent only to reading a copy. 1 Camp. 195; 1 Stark. 167. This uncertainty as to the contents of the contract, and that there was within the process of the court a witness who had made out a copy, are also objections to his testimony. Nor does the evidence show with any distinctness, an agreement to do what was claimed by the plaintiff below.

4. The evidence was not admissible upon either counts of the declaration, as the testimony given varied from the *allegata* in both; and the effect of the evidence would be, to explain a written contract, which cannot be done by parol. This evidence can only be given to explain an ambiguity. *Cope* v. *Atkins*, 1 Price 143, and also 404 in the same volume. That evidence also showed the contract to be executory, and not a contract to refund or pay the dividend, for breach of which *indebitatus assumpsit* will not lie. *Cutter* v. *Powell*, 6 T. R. 320; 2 Petersdorff 418; *Cooke* v. *Munstone*, 4 Bos. & Pul. 351; *Leeds* v. *Burrows*, 12 East 1. Nor does the declaration allege a contract to refund the dividend, nor any consideration sufficient to raise such a contract. The judgment being general, if any one count was bad, the judgment must be arrested. 6 T. R. 691. A sale of the supposed profits of a bank does not, *ex vi termini*, include an agreement to refund them, if no profits are made; nor are representations of the prospects of dividends the subjects of an action.

Swann and *Key*, for the defendant in error.—After the decision of the court below, the only question in the case is, what was the agreement of the parties? It was a sale of stock at par, and of the dividends; and the defendant in *error did not get the dividends which he had advanced to the plaintiff in error, and there was an implication that they should be repaid. The evidence was contradictory, and was proper for the jury. [*594

As to the admission of parol testimony to explain written evidence, it is an established principle, that the acts of the parties, at the time of the making of the contract, may be proved by parol. Many cases might be cited to establish this principle.

As to the breach of the contract, and the liability of the plaintiff in error, the books of the bank show, that at the time of the sale of the stock,

no profits were made; the plaintiff in error having been president of the bank, knew this, and he knew that the three per cent. beyond the par value of the stock was an advance, and must be repaid, and this may be recovered by *indebitatus assumpsit.*

Marshall, Ch. J., delivered the opinion of the court.—This action was brought in the circuit court for the district of Columbia, by Elisha Riggs, the defendant in error, to recover back a sum of money paid on a contract for the purchase of stock. The declaration contained two counts; the first on the contract, which was in writing; the second for money had and received by the defendant, to the use of the plaintiff.

At the trial, the plaintiff in the circuit court, offered testimony to prove the contents of the contract, having first given notice to the defendant to produce the duplicate copy which had been delivered to him, when it was executed, and made an affidavit that the copy which had been retained by him, was either destroyed or lost. The secondary evidence was admitted, the defendant in the circuit court reserving all objections, both to its admissibility and competency.

The first count in the declaration states a conversation between the parties, on the 15th of May 1818, concerning the sale of the stock, which the said John Tayloe held in the Central Bank of Georgetown; and alleges, that it was then and there agreed, that the said John should sell to the said Elisha, the stock which he held in the said bank, amounting to 7642 shares, at par; and further, that the said John represented, that a dividend of four per cent. would be made on the said stock, at the ensuing first Monday in July, and insisted, that the said Elisha should advance to him, in addition to the par value, so much of the said dividend as the said stock had already earned, which according to a calculation then made, *amounted to three per cent. The declaration further alleges, that said Elisha, confiding in the representations of the said John, did agree to advance the supposed earnings of the said stock. The agreement was then reduced to writing, and signed by the parties. It was further agreed, that the said Elisha might confirm or annul the contract in —— days. The declaration further states, that, confiding entirely to the representations of the said John, the said Elisha did agree to confirm the said agreement, and did agree to buy the said stock, at par price, and to advance to the defendant the profits which the stock was supposed to have earned. The declaration then charges, that the stock was transferred, its par value paid, and the additional sum of three per cent., its supposed earnings, amounting to $1902, paid. The declaration further charges, that at the time of the contract, the bank had made no profit on which a dividend could be declared; and that it was not competent for the said bank, on the said first Monday in July, then next following, to declare any dividend; and that in fact the bank did not declare any dividend on the said stock, of which the said defendant had notice; by means whereof, he became liable and bound to refund the money so advanced, for the supposed earnings of the said stock, and being so liable, he, in consideration thereof, assumed, &c.

*595]

William Hebb, a witness produced by the plaintiff below, deposed, that he came into a room in which the parties were sitting, when the said Tayloe informed him, that the said Riggs was about to purchase his stock, and he

requested the witness to take a seat and be an evidence to the contract. The said Riggs then asked the said Tayloe, what were his terms? He answered, that he would take par, with the dividend which would be declared at the next periodical term, which he thought would be four per cent. Mr. Riggs said, he supposed, Mr. Tayloe meant only the interest which had accrued at that time, to which Mr. Tayloe assented; a calculation was then made, and the supposed profit estimated at three per cent. The plaintiff asked time to consult his friends, and said he would take the stock on the terms offered. The plaintiff, at the request of the defendant, drew up a memorandum of the agreement, which was read over hastily, in the presence and hearing of the witness. It was copied, signed, and attested by the witness, and each party took one. He understood, a day or two afterwards, that the contract was affirmed. On being cross-examined, the witness said that he did not recollect whether the written contract expressed that par was to be paid for the stock, nor that any advance upon the stock was specified; nor does he recollect, how the contract *was expressed. But his impression and [*596
belief is, that the understanding of the parties was, that three per cent. was to be paid, upon a contingency that the next dividend amounted to four per cent., and that the written contract was to the same effect. The counsel for the defendant below objected both to the admissibility and competency of this testimony; but the court overruled his objections, and permitted it to go to the jury. To this opinion, he excepted.

The first question to be considered is, whether parol testimony could, in this case, be let in, to prove the written contract? The rule of law is, that the best evidence must be given of which the nature of the thing is capable; that is, that no evidence shall be received, which pre-supposes greater evidence behind, in the party's possession or power. The withholding of that better evidence, raises a presumption, that, if produced, it might not operate in his favor. For this reason, a party who is in possession of an original paper, or who has it in his power, is not permitted to give a copy in evidence, or to prove its contents. When, therefore, the plaintiff below offered to prove the contents of the written contract on which this suit was instituted, the defendant might very properly require the contract itself. It was itself superior evidence of its contents, to anything depending on the memory of a witness. It was once in his possession, and the presumption was, that it was still so. It was necessary to do away this presumption, or the secondary evidence must be excluded. How is it to be done away? If the loss or destruction of the paper can be proved by a disinterested witness, the difficulty is at once removed. But papers of this description generally remain in possession of the party himself, and their loss can be known, in most instances, only to himself. If his own affidavit cannot be received, the loss of a written contract, the contents of which are well known to others, or a copy of which can be proved, would amount to a complete loss of his rights, at least, in a court of law.

The objection to receiving the affidavit of the party is, that no man can be a witness in his own cause. This is, undoubtedly, a sound rule, which ought never to be violated. But many collateral questions arise in the progress of a cause, to which the rule does not apply. Questions which do not involve the matter in controversy, but matter which is auxiliary to the trial, which facilitate the preparation for it, often depend on the oath of the

party. An affidavit to the materiality of a witness, for the purpose of obtaining a continuance; or a commission to take his deposition, or an affidavit of his inability to attend; *is usually made by the party, *597] and received without objection. So, affidavits to support a motion for a new trial are often received. These cases, and others of the same character which might be adduced, show, that on many incidental questions which are addressed to the court, and do not affect the issue to be tried by the jury, the affidavit of the party is received.

The testimony which establishes the loss of a paper is addressed to the court, and does not relate to the contents of the paper. It is a fact which may be important, as letting the party in to prove the justice of the cause, but does not itself prove anything in the cause. As this fact is generally known only to the party himself, there would seem to be a necessity for receiving his affidavit in support of it. In the courts of common law, in England, we find some cases, in which the affidavit of a party has been received, respecting collateral facts which occur in the progress of a cause; and in courts of equity, it is usual, when a bill is filed to set up a written instrument which is lost, to annex an affidavit to the bill, that the instrument is lost. In *Forbes* v. *Wale*, 1 W. Bl. 532, the plaintiff offered a bond in evidence, attested by two witnesses, on proving the death of one of them; but being himself examined, acknowledged the other to be living; he was nonsuited. It cannot be doubted, that had he sworn the other subscribing witness was dead, he would have been allowed to prove the bond. In *Morrow* v. *Saunders*, 3 Moore 674, the plaintiff was admitted to have access to a paper in the possession of the opposite party, on his own affidavit, that there was no copy or counterpart in his possession, nor had there ever been one between the parties, except that in possession of the defendant. In *Jackson* v. *Frier*, 16 Johns. 193, the supreme court of New York indicated the opinion, that secondary evidence might be admitted, to prove the contents of a paper, on the affidavit of the party to its loss. Mr. Chief Justice Spencer, in delivering the opinion of the court, quoted Godbolt 193, in which the court refused to permit the depositions of witnesses, taken in a suit between the same parties, to be read, unless affidavit be made that the witnesses were dead; and also Godbolt 326, in which the court said, that if the party cannot find a witness, he is as it were dead unto him; and his deposition, in an English court, in a cause between the same parties, may be allowed to be read to the jury, so as the party make oath that he did his endeavor to find the witness, but that he could not.

In the former decision in this cause, 9 Wheat. 483, this question was, we think, substantially, though not expressly determined. When we compare the mischief to be apprehended from the *admission of secondary *598] proof, on the affidavit of the party, where there is reason to believe that other testimony to that fact cannot be adduced, with the mischief to arise from the absolute exclusion of such an affidauit, we think the views of justice will be best promoted, by allowing the affidavit, not as conclusive evidence, but as submitted to the consideration of the court, to be weighed with the other circumstances of the case. In the case before the court, it is not probable, that any other testimony of the loss of the paper was attainable; and we think, the affidavit of the party laid a proper foundation for the admission of secondary evidence.

Secondary evidence having been properly admitted, and the transfer of the stock and the payment of the purchase-money proved, the next inquiry is, into its competency to establish the contract stated in the declaration. This not being an action for deceit and imposition, but on a written contract, the right of the plaintiff to recover is measured precisely by that contract, and the secondary evidence must prove it, as laid in the declaration. The conversation which preceded the agreement forms no part of it, nor are the propositions or representations which were made at the time, but not introduced into the written contract, to be taken into view, in construing the instrument itself. Had the written paper been produced, neither party could have been permitted to show his inducements to make it, or to substitute his understanding of it, for the agreement itself. If he was drawn into it by misrepresentation, that circumstance might furnish him with a different action, but cannot affect this.

Discarding the representation made by the vendor of the profits of his stock, we are to inquire, what was the actual agreement? The declaration states a parol agreement to sell and purchase the stock at par. But this agreement appears not to have been definite, since a sale of the stock would pass it, in its then condition, comprehending the dividends to be thereafter declared upon it. The parties, therefore, proceed to a consideration of that part of the subject which respects the profits; and after concurring in the opinion, that the stock was worth par, independent of the next ensuing dividend, which they supposed would be four per cent., calculate how much of this sum was already earned. They found that three per cent. was the proportion of this estimated profit, which had accrued at the date of the sale. The whole contract, thus completed, was reduced to writing, and signed by the parties. It is a contract to sell all the bank-stock of the vendor, rating the stock itself at par, and the dividends which had already accrued thereon, at three per cent. No stipulation was made to return this sum of three per cent., or a part of it, if no dividend, or a less dividend than four *per cent., should be declared, nor to add to the sum, if a larger dividend should be declared than was estimated by the parties. [*599

Does the testimony offered by the plaintiff in the circuit court prove this contract? A conversation was in its progress between the parties, respecting the sale and purchase of the stock, when the witness came into the room, and was requested to notice their agreement. Mr. Riggs then asked Mr. Tayloe, what were his terms? Mr. Tayloe answered, that he would take par, with the dividends which would be declared at the next periodical term, which he supposed would be four per cent. Four per cent. was assumed as the dividend which would be declared, and three per cent. was estimated as the portion of that dividend which had already accrued. This proposition was accepted, and the agreement reduced to writing.

If the declaration counts on one entire contract for the sale of the stock, including the dividend upon an estimate of the stock, at par, and the approaching dividend at four per cent., the testimony supports it; if the declaration counts on two distinct contracts, entirely independent of each other, this part of the testimony does not support it. The witness describes a single contract, consisting, it is true, of two distinct items, but both are comprehended in the same agreement.

On being cross-examined, the witness shows a very imperfect recollec-

tion of the contract he is endeavoring to describe. He does not recollect, that par was to be paid, nor that any advance on the stock was specified in the contract. But his impression and belief is, that three per cent. was to be paid, upon a contingency that the next dividend amounted to four per cent. and that the written contract was to the same effect. This part of the testimony shows, that what the witness had previously said, was founded on his recollection of the conversation between the parties which formed the verbal agreement, not on his recollection of the writing itself. He does not remember the terms in which the written contract was expressed ; nor that par was to be paid for the stock ; nor that any advance was specified. He believes, that the written contract conformed to the verbal agreement, and on this belief, is founded his impression, that the three per cent. was to be paid, on a contingency that the next dividend should amount to four per cent. Yet, when we refer to his description of the conversation which constituted the verbal agreement, no part of the consideration money is stipulated to be paid on a contingency. The declaration does not state a contingent contract ; nor is any inference to be drawn, that it was contingent, from any part of the declaration, unless it be from the use of the word *"advance," which word, or any other equivalent to it, the witness does not remember.

*600]

When a written contract is to be proved, not by itself, but by parol testimony, no vague uncertain recollection concerning its stipulations ought to supply the place of the written instrument itself. The substance of the agreement ought to be proved satisfactorily ; and if that cannot be done, the party is in the condition of every other suitor in court, who makes a claim which he cannot support. When parties reduce their contract to writing, the obligations and rights of each are described, and limited by the instrument itself. The safety which is expected from them, would be much impaired, if they could be established upon uncertain and vague impressions made by a conversation antecedent to the reduction of the agreement.

A part of the testimony came out on the cross-examination, which serves to show on what uncertain ground the belief of the witness was founded, that the three per cent. depended on the contingency, that the next dividend should amount to four per cent. He was asked, whether the writing was, as deposed by another witness, in these terms, or in terms to this effect : "I bind myself to receive at any time within three days, three per cent. advance upon my stock in the Central Bank of Georgetown and Washington." He answered, that the writing, as recollected by him, was the reverse of the terms above propounded, inasmuch as the writing described by him bound the defendant to transfer the stock. This answer would indicate, that the written contract bound the vendor to transfer his stock, at any time within three days, at three per cent. advance. Upon the most attentive comparison we can make of the testimony given by Hebb, with the contract stated in the declaration, we think, that his evidence does not support the contract as laid, and was, therefore, not competent to sustain the first count.

The second count, for money had and received, is not supported by any express promise to refund the money supposed to be advanced on account of the dividend, if less than four per cent. should be declared, or if no dividend should be made. It rests on the promise which the law implies, where the consideration totally fails. If the written contract comprehended the divi-

dend, with the stock itself, so that an advance of three per cent. was given for the whole, the circumstance that this entire agreement was founded on a calculation of the separate value of the distinct parts, which were the subject of it, would not entitle the purchaser to recover upon this count, because the consideration would not totally fail. Could the contract for the dividends be considered as entirely distinct from *that for the stock itself? The court is not prepared to say, that a mere speculative [*601 bargain, where the parties know that they are treating for a thing of uncertain value, which depends on unknown contingencies, and may greatly exceed their estimates, or may be nothing; where the purchaser knows that he buys a chance, as a lottery-ticket; is a bargain on which the law will raise a promise to refund the purchase-money, if the consideration should fail. It is, therefore, the opinion of the court, that the testimony does not show a contract which supports the second count.

The defendant in the circuit court then gave evidence to the jury, tending to prove that the contract was a mere purchase of stock, at an advance of three per cent.; and then moved the court to instruct the jury, "that the evidence given by the plaintiff, either taken by itself, or in connection with that of the defendant, is not competent and sufficient to be left to the jury, as evidence that the said written contract continued to be executory, after the transfer of the stock by the defendant to the plaintiff, and the payment therefor by the plaintiff, as stated by the plaintiff's evidence; nor that it contained any stipulation or condition, that the three per cent. advance on the said stock, was paid, or agreed to be paid, by the plaintiff, on a contingency that the next dividend amounted to four per cent.; or that the defendant should refund to the plaintiff, the three per cent. advance upon the par value of the stock paid by the plaintiff, as aforesaid, in the event of there being no dividend declared upon such stock, at the then next ensuing regular period for declaring such dividend. The court refused to give this instruction, as prayed, being of opinion, that so much of the said contract as relates to the advance of the three per cent. portion of the dividend, is executory, in so far as regarded the implied *assumpsit* of the defendant to refund the said three per cent. advance, in the event of there being no dividend on the said dividend day."

It is probable, that the circuit court might not have intended to express an opinion respecting the effect of the testimony laid before the jury, but we think such an opinion is expressed. The court declares, that so much of the said contract as relates to the advance of the three per cent. portion of the dividend, is executory, in so far as it regarded the implied *assumpsit* of the defendant to refund, &c. These words, we think, determine that the testimony established this implied *assumpsit*. On the question whether such a contract was proved as did raise this *assumpsit*, there was, undoubtedly, much conflicting testimony, and the court erred, as we think, in declaring that opinion to the jury.

After several proceedings in court, which it is unnecessary *to [*602 mention, as they do not materially affect the merits of the cause, the plaintiff prayed the court to instruct the jury, that if, from the whole evidence, the jury should be of opinion, that the defendant, in his written contract, did agree to sell his stock at par, and to take the earnings which the said stock had made, in lieu of the dividend, which he stated and represented

would be declared at the next dividend day; and if the jury should be further of the opinion, that the plaintiff did actually advance to the defendant the amount of the said supposed earnings of the stock, under a belief created by the defendant, that such dividend would be made, that then the plaintiff would be entitled to recover back the money so paid, under such mistaken impression, if the jury should find from the evidence, that there was no such dividend declared; and that the said stock had not, at the time of the said contract, earned any such supposed interest or dividend.

This instruction was ultimately given by the court. In discussing its correctness, it is necessary to recollect, that this is an action on a written contract, not for deceit or misrepresentation in making that contract. The inquiry then is, what was the contract? Not how it was obtained. The representation then of the seller respecting the next dividend, and the belief of the purchaser, may be discarded from the case; and our attention must be confined to the contract, as stated in the prayer of counsel. The jury were instructed to find for the plaintiff, if they were satisfied from the evidence, that the defendant, in his written contract, agreed to sell his stock at par; and to take the earnings which the said stock had made, in lieu of the dividend to be declared at the next dividend day; and if they should also be satisfied, that the plaintiff did actually advance to the defendant the amount of the said supposed earnings of the stock, under a belief that such dividend would be made. This instruction, when given on the naked contract, stripped of that alleged misrepresentation which forms no part of it, cannot, we think, be supported.

We are, therefore, of opinion, that there is error in the proceedings of the circuit court, and that the judgment ought to be reversed, and the cause remanded to the circuit court, with directions to set aside the verdict and award a *venire facias de novo.*

This cause came on, &c.: On consideration whereof, this court is of opinion, that there is error in the several instructions given by the circuit court to the jury, in this, that the said court instructed the jury that the evidence given by the plaintiff in that court, was competent to support both the first and second counts in the declaration; and also in this, that the said
*603] *court instructed the jury, that so much of the said contract as relates to the advance of the three per cent. portion of the dividend is executory, in so far as regarded the implied *assumpsit* of the defendant to refund the said three per cent. advance, in the event of there being no dividend on the said dividend day; and also in this, that the said court instructed the jury to find for the plaintiff, if they should be satisfied from the evidence, that the defendant, in his written contract, agreed to sell his stock at par, and to take the earnings which the said stock had made in lieu of the dividend to be declared at the next dividend day, and that in fact no dividends were made. Wherefore, it is considered and adjudged by this court, that the said judgment be and the same is hereby reversed and annulled, and that the cause be remanded to the circuit court, with directions to award a *venire facias de novo,* and to take other proceedings, according to law.

*Humphrey Fullerton, John Carlisle and John Waddle, Plaintiffs in error, *v.* The President, Directors and Company of the Bank of the United States, Defendants in error.

Practice.—Burden of proof.

The state of Ohio not having been admitted into the Union until 1802, the act of congress passed May 8th, 1792, which is expressly confined in its operations to the day of its passage, in adopting the practice of the state courts into the courts of the United States, could have no operation in that state; but the district court of the United States, established in that state, in 1803, was vested with all the powers and jurisdiction of the district court of Kentucky, which exercised full circuit court jurisdiction, with power to create a practice for its own government. The district court of Ohio did not create a system for itself, but finding one established in the state, in the true spirit of the policy pursued by the United States, proceeded to administer justice according to the practice of the state courts, and by a single rule, adopted the state system of practice. When, in 1807, the seventh circuit was established, the judge assigned to that circuit found the practice of the state adopted, in fact, into the circuit court of the United States, and the same has since, so far as it was found practicable and convenient, by a uniform understanding, been pursued, without any positive rule upon the subject. p. 612.

The act of 18th February 1820, relative to proceedings against parties to promissory notes, was a very wise and benevolent law, and its salutary effects produced its immediate adoption into the practice of the courts of the United States, and the suits have, in many instances, been prosecuted under it. p. 613.

It will not be contended, that the practice of a court can only be sustained by written rules, nor that a party pursuing a form or mode of proceeding, sanctioned by the most solemn acts of the court, through the course of years, is to be surprised and turned out of court, upon a ground which has no bearing upon the merits. Written rules are unquestionably to be preferred, because of their certainty; but there can be no want of certainty, where long acquiescence has established it to be the law of the court, that the state practice shall be their practice, so far as they have the means of carrying it into effect, or until deviated from, by positive rules of their own making. p. 613.

The course of prudence and duty in judicial proceedings in the United States, when cases of difficult distribution as to power and right present themselves, is to yield rather than encroach; the duty is reciprocal, and will, no doubt, be met in the spirit of moderation and comity. In the conflicts of power and opinion, inseparable from our very peculiar relations, cases may occur, in which the maintenance of principles, and the administration of justice, according to its innate and inseparable attributes, may require a different course; and when such cases do occur, our courts must do their duty; but until then, it is administering justice in the spirit of the constitution, to conform as nearly as possible to the administration of justice in the courts of the several states. p. 614.

Although the act of the legislature of Ohio, regulating the mode of proceeding in actions on promissory notes, was passed after the making of * the note upon which this action was brought, yet the circuit court of the United States for the district of Ohio having [*605 incorporated the action under that statute, with all its incidents, into its course of practice, and having full power by law to adopt it, there does not appear any legal objection to its doing so, in the prosecution of the system under which it has always acted.[1] p. 615.

Modern decisions go to establish, that if a note be at the place where it is payable, on the day it falls due, the *onus* of proving payment falls upon the parties who are liable to pay it; and the instructions of the circuit court, in this case, were more favorable to the parties to the note, where the court said, upon the sufficiency of the demand, that on an article or a note made payable at a particular bank, it is sufficient to show, that the note had been discounted, and become the property of the bank, and that it was in the bank, and not paid when at maturity.[2] p. 616.

Error to the Circuit Court of Ohio. This was a writ of error brought to reverse a judgment rendered in the circuit court of the United States for

[1] S. P. Hiriart *v.* Ballou. 9 Pet. 156. [2] United States Bank *v.* Carneal, 2 Pet. 543.

the district of Ohio, in favor of the Bank of the United States, the present defendants in error.

The declaration contained a common count for money lent and advanced. The plea is *non assumpserunt*. There is another plea of *non assumpsit*, filed by H. Fullerton alone, and under it, a notice, that he would set off a large sum of money, $3957.33\frac{1}{3}$, due by the bank to the said Fullerton, being the avails of a certain note (the note on which the action was brought) which was discounted by the said Fullerton at the office of discount and deposit in Cincinnati, and the proceeds of which he had never checked out. There was another notice of set-off by all the defendants; that the plaintiffs were indebted to the defendant Fullerton, in a large sum of money, $5000, being the avails of a certain promissory note (the note on which plaintiff's action was founded) which had never been paid by the bank to Fullerton, or received by him, but retained by the plaintiffs; and Fullerton applied the same, by way of discharge and set-off, to the said note made to plaintiffs.

The cause was tried by a jury; and, on the trial, the plaintiff exhibited in evidence, a certain note, a copy of which follows:

$4000. Cincinnati, February 1, 1820.

Sixty days after date, I promise to pay John Carlisle, or order, at the office of discount and deposit of the Bank of the United States, at Cincinnati, four thousand dollars, for value received.

(Signed) Isaac Cook.

Indorsed—John Carlisle, John Waddle, Humphrey Fullerton.

Isaac Cook, the maker of the note, died pending the suit, and before the trial. To the introduction of this note in evidence, the defendants objected, as evidence of a several contract of the maker and each one of the indorsers, and not of any *joint undertaking or liability of the defendants. *606] This objection was overruled by the court, and the note permitted to be read in evidence, under the eighth section of the act of the general assembly of Ohio, entitled, "an act to regulate judicial proceedings, where banks and bankers are parties, and prohibit the issuing bank-bills of a certain description," passed 18th February 1820; to which decision of the court, the defendants excepted.

The eighth section of the act provides, "that when any sum of money due and owing to any bank or banker shall be secured by indorsements on the bill, note, or obligation for the same, it shall be lawful for such bank or banker, to bring a joint action against all the drawers and indorsers, in which action the plaintiff or plaintiffs may declare against the defendants jointly, for money lent and advanced, and may obtain a joint judgment and execution for the amount found to be due; and each defendant may make the same separate defence against such action, either by plea, or upon trial, that he could have made against a separate action; and if, in the case herein provided for, the bank or banker shall institute separate actions, against drawers and indorsers, such bank or bankers, shall recover no costs: Provided always, that in all suits or actions prosecuted by a bank or banker, or persons claiming as their assignees, or under them, in any way, for their use or benefit, the sheriff, upon any execution in his hands in favor of such bank or banker, their or his assignee as aforesaid, shall receive the note or notes

of such bank or banker, from the defendant, in discharge of the judgment; and if such bank or banker, their or his assignee, or other persons suing in trust for the use of such bank or banker, shall refuse to receive such notes from the sheriff, the sheriff shall not be liable to any proceedings whatever, at the suit, or upon the complaint, of the bank or banker, their or his assignee as aforesaid."

The facts of the case, so far as they were considered as important to the decision of the court, are fully stated in the opinion delivered by Mr. Justice JOHNSON.

The case was argued by *Leonard*, for the plaintiffs in error; and by *Sergeant*, for the defendants.

The counsel for the *plaintiff* made the following points:—1. The circuit court erred in admitting the note in evidence under the money counts in the declaration, for if the statute of Ohio could be used as authority for the form of action, the death of one of the parties, during the suit, determined the right to proceed under that statute. 2. The statute of Ohio, regulating the practice of the state, is not obligatory as to the practice of the courts of the *United States, and the statute of 18th February 1820, was passed after the making of the note on which this action is founded. [*607 3. There was no proof of demand of payment of the note, and the indorsers on the note were discharged by this omission; and by the course the bank adopted in reference to the note, after its non-payment by the maker. 4. The notice of the non-payment was not given in time to the indorsers.

Leonard insisted, the court erred in admitting the note in evidence, under the money counts. The statute of Ohio authorizes joint actions against "all the drawers or indorsers." 22 Ohio Laws, p. 361. This action was instituted against the maker and indorsers, and the maker died before trial Although disjunctives are sometimes construed conjunctively, yet no case could be cited, in which it had been held, that a disjunctive might be construed conjunctively, at one time, and at another, agreeable to its literal signification. The statute being in derogation of the principles of the common law, authorizing a joint action against several persons, on several distinct and dissimilar contracts, was *strictissimi juris*, and after the death of the maker, no suit could be instituted or prosecuted under it. This construction was fortified by another law of Ohio, requiring the property of the principal to be exhausted, before that of the surety is made liable, which was held to apply as between makers and indorsers of accommodation notes.

2. The bill of exceptions distinctly raises the question, whether the statutes of Ohio, regulating the state practice, are obligatory, *vi proprio*, on the United States courts. There is no evidence in the record, that the state practice was ever adopted by the court, and "the note was permitted to be read in evidence, under the act of Ohio." See *Wayman and another* v. *Southard and another*, 10 Wheat. 1. Admitting the circuit court might, under the authority to establish its practice, adopt, by written rules or otherwise, the practice in existence at the time of the act of adoption in the state courts, the court was not empowered to incorprate into its practice, by one act of prospective regulation, whatever might be the future practice of the

state courts. This would be, not to exercise the judicial functions intrusted to the court, but to transfer them to the state authorities. An act of congress adopting the state practice in existence at the time of its passage, is valid ; but an act prescribing such rules of practice as the state legislatures might in future enact, would be unconstitutional, as it would transfer to the states, the powers vested by the constitution in congress. If, then, the court could not, in the active exercise of its powers, establish the future *608] *state practice, much less could the passive acquiescence of the court, in laws and rules of practice enacted from time to time by the state, establish it as a fundamental and constitutional rule, that future state regulations should thereby become a part of the circuit court practice. In the present instance, the statute had never received the express sanction of the court, was introduced and followed up by the United States Bank alone, had never been contested, and always used *sub silentio.*

The act of Ohio was not passed until after the note was discounted. The act established a rule of property, construction or evidence, rather than a rule of practice, and therefore, could not be applied to a contract entered into before its passage. It was such a rule, as is referred to in the 34th section of the judiciary act, ch. 20.

In general, a demand is necessary on the maker to charge the indorser. It may be dispensed with, when the note is payable at the holder's ; and its place supplied by proof, that the holder was present, ready to receive payment, and the account of the maker inspected, and no credit found in his favor. *United States Bank* v. *Smith*, and the cases there cited, 11 Wheat. 171. This is the English rule, 2 H. Bl. 509, and this court has strongly intimated an opinion in favor of its correctness. No case—not the cases in Mass., cited 11 Wheat. 171, go the length to waive proof that the holder was present at the time and place, ready to receive payment. The charge of the court did not come up to the rule. "If the jury were satisfied, from the evidence, the note was in bank, and not paid when it came to maturity," the record purports to contain all the evidence in the case, and none was exhibited of the non-payment of the note. Agreeable to the charge, it would be sufficient for the plaintiffs to prove the note in bank, at its maturity, without any proof that it was then unpaid : because there was no proof of non-payment of the note in the case, and besides, proof ought not to be required of a negative, that the note was unpaid. Indeed, it is impossible to give positive proof of non-payment. In this case, as in all other cases whatsoever, the jury must be satisfied, that the note was unpaid, when it came to maturity, or render a verdict for the defendant. Of this they would be satisfied, without positive proof. Non-payment is presumed, until payment is proved. If, therefore, the jury were satisfied, the note was in bank, unpaid, when it came to maturity, a verdict should not have been passed for the plaintiffs, unless they were also satisfied, a demand had been made, or excused or dispensed with. The non-payment might have grown out of the absence of the holder, at the time and place limited for the payment. To charge an indorser, *609] *affirmative proof must be exhibited of a demand, or of facts sufficient to excuse or dispense with it. All the books say this, and none assert that proof of a note's being in bank, and unpaid, at its maturity, is such excuse or dispensation ; much less, that the presumption of non-payment, from the absence of proof of payment, supersedes its necessity and supplies

its place. The doctrine of the charge, when analyzed to its last result, and applied to the evidence in the case, is, that proof the note was in bank, when it came to maturity, will charge the indorser; and this without a demand, or the evidence of any facts supplying or excusing its want.

The jury should have been instructed, they must be satisfied by affirmative proof, the notice was put in the post-office, on the day after the demand, in season to go by the mail next succeeding the day of demand. Proof, barely, that it was put in the post-office on that day, without affirmative proof it was there in season to go by the next post, was insufficient. *Lenox* v. *Roberts*, 2 Wheat. 373. In *Darbyshire* v. *Parker*, 6 East 3, Lord ELLENBOROUGH says, the rule as laid down originally in Marius, is, the notice must be sent by the next post. In one word, it is the next post, and not the next day. Due diligence consists in placing the notice in the office, before the post next after the last day of grace leaves town; and not in placing it there, on the day next after the last day of grace. This, although on the next day, might not be in time for the next mail; and due diligence must be proven, affirmatively, by the plaintiffs. The record shows the plaintiffs did prove the notice was put in the office on the next day, but not whether in season for the next mail; the record likewise shows they did not attempt to prove this, as it professes to contain all the evidence exhibited on the trial.

He then went into a minute examination of the instructions asked and charge given, comparing them with the testimony; to show the court erred in the instructions refused, and those given, relative to the discount of the note, and the application of its proceeds, if a discount was made.

For the defendants in error, it was argued by *Sergeant*, upon the first bill of exceptions, that the provision of the act of the state of Ohio, must be regarded either as a "law of the state," furnishing a "rule of decision" under the 34th section of the judiciary act of 1789, or as a mere rule of practice. He would not say, it was of the former description, though that position would perhaps be supported by the authority of 3 Dall. 344, and Ibid. 425. It might be deemed, in effect, an enactment, that *quoad hoc*, the contract should be considered a joint contract, for the purpose of remedy. In Pennsylvania, where there is no court of chancery, ejectment may be maintained upon an *equitable title. Not that an equitable title is a legal title, in general, but only that it is a legal title, for the purpose [*610 of maintaining the action. This has been in part adopted in the federal court in that district, as the law of the state. Upon the same principle, the law of Ohio would seem to be a rule of decision. If so, it would be obligatory upon the circuit court. But this it was not necessary to affirm; for, if it was a "rule of practice," the court had power to adopt it, and it is quite clear, that it had been adopted, though there was no written rule on the subject. So that, either way, it was properly applicable to the case, and there was no error in applying it. As a beneficial remedial law, it was well worthy of adoption.

Upon the construction of the act, it was argued, that taking the whole of the section together, it was the obvious intention of the legislature, to give one action against the maker *and* indorsers. The latter part of the section was irreconcilable with any other intention. Besides, it is necessary

to make sense of the first part of the section itself. Otherwise construed, that is, disjunctively, the effect would be to give a joint action against drawees. But a joint action might be maintained against drawees, without the aid of an act of the legislature. The court would not incline to impute needless legislation.

If this was the true construction, and the act gave a joint action, or, *quoad* the remedy, considered the contract as joint, it would leave the action, when brought, upon the same footing and subject to the same rules as all other actions upon joint contracts, unless otherwise provided by the act. Does a joint action abate by the death of one of the defendants? Certainly not. Is there anything in the act which declares that this action shall abate in that event? It is clear, that there is no such provision; such a provision would have been inconsistent with the obvious design of the act; for how would the multiplication of suits be avoided, by declaring that the action should abate upon a contingency of no importance to the merits, and the plaintiff in that case be compelled to bring several suits? It would be derogatory to the intelligence of the legislature, to impute such an intention. There was nothing to warrant it, either in the words or spirit of the act.

Upon the second bill of exceptions, it was argued: 1. That the nature of the case was apparent from the record, and the effort of the defence appeared to have been, to give it technical complexion different from the reality. From a list in the record, it would be seen, that the note in question was one (the last) of a series of notes, beginning in the year 1817, with the same names, but not always in the same order, discounted by the office of the Bank of the United States, at Cincinnati. This note was put into bank, as a renewal, for the precise purpose, *manifestly known to all *611] the parties, of applying the proceeds to the payment of the next preceding note. It was discounted, on that condition, and on no other. The defendants below were interested in the condition, for their names were all upon the prior note, which must have been protested, but for the payment by means of this discount. Of the fourteen instructions required (most of them now abandoned), it will be seen, that the greater part, in some shape or other, aimed to work out a conclusion (contrary to the truth of the case), that the proceeds of the discount were to be placed to the credit of the last indorser, and the preceding note to remain unpaid. Upon that subject, the charge of the court was clear and satisfactory, and to the full as favorable to the defendants as they could reasonably ask, leaving it to the jury, as a matter of fact, to decide, whether, from the evidence in the case, it was not proved, that the application of the proceeds was made with the consent of the last indorser. The fact of his consent, the jury have, therefore, found. For this, the counsel referred to the charge.

2. As to proof of demand, the charge of the court (though there seems to have been no dispute on that point below) was in these words: "The jury ought to be satisfied, that the note had been discounted by, and become the property of, the bank; that it was in bank, and not paid, when it came to maturity." The note being payable at the bank, and the jury having found that it was in bank, and not paid, when it came to maturity, nothing more could be necessary.

3. Upon the point of notice, the charge of the court was, as it was under-

stood, in precise conformity with what the counsel for the plaintiff in error required. This was the natural and the grammatical interpretation of the language used by the learned judge—"succeeding" referred, as its antecedent, to "the last day of grace." Thus understood (and if there had been ambiguity, it was the duty of the counsel below to ask for a more precise instruction at the time), the charge is, that the notice was to be in the post-office, in time to go by the mail following the last day of grace; and this the plaintiff in error insists it ought to be. As to the fact, whether there was a mail on the following day, and at what hour, there was no evidence. It is unnecessary to state the arguments more at large, as the opinion of the court goes so fully into the case.

JOHNSON, Justice, delivered the opinion of the court.—This cause comes up from the circuit court of Ohio, on a writ of error. The record exhibits a judgment recovered by the defendants here, against the plaintiffs, in an action for money lent *and advanced, The plea was *non assumpsit*, [*612 with notice of a discount, and a verdict for plaintiff below. The errors assigned arise upon various bills of exception, the first of which was taken to the evidence offered to maintain an action, in these words:

"The plaintiff in support of his action, offered in evidence the following promissory note made by Isaac Cook, and indorsed by Humphrey Fullerton, John Waddle and John Carlisle."

"$4000. Cincinnati, February 1st, 1820.

Sixty days after date, I promise to pay John Carlisle, or order, at the office of discount and deposit of the Bank of the United States, at Cincinnati, four thousand dollars, for value received.

(Signed) ISAAC COOK.

Indorsed—John Carlisle, John Waddle, Humphrey Fullerton."

"To the introduction of this evidence the defendant, by his counsel, objected, as evidence of a several contract of the drawer and each of the indorsers on the note and not of any joint undertaking or liability of the defendants; which objection was overruled by the court, and the note permitted to be read in evidence, under the act of the general assembly of Ohio, entitled, 'an act to regulate judicial proceedings, where banks and bankers are parties, and to prohibit the issuing of bank-bills of certain descriptions,' passed 18th of February 1820; to which decision, the counsel excepted."

Cook, it appears, was originally made a party defendant to the action, but died pending the suit; the plaintiff suggested his death on the record, and went to trial against the remaining three defendants.

In order to understand the bearing which the instruction moved for has upon the cause, it is necessary to remark, that the state of Ohio was not received into the Union until 1802; so that the process act of 1792, which is expressly confined in its operation to the day of its passage, in adopting the practice of the state courts into the courts of the United States, could have no operation in that state. But the district court of the United States, established in the state, in 1803, was vested with all the powers and jurisdiction of the district court of Kentucky, which exercised full circuit court jurisdiction, with power to create a practice for its own government. The

district court of Ohio, it appears, did not create a system for itself, but finding one established in the state, in the true spirit of the policy pursued by the United States, proceeded to administer justice according to the practice of the state courts; or, in effect, adopted, by a single rule, the state system
*613] *of practice, in the same mode in which this court, at an early period, adopted the practice of the king's bench in England. So that, when the seventh circuit was established, in the year 1807, the judge of this court, who was assigned to that circuit, found the practice of the state courts adopted, in fact, into the circuit court of the United States.

It has not been deemed necessary to make any material alterations since; but so far as it was found practicable and convenient, the state practice has, by a uniform understanding, been pursued by that court, without having passed any positive rules upon the subject. The act of the 18th February 1820, alluded to in the bill of exceptions, was a very wise and benevolent law, calculated, principally, to relieve the parties to promissory notes from accumulated expenses; its salutary effects produced its immediate adoption into the practice of the circuit court of the United States; and from that time to the present, in innumerable instances, suits have been there prosecuted under it. The alteration in practice (properly so called) produced by the operation of this act, was very inconsiderable, since it only requires notice to be given of the cause of action, by indorsing it on the writ, and filing it with the declaration, after which the defendants were at liberty to manage their defence, as if the note had been formally declared upon in the usual manner.

It is not contended, that a practice, as such, can only be sustained by written rules; such must be the extent to which the argument goes, or certainly, it would not be supposed, that a party pursuing a former mode of proceeding, sanctioned by the most solemn acts of the court, through the course of eight years, is now to be surprised and turned out of court, upon a ground which has no bearing upon the merits. But we are decidedly of opinion, the objection cannot be maintained. Written rules are, unquestionably, to be preferred, because their commencement, and their action, and their meaning, are most conveniently determined; but what want of certainty can there be, where a court, by long acquiescence, has established it to be the law of that court, that the state practice shall be their practice, so far as they have the means of carrying it into effect, or until deviated from by positive rules of their own making. Such we understand has been the course of the United States court in Ohio, for twenty-five years past. The practice may have begun, and probably did begin, in a mistaken construction of the process act, and then it partakes of the authority of adjudication.

But there was a higher motive for adopting the provisions of this law into the practice of that court; and this bill of exceptions brings up one of those difficult questions, which must often occur in a court in which
*614] *the remedy is prescribed by one sovereign, and the law of the contract by another. It is not easy to draw the line between the remedy and the right, where the remedy constitutes so important a part of the right; nor is it easy to reduce into practice, the exercise of a plenary power over contracts, without the right to declare by what evidence contracts shall be judicially established. Suppose, the state of Ohio had declared, that the

undertaking of the maker and indorser of a note, shall be joint, and not several or contingent; and that such note shall be good evidence to maintain an action for money lent and advanced; would not this become a law of the contract? where then would be the objection to its being acted upon in the courts of the United States? Would it have been prudent or respectful or even legal, to have excluded from all operation in the courts of the United States, an act which had so important a bearing upon the law of contracts, as that now under consideration? An act in its provisions so salutary to the citizen, and which, in the daily administration of justice in the state courts would not have been called upon otherwise than as a law of the particular contract; a law, which as to promissory notes, introduced an exception into the law of evidence, and of actions. It is true, the act, in some of its provisions, has inseparably connected the mode of proceeding, with the right of recovery. But what is the course of prudence and duty, where the cases of difficult distribution as to power and right present themselves? It is to yield, rather than encroach; the duty is reciprocal, and will, no doubt, be met in the spirit of moderation and comity. In the conflicts of power and opinion, inseparable from our very peculiar relations, cases may occur, in which the maintenance of principle, and the administration of justice, according to its innate and inseparable attributes, may require a different course; and when such cases do occur, our courts must do their duty; but until then, it is administering justice in the true spirit of the constitution and laws of the United States, to conform, as nearly as practicable, to the administration of justice in the courts of the state.

In the present instance, the act was conceived in the true spirit of distributive justice; violated no principle; was easily introduced into the practice of the courts of the United States; has been there acted upon through a period of eight years; and has been properly treated as a part of the law of that court. But it is contended, that it was improperly applied to the present case, because the note bears date prior to the passage of the law; and this certainly presents a question which is always to be approached with due precaution, to wit, the extent of legislative power over existing contracts. But what right is violated, what hardship or injury *produced, by the operation of this act? It was passed for the relief of [*615 the defendant, and is effectual in relieving him from a weight of costs, since it gives to the plaintiff no more than the cost of a single suit, if he should elect to bring several actions against maker and indorser. Nor does it subject the defendants to any inconvenience from a joint action; since it secures to each defendant, every privilege of pleading and defence of which he could avail himself, if severally sued. The circuit court has incorporated the action, with all its incidents, into its course of practice; and having full power by law to adopt it, we see no legal objection to its doing so, in the prosecution of that system, upon which it has always acted. It cannot be contended, that the liabilities of the defendants under their contract, have been increased, or even varied; and as to change in the mere form of the remedy, the doctrine cannot be maintained, that this is forbidden to the legislative power, or to the tribunal itself, when vested with full power to regulate its own practice.

The next bill of exceptions has relation exclusively to the discount. It sets out a great deal of evidence, and sixteen specifications, if they may be

so called, of the prayers asked of the court by the defendants' counsel; the whole making out this case. It appears, that in December 1817, Isaac Cook's note, with these indorsers upon it, was discounted at the bank of Cincinnati, and renewed, every sixty days, down to February 1st, 1820. It commenced at $6000, and in September 1818, was reduced to $4000, for which amount it was renewed uniformly down to the last date. In its origin, one McLaughlin's name was also on the paper, and sometimes he, and sometimes Cook, was the last indorser, until March 1819, when Cook was uniformly the last indorser, down to the date of the present note. The proceeds of the successive renewals, were, of course, credited to him, and passed to the payment of the preceding note. But on this note, Fullerton stands as the last indorser, and the proceeds were credited to him, and Cook's note of the proceding date was charged to Fullerton's account, without his check; thus balancing the credit which the discounting of the last renewal gave to Fullerton on the books of the bank. The note so charged was, of course, not protested, and thus Fullerton and his co-indorsers escaped payment of that note; and now they propose to escape the payment of this, by insisting that, without a check from Fullerton, authorizing the application of the proceeds as credited to him, to the payment of the previous note, the bank is still indebted to him to that amount. This is an ungracious defence, and one which no court of justice can feel disposed to sustain. To repel it, the plaintiffs introduced witnesses to prove, that this note was expressly discounted, in *order that the proceeds might be applied to the previ- *616]
ous note; and would not have been discounted otherwise; and contend, that the bank, having the fund in hand to pay itself, had a right so to apply it, without a check, upon the ground of implied assent. With a view to that question, the defendants below have introduced thirteen out of sixteen of their prayers. They all go to maintain the single proposition, that Fullerton, as last indorser, was entitled to credit for the proceeds of this note, and is still entitled, if they have not been legally applied to the payment of the note which preceded it.

The remaining three prayers, to wit, the 13th, 14th and 15th, raise a question on the sufficiency of the demand on the maker, and of the notice of non-payment to the indorser, and the proof introduced to establish both facts. The entry in the record, on the subject of the charge to the jury, is in these terms: "But the court, instead of the foregoing instructions as asked, charged and instructed the jury, that to enable the plaintiffs to recover, the jury ought to be satisfied from the evidence, that the note had been discounted by, and become the property of, the bank; that it was in the bank and not paid, when it came to maturity; that due notice of the protest and non-payment had been given to the parties, and that such notice had been put into the post-office, the day after the last day of grace, in time to go by the succeeding mail; that every note discounted in bank, was *primâ facie* to be regarded as a business note, and that when such notes were discounted, generally and regularly, the proceeds of the note should be carried to the credit of the last indorser, and paid to his check; that the printed and published rules of the bank, ought, in the absence of other testimony, to be considered as regulating the course of business of the bank; but that if the jury were satisfied from the evidence, that a practice and course of business, in the office of discount and deposit in Cincinnati, had prevailed and was

known to defendants, and that the note in question had been discounted and treated in all respects, according to such practice and course of business, but not according to the printed rules, the plaintiffs had a right to recover. That the bank had not a right to apply the proceeds of the note, contrary to the understanding and directions of the last indorser, or to any other use than the use of the last indorser, without his consent; but that if the jury were satisfied from the evidence, that according to the custom and practice of the bank, in the case when a new note was put into the bank for the purpose of renewing and continuing a former loan or discount, the check of the last indorser was sometimes required, and sometimes dispensed with, and that in the latter case, it was the practice to file away the old note as a check; and that if the note sued upon had been *discounted and treated in the latter manner, with the consent of the parties to it, the plaintiffs had [*617 a right to recover, and that such consent may be inferred and found by the jury, from the facts and circumstances given in evidence, without direct or positive proof, if in the opinion of the jury, the facts and circumstances proved, warrant such inference. That if the jury find the note was not discounted, the plaintiff cannot recover; or if they find that it was discounted, but the proceeds remain in the bank, carried to the credit of the last indorser, and not drawn or applied, with his consent, to any other purpose, the money may and ought to be set off against the note; but if they find, that the note sued on was put into bank for the purpose of renewing a former note or loan, and for no other purpose, and with the understanding of all the parties, that if discounted, the preceeds could and would, by the course of business in the bank, be applied solely to the discharge of the former note, and that they had been so applied, and the old note retained, and written off as a check, by the bank; that the plaintiffs ought to recover."

The exception taken is, to refusing to give the instructions as asked, and to giving them in the form in which they were propounded, to the jury. And the question is, whether the instructions given covered the whole ground of the instructions prayed for, and were legally correct, in the form in which they were rendered? We are of opinion, they cover the whole ground taken by the defendants, or at least, so far as they had a right to require. This will be obvious, from a simple analysis of the charge; the propositions which it imports, will be examined in their order. The first is, upon the sufficiency of the demand, and the law laid down on this point is, "that on a note made payable at a particular bank, it is sufficient to show, that the note had been discounted and become the property of the bank, and that it was in the bank, not paid at maturity." Nothing more than this could have been required of the court; for the positive proof that the note was not paid, will certainly imply that there were no funds of the maker there to pay it. The fact could not have been made more positive by inspection of the books. The charge is perhaps too favorable to the defendants, since modern decisions go to establish, that if the note be at the place, on the day it is payable, this throws the *onus* of proof of payment upon the defendant. 4 Johns. 188. This is more reasonable than to require of the plaintiff the proof of a negative, and comports better with the general law of contracts.

The next instruction is, in the language of the court, "that notice of the

non-payment and protest, should have been given to the indorser through
*618] the medium of the post-office, the day *after the last day of grace, in time to go by the succeeding mail." The defendant's counsel, in arguing on this part of the instruction, insisted much on the obligation on the plaintiff to establish, definitively and positively, that the notice given was in time to go by the next mail ; but has not adverted to his own omission, in not putting into the case evidence that there was a mail established from Cincinnati, to the place of the defendant's residence. Yet, if the jury might be left, on this point, to take that fact upon notoriety, or personal knowledge, it would be difficult to maintain, that they might not, on the same grounds, find the minor fact, that the notice deposited in any part of the business hours of that day, would be in time for the mail ensuing the third day of grace. It is argued, that the language used by the court on this point is equivocal, and may have led the jury to suppose, that sending the notice by the mail which succeeded the day after the last day of grace, was sufficient. But we think the construction is forced. The words are, "the day after the last day of grace, in time to go by the succeeding mail." Succeeding what? obviously the last day of grace, otherwise, there might be no necessity for putting it in the office, until the second day after the last day of grace, whereas, the necessity of putting it in on the first day after, is expressed in the charge. With this signification it was rather more favorable than need be given, since the mail of the next day may have gone out before early business hours, or no mail may have gone out for several days.

The residue of the charge relates to the application of the proceeds of this note, to the previous note, without the check of the last indorser ; and this also, we think, embraces all the defendants asked, and is as favorable as the law would sanction. It admits, that this should be regarded as a business note, that the proceeds should have been passed to the credit of the last indorser, and should not have been applied otherwise than by his assent ; but it then goes on to assert, what surely could not be controverted, that with the assent of the last indorser, the money, instead of being passed to his credit, might be otherwise applied ; that with his consent, it might be applied to the satisfaction of another note, for which he was indorser, without his checking for the amount ; and that his consent may be implied, from circumstances, as all other facts may be. The jury have found, then, that with his consent, it was so applied, and the evidence fully bore them out in their finding ; if competent, it was all the law requires.

It may be proper to observe, that every discount is in the nature of a
*619] cross-action, and if the discount filed in this case were *thrown into the form of an action, it would be for money had and received to defendant's use.

The merits of this defence need only be tested by the law which governs that action, to make it clear, that the evidence would not sustain it. It goes in fact to show, that in what are called renewals of bank loans, the lending is qualified and not absolute ; that when credit is given and money advanced upon a note of that description, it is not an advance on general account, but only for the purpose of a specific application. Any act done by the bank, therefore, whatever be the mere form, if it have for its end the carrying of the contract into effect, in its true spirit and intent, must be binding upon

all the parties to the contract. Nothing more is affirmed in this charge or verdict.

One general objection was taken in argument to the instruction given, importing a charge of inconsistency, inasmuch as although it admits the note to be a business note, as it is called, and therefore, to be passed to the credit of the last indorser, it permits it to be treated as an accommodation note, in allowing it to be passed to the credit of the maker. But if this were strictly the fact, what defence does it afford to the action, if such were the agreement, and the real understanding, of the parties? In strictness, however, it was not passed to the credit of the maker alone, for in the progress of the ruinous system of loans which prevails over the country, the note discounted as the renewal of an accommodation note, cannot be called a business note, nor can it, in correctness, be predicated of such a note, that it is passed to the credit of the maker alone, when the last indorser has, in effect, an equal relief from the application of the proceeds.

We do not deem it necessary to consider a question commented upon in argument, by the counsel for the bank, and perhaps glanced at by the opposite counsel, whether this note was not void as an accommodation note, under the rules of the bank, because not secured by a deposit of stock. No one of the exceptions raises the question, and we should think it injustice to the counsel for the plaintiffs here, to suppose that he intended to raise it.

Judgment affirmed, with costs.

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*620] *James McDonald, Appellant, *v.* Freeman Smalley and others (in all forty).

Jurisdiction.

Where the record of the court below contained the whole proceedings in the case, and exhibited all the matters either party required for a final disposition of the case, and the counsel for both the appellants and the appellees, were willing to submit, upon argument, the whole case to the final decision of the court; but it appeared, that the circuit court of Ohio had not decided any question but that which had been raised upon the jurisdiction of the court, the counsel were directed by this court to argue the point of jurisdiction only. p. 621.

It cannot be alleged, that a citizen of one state, having title to lands in another state, is disabled from suing for those lands in the courts of the United States, by the fact that he derives his title from a citizen of the state in which the lands lie. p. 623.

M., a citizen of Ohio, apprehensive his title to lands in that state could not be maintained in the state court, and being indebted to the plaintiff, a citizen of Alabama, to the amount of $1110, offered to sell and convey to him the land, in payment of the debt, stating in the letter by which the offer was made, that the title would most probably be maintained in the courts of the United States, but would fail in the courts of the state; the property was estimated at more than the debt, but in consequence of the difficulties attending the title, he was willing to convey it for the debt, which was done; the plaintiff in error, after the land was conveyed to him, gave his bond to make a quit-claim title to the land, on condition of receiving $1100: *Held*, that the title acquired by the purchase, gave jurisdiction to the court of the United States.[1] p. 623.

The motives which induced M. to make the contract for the purchase of the land, can have no influence on its validity; a court cannot enter into the consideration of those motives, when deciding on its jurisdiction. p. 624.

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[1] S. P. Smith *v.* Kernochan, 7 How. 198; Jones *v.* League, 18 Id. 76; Briggs *v.* French, 2 Sumn. 252; Newby *v.* Oregon Central Railway Co., 1 Sawyer 63. But a mere colorable transfer will not confer jurisdiction. Barney *v.* Baltimore, 6 Wall. 280.

McDonald v. Smalley.

In a contract between a mortgagor and mortgagee, being citizens of different states, it cannot be doubted, that an ejectment, or bill to foreclose, may be brought in a court of the United States, by the mortgagee residing in a different state. p. 624.

The rules which govern the practice of the circuit courts in chancery, have been prescribed by this court; and ought to be observed. p. 625.

This was an Appeal from the Circuit Court of Ohio, by the complainant in that court, on a bill filed on the chancery side of the court, the object of which was, through the aid of that court, to obtain a conveyance of a tract of land, situate in the state of Ohio. The complainant, a citizen of the state of Alabama, derived title under a conveyance from Duncan McArthur, a citizen of Ohio; and the only point decided in the circuit court, was upon the question of jurisdiction. The circuit court dismissed the bill, for want of jurisdiction; and the complainant appealed to this court.

*621] *Before the argument commenced, the counsel for both parties asked instructions of the court upon the question, whether, as the record contained the whole of the proceedings in the cause, and exhibited all the matters either party required for a final disposition of the case, in this court, upon all the points in controversy, this court would permit the argument to go to the whole case, so that a decree could be given here upon the whole case; or, whether, an opinion upon the jurisdiction only having been given in the circuit court, the argument should be confined to that question. The court having advised upon the subject, directed the counsel to argue the point of jurisdiction only, as no other than that had been decided in the court from which the appeal had been taken.

In the circuit court of Ohio, the defendant suggested, that McDonald, the complainant in the bill, was not a citizen of Ohio; and according to a practice in the courts of the state of Ohio, under the authority of a law of that state, interrogatories were exhibited to the complainant, to which answers were given. This law was passed subsequent to the act of congress establishing the judiciary system, and was admitted not to be authority in the courts of the United States. The facts stated by the complainant, in answer to those interrogatories, with other testimony, furnished the ground taken against the jurisdiction of the court.

On the 14th November 1823, Duncan McArthur conveyed, by deed of indenture, the land in controversy, to the complainant; the consideration expressed in the deed being $1100, the amount of a debt he owed to the complainant, for land purchased from him. In reply to the interrogatory, "whether he was the beneficial owner, or was prosecuting the suit for the benefit of some resident in Ohio; and whether he is the real prosecutor of the suit, and was so at its commencement, or whether his name was used for the benefit of a citizen of the state of Ohio?" the complainant answered, by referring to a letter from Duncan McArthur to him, dated July 18th, 1823. In that letter, Duncan McArthur offered to give the land in question, 1266 acres, alleged to be worth five dollars per acre, to pay a debt of $1100; suggests that the title is good, if prosecuted in the federal court; "but state judges do not understand land-causes, and a claimant in the military district might as well toss up heads and tails, as sue in a state court." It contained also this suggestion; "should you accept this offer, and not wish to prosecute the claim yourself, you can make something handsome, I have no doubt, by selling it to some of your neighbors;" and it concluded with

offering "any assistance in my power, should *a suit be brought for recovery of the land in the circuit court."

He also stated, in his answer, that the deed under which he claimed, was executed for the purpose of giving jurisdiction to the court of the United States; because he believed that court safer than any other in the state of Ohio; that the contract was made by letter, of which he had not retained a copy; and that at the time the deed was "written," there was no special agreement between him and McArthur, but, perhaps, propositions by letter: "I give my bonds to a third party for a quit-claim title to said lands, on condition of their paying me $1100."

The complainant insisted, that the deed from McArthur conveyed to McDonald such a title as would enable him to sustain the suit in a federal court; that it was sufficient, if he had any interest; that by accepting the deed, McDonald had been paid his debt, and though he might be only mortgagee, he could sue in this court. The respondent contended, that the answer of McDonald showed that he was not the owner of the land; and his manner of answering, left no doubt, but that the owner was a citizen of Ohio, and that the jurisdiction of the court, therefore, could not be maintained.

Baldwin and *Doddridge*, for the complainant.—It is evident, that the complainant held the land, and it was not material, how he held it. He had an interest in the land, and was a citizen of Alabama. It is not necessary, that a party, to sue in the courts of the United States, shall be the sole owner, if he is beneficial owner of a part of the land; if he has any interest in the lands, it is sufficient. The class of cases decided in the circuit court of Pennsylvania, by Mr. Justice WASHINGTON, has established the principle. *Robert Browne's Lessee* v. *Browne*, 1 W. C. C. 429. Here, the interest in the land is certainly to the extent of the debt; and the court will sustain the jurisdiction, although the interest may not be commensurate with the whole of the land. It is important and necessary, and it was in view of the framers of the constitution of the United States, that their tribunals should be opened to those whom prejudice, or unjust and unconstitutional legislation, in the states, might prevent from maintaining their rights in the courts of the states, and the courts of the United States should favor such appeals. Titles may be, and sometimes are, bad in a state, before a state court. which are perfect under the decisions of the national courts. *Huideköper's Lessee* v. *Douglass*, 1 W. C. C. 258. Mr. Doddridge also referred to cases, similar in principle, decided in the courts of Virginia.

Hammond, for the appellees.—*The inference to be drawn from the decisions of the courts of Pennsylvania, is different from that [*623 which the complainant's counsel deduces. The interference of the courts of the United States, in relation to titles to lands, so as to regulate them differently from the laws of the state, is to be deprecated; such property should be held according to the decisions of the courts of the state.

The complainant has nothing but a mortgage interest in the land, and such an interest cannot give jurisdiction to the courts of the United States. The engagement to give a quit-claim deed, coupled with the absence of proof to show that the deed to be made was to another person than McArthur, authorizes the assertion, that the whole arrangement was one intended only

to aid McArthur in bringing his title before a court of the United States; and such a proceeding cannot be sustained.

Marshall, Ch. J., delivered the opinion of the court.—This suit was instituted in the circuit court of the United States for the seventh circuit, and district of Ohio, to obtain a conveyance of a tract of land, lying in what is termed "the military district;" claimed by the complainant under a patent, younger than that under which it is held by the defendants. The complainant is a citizen of Alabama, and claims the land under a conveyance from Duncan McArthur, who is a citizen of Ohio. The defendants objected to the jurisdiction of the court; and after hearing the parties upon this point, the court dismissed the bill, being of opinion, that its jurisdiction could not be sustained. From this decree, the complainant has appealed, and the cause is now before this court on the question of jurisdiction.

The bill states the complainant to be a citizen and resident of the state of Alabama, and the defendants to be citizens and residents of the state of Ohio. It has not been alleged, and certainly cannot be alleged, that a citizen of one state, having title to lands in another, is disabled from suing for those lands in the courts of the United States, by the fact, that he derives his title from a citizen of the state in which the lands lie; consequently, the single inquiry must be, whether the conveyance from McArthur to McDonald was real or fictitious?

The transaction, as laid before the court, appears to be this; McArthur was apprehensive that his title could not be sustained in the courts of the state, in which alone he could sue; and being indebted to McDonald in the sum of $1100, offered to sell and convey to him the land in controversy, in
*624] payment of *this debt. The letter in which this offer was made, expresses the opinion that his title was good, and would most probably be established in the courts of the United States, but would fail in the courts of the state. He estimates the property as being worth much more than the sum he is willing to take for it, but in consequence of the difficulties attending the title, he is willing to convey it in satisfaction of the debt. He suggests, that if McDonald should be disinclined to engage in the controversy himself, he might make an advantageous sale to some of his neighbors, who might be disposed to emigrate to Ohio; and offers to render any service in his power to the proprietor of the land, in the prosecution of the claim in the courts of the United States. The contract was concluded by a letter, written in answer to that which has been stated, of which the said McDonald retained no copy. There was no special agreement between the plaintiff and McArthur when the deed was written, but perhaps some proposition by letter. He gave his bond to a third party for making a quit-claim title to the land, on condition of receiving from him $1100.

This testimony, which is all that was laid before the court, shows, we think, a sale and conveyance to the plaintiff, which was binding on both parties. McDonald could not have maintained an action for his debt, nor McArthur a suit for his land. His title to it was extinguished, and the consideration was received. The motives which induced him to make the contract, whether justifiable or censurable, can have no influence on its validity. They were such as had sufficient influence with himself, and he had a right to act upon them. A court cannot enter into them, when deciding on its

jurisdiction. The conveyance appears to be a real transaction, and the real as well as nominal parties to the suit, are citizens of different states.

The only part of the testimony which can inspire doubt, respecting its being an absolute sale, is the admission that the plaintiff gave his bond to a third party for a quit-claim title to the land, on paying him $1100. We are not informed, who this third party was, nor do we suppose it to be material. The title of McArthur was vested in the plaintiff, and did not pass out of him by this bond. A suspicion may exist, that it was for McArthur. The court cannot act upon this suspicion. But suppose the fact to be avowed, what influence could it have upon the jurisdiction of the court? It would convert the conveyance, which on its face appears to be absolute, into a mortgage. But this would not affect the question. In a contest between the mortgagor and mortgagee, being citizens of different states, it cannot be doubted, that an ejectment, or a bill *to foreclose, may be brought by the mortgagee, residing in a different state, in a court of the [*625 United States. Why then may he not sustain a suit in the same court, against any other person being a citizen of the same state with the mortgagor? We can perceive no reason why he should not. The case depends, we think, on the question, whether the transaction between McArthur and McDonald was real or fictitious; and we perceive no reason to doubt its reality, whether the deed be considered as absolute or as a mortgage.

A question has been made, whether the circuit court ought to have noticed the testimony on the conveyance under which the plaintiff claims, because it was brought irregularly before them. By a law of the state, interrogatories may be propounded by the defendant in his answer, which the plaintiff is compelled to answer, as if they had been propounded in a cross-bill. Although this point has become unimportant in this cause, the court thinks it proper to say, that the rules which govern the practice of the circuit courts in chancery, have been prescribed by this court, and ought to be observed.

We think there is error in the decree of the circuit court, dismissing the complainant's bill, and that the same ought to be reversed, and the cause remanded for further proceedings, according to law.

This cause came on, &c., and was argued on the point of jurisdiction: On consideration whereof, this court is of opinion, that there is error in the decree of the said circuit court, dismissing the complainant's bill. It is, therefore, decreed and ordered by this court, that the decree of the said circuit court in this cause be and the same is hereby reversed and annulled; and it is further ordered, that the cause be remanded to the said circuit court for further proceedings to be had therein, according to law and justice.

*Duncan McArthur, Plaintiff in error, *v.* Wesley S. Porter's Lessee.

Special verdict.

A special verdict was found by the jury, upon which judgment was to be entered, according as the opinion of the court might be upon the construction of a certain deed, which deed was referred to, and made part of the special finding of the jury, but was not contained in the record thereof; a deed formed a part of a bill of exceptions taken to the opinion of the court, upon a motion for a new trial; which bill of exceptions, with the said deed, was contained in the record; the court cannot judicially know that this is the same deed which is referred to in the verdict of the jury, or what are the other evidences of title connected with it.

This case came up by writ of error to the Circuit Court of the District of Ohio, and was argued by *Baldwin*, for the plaintiff in error; and by *Ewing*, for the defendant in error. The cause was remanded to the circuit court, in consequence of a defect in the record, and no opinion having been given by the court upon the points presented and discussed by the counsel, they are omitted.

Marshall, Ch. J., delivered the opinion of the court:—This was an ejectment in the court for the seventh circuit and district of Ohio, in which the jury found a verdict in the following words:

"We, the jury, find the defendant guilty of the trespass and ejectment, in the declaration mentioned, and assess the plaintiff's damages to six cents, which verdict is thus rendered, subject to the opinion of the court on the question reserved by consent of parties, as to so much of the land in controversy, as is contained in the deed of the sheriff of Ross county, to the said defendant, bearing date the —— day of —— 1802, and upon that part of the land included in said deed. If the opinion of the court, on the question so reserved by consent, shall be with the plaintiff, that the said deed is not valid to pass the land therein described, then we, the jury, find the defendant guilty of the trespass and ejectment in the declaration mentioned, accordingly, for that part also; and if the opinion of the court thereon shall be in favor of the defendant, that said deed, with the other evidences exhibited as part of said title, is valid to pass the fee to the defendant; then the jury find the defendant not guilty of the trespass and ejectment in the said declaration mentioned, as to that part of the lands and premises in controversy."

*627] This conditional verdict is for the plaintiff, or defendant *according to the opinion of the court on the validity of a deed, with the other evidences exhibited as part of said title. But this deed and these other evidences of title are not exhibited to the court, in such manner as to enable us to notice them. A deed does, indeed, form a part of a bill of exception taken to the opinion of the court, on a motion subsequently made for a new trial. But the court cannot know, judicially, that this is the same deed which is referred to in the verdict, or what are the other evidences of title which are connected with it. The verdict is too imperfect to enable the court to render judgment on it.

The judgment of the circuit court is, therefore, reversed, and the cause remanded to the circuit court, with directions to set aside the verdict, and to award a *venire facias de novo.*

THIS cause came on, &c.: On consideration whereof, it is the opinion of this court, that the judgment of the said circuit court in this cause is erroneous, because the verdict is imperfect. It is, therefore, considered and adjudged by this court, that the said judgment be and the same is hereby reversed and annulled. And it is further ordered, that this cause be remanded to the said circuit court with directions to award a *venire facias de novo*.

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*618] *JAMES JACKSON, *ex dem.* LACY ANDERSON, *v.* JOHN CLARK and ROBERT ELLISON.

Land-law of Ohio.

Construction of the act of congress, passed March 2d, 1807, entitled, "an act to extend the time for locating Virginia military-warrants, for returning surveys thereon to the office of the secretary of the department of war, and appropriating lands for the use of schools, in the Virginia military reservation, in lieu of those heretofore appropriated."[1] p. 634.

The reservation made by the law of Virginia of 1783, ceding to congress the territory northwest of the river Ohio, is not a reservation of the whole tract of country between the river Scioto and Little Miami; it is a reservation of only so much of it, as may be necessary to make up the deficiency of good lands in the country set apart for the officers and soldiers of the Virginia line, on the continental establishment, on the south-east side of the Ohio; the residue of the lands are ceded to the United States, as a common fund for those states, who were or might become members of the Union, to be disposed of for that purpose. p. 635.

Although the military rights constituted the primary claim upon the trust, that claim was, according to the intention of the parties, so to be satisfied, as still to keep in view the interests of the Union, which were also a vital object of the trust; this was only to be effected, by prescribing the time in which the lands to be appropriated by these claimants should be separated from the general mass, so as to enable the government to apply the residue to the general purposes of the trust. p. 635.

If the right existed in congress to prescribe a time within which military warrants should be located, the right to annex conditions to its extension, follows, as a necessary consequence. p. 635.

If it be conceded, that the proviso in the act of 2d March 1807, was not intended for the protection of surveys which were in themselves absolutely void; it must be admitted, that it was intended, to protect those which were defective, and which might be avoided for irregularity; if this effect be denied to the proviso, it becomes itself a nullity. p. 635.

Lands surveyed are, under the law, as completely withdrawn from the common mass, as lands patented; it cannot be said, that the prohibition, that "no location shall be made on tracts of land for which patents had previously been issued, or which had been previously surveyed," was intended only for valid and regular surveys; they did not require legislative aid. The clause was introduced for the protection of defective entries and surveys, which might be defeated by entries made in quiet times. p. 638.

ERROR to the Circuit Court of the United States for the district of Ohio. The plaintiff brought an action of ejectment, in the circuit court of Ohio, to recover a tract of land, situate in Adams county, in the Virginia military district, and state of Ohio.

On the trial of the cause, a bill of exceptions was tendered by the plaintiff, to the opinion of the court upon the admissibility of certain testimony which was offered by the plaintiff, and which was rejected by the court.

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[1] See Lindsey *v.* Miller, 6 Pet. 666; Galloway *v.* Finley, 7 Id. 264; McArthur *v.* Dun, 7 How 262.

The facts of the case, with the matters which were the *subject of the plaintiff's exceptions, appear in the opinion of the court.

The case was argued by *Leonard* and *Hammond*, for the plaintiff in error; and by *Creighton* and *Ewing*, for the defendants.

The argument of the counsel of the plaintiff in error, was principally upon these points:—1. Congress could not rightfully limit the time within which military warrants should be located and surveyed. 2. The act of congress, prohibiting locations on lands already surveyed, and declaring any patent which should be issued on such survey void, does not comprehend the survey in this case.

Leonard and *Hammond*, insisted, the proviso of the act of 2d March 1807, was simply designed to protect voidable surveys, not those absolutely void. Before the statute, surveys made in defective locations, or not executed in conformity, were voidable, but might be carried into grant; and the grants issued thereon, were, without the aid of the act, appropriations of the land. These were the principal evils in the country, demanding legislative interference, and led to the enactment of the statute. And this places all voidable surveys, which might be patented, on the same footing as if they were patented, so far as to prevent subsequent appropriation, but does not cover with its protection, surveys on which grants can never issue. The authority of the surveyor to make a survey, is derived solely from the warrant; and surveys executed without warrants, are void. This is apparent from all the laws of Virginia relative to the subject, and from the common practice and universal understanding of those laws, and the decisions of the courts. By the act of 9th June 1794, now in force, no patent can issue on the defendant's survey.

On the construction of defendants, the proviso will operate as a virtual repeal of that act, and give such validity to these surveys, as to remove the necessity of obtaining grants; or otherwise, by preventing subsequent locations, vest the land in the United States. The latter construction would be an infringement of the compact between Virginia and the United States, and a refusal to execute it in good faith. If congress can limit the time within which locations may be made, they are bound to execute the power with the utmost honor, and not apply a limitation to one part of the district, without extending it to all. Much less are they authorized, under color of limiting the time, to appropriate the land to their own use. None will presume such ill faith in congress. The Virginia troops acquired a right, and
*630] at the price of blood, to *compensation in land, by the express stipulation of that state. Virginia did not cede the north-west territory to the Union, till the United States engaged to make good the compensation, out of the reservation. The faith of two sovereigns has pledged the military district to these troops.

The whole course of the legislation of congress evinces, that it was not their design to authorize locations or surveys, without military warrants, or for more land than is embraced in them. It cannot be supposed, that it was the design of the proviso to protect surveys wholly unauthorized, on which grants can never issue; but to protect surveys that are irregular, defective,

voidable, and which might be patented. The act of Virginia, protecting old military surveys, is as strongly expressed as the proviso, but has always been held to apply only to those founded upon warrants.

A sale of land, by title bond, and location afterwards made, does not vest the purchaser with title in the warrant or entry. The purchaser reposes confidence in the vendor, and if this confidence is misplaced, the purchaser, and not the government, must sustain the loss. The purchaser can look to his bond for indemnity. Massie was then the proprietor, and had the right to elect either of these locations, and by recording a survey of the earlier, he bound himself, and abandoned the latter. The taking out the warrant, and the plats of survey, as on a satisfied warrant, is a solemn act of abandonment. The recorded survey, and not the survey executed on the ground, is protected by the proviso. The recording a survey, after the satisfied warrant with the plats of survey are taken from the office, is a void act. A new entry cannot be held a withdrawal of one prior; or, if so, it cannot be held a withdrawal of a survey recorded when the plat is taken from the office, and especially, when not returned, and thus a survey of 553 acres, made on only 403 acres of located warrant, the residue of the 553 acres being surveyed, recorded, the plats taken out of the office, and not returned, is not shielded by the proviso.

They cited, among other cases, *Taylor's Lessee* v. *Myers*, 7 Wheat. 23; *Kerr* v. *Watts*, 6 Ibid. 550; *Matthie* v. *Potts*, 3 Bos. & Pul. 23; *Taylor and another* v. *Brown*, 5 Cranch 234; *Wilson* v. *Mason*, 1 Ibid. 45; *Hickman* v. *Boffman*, Hardin 356; and *Estill's Heirs* v. *Hart's Heirs*, Ibid. 577; Sneed 81, 82; *Johnson* v. *Buffington*, 2 Wash. 116; *Holt's Heirs* v. *Hemphill's Heirs*, 3 Ohio 232, and referred to Swan's Collection of Ohio Land Laws, under the head of Virginia military lands.

Creighton and *Ewing*, for the defendants in error, contended:—In the case presented by the record and bill of exceptions, *the counsel for the defendants insist, that they are protected by the proviso of the [*631 act of congress of the 2d March 1807, entitled an act to extend the time for locating Virginia military warrants, for returning surveys, &c.; and subsequent acts of congress on the same subject, containing the same proviso; and that the patent obtained by the plaintiff is "null and void."

The United States, under the deed of cession of 1784, from Virginia, held the Virginia military district in trust for the Virginia claimants. The surplus, subject to sale, as other lands belonging to the United States. In the execution of these trusts, the congress of the United States, on the 23d of March 1804, passed an act limiting locations in the Virginia military district to three years, and five years to execute and return surveys. The holders of warrants asked an extension of the time. When the act of the 2d March 1807 was passed, extending the period for making locations and returning surveys, the proviso on which the defendants rely, was introduced, and has been retained in all the subsequent acts of congress on that subject. The power of congress to limit the period for making locations and surveys in the district (exercised since the year 1804), heretofore, has never been questioned. In the exercise of an undoubted power, the object and policy of the national legislature in the introduction of the proviso cannot be mistaken, in excluding from location "land for which patents had previously

been issued, or which had been previously surveyed." The survey claimed by the defendants, is a subsisting survey, which has never been abandoned or withdrawn, and comes expressly within the doctrine laid down by the court in the case of *Taylor's Lessee* v. *Myers*, 7 Wheat. 23. "The proviso in the act of March 2d, 1807, which annuls all locations made on lands previously surveyed, applies to subsisting surveys—to those in which an interest is claimed." The act places surveys on the same footing with patents, for all the purposes of defence in trials at law. A patent is a title from its date, and conclusive against all those whose rights did not commence previous to its emanation. *Hoofnagle and others* v. *Anderson*, 7 Wheat. 212. In the action of ejectment, in Ohio, the parties are never permitted to go behind the patent. The same rule applies, under this act, to surveys. The class of cases referred to, and relied on by the plaintiff's counsel, are cases in chancery, where it is the appropriate duty of the court to go behind the patent or survey.

Whether a patent can be obtained by the defendants, on their survey, will be a question between them and the government, *whenever the government shall make provision to inquire into the claim. It can never be a question between the plaintiff and defendants. It is sufficient for the defendants in this controversy, that they have a subsisting survey, claimed by them, and that the patent obtained by the plaintiff has been procured in contravention of the positive provisions of the act, and is "null and void." If it were admissible to go into the inquiry desired by the plaintiff, it will be seen, that when Nathaniel Massie sold the land in question to the defendants, and at the time he made the entry and survey, he owned 403 acres, part of Leven Powell's warrant, and 150 acres, part of Thomas Goodwin's warrant, making 553 acres, the precise quantity in the entry and survey. If the objection to the defendants' title exists, as suggested by the plaintiff's counsel, the facts disclosed in the evidence offered by him, present a case where a court of equity would give to the defendants ample relief.

*632]

Marshall, Ch. J., delivered the opinion of the court:—This is an ejectment brought by the plaintiff in error, in the court of the United States for the seventh circuit and district of Ohio, to recover a tract of land lying in the military district. The plaintiff offered, as his title, a patent from the government of the United States, bearing date the 10th of November 1824.

The defendants then introduced a certified copy of an entry and survey of the lands in controversy, sworn to by Richard G. Anderson, the principal surveyor of the Virginia military district; the survey purporting to have been made on the 10th of October 1796, and recorded on the 15th of April 1812, founded on an entry, bearing date the 19th day of July 1796, for 553 acres of land, in the name of Nathaniel Massie, assignee, numbered 2744, and founded upon Leven Powell's warrant, for 2000 acres, No. 3398, and Thomas Goodwin's warrant for 200 acres, No. 1930. It was admitted, that the defendants were purchasers from Massie, prior to the year 1796; entered into possession of the premises under the said purchases, and received a conveyance from him, before the year 1812. It was also admitted, that the plaintiff's entry was made on the 10th of June 1824, and his survey on the 20th of the same month. The defendant relied on this survey, and on the pro-

viso of the act passed the 2d of March 1807, entitled "an act to extend the time for locating Virginia military warrants, &c." This act annexes the following proviso to the provision it *grants to obtain warrants for military service, and to make locations within the military district: [*633 "Provided, that no locations as aforesaid, within the aforesaid mentioned tract shall, after the passing of this act, be made on tracts of land for which patents had previously been issued, or which had been previously surveyed, and any patents which may, nevertheless, be obtained for land located contrary to the provisions of this section, shall be considered as null and void."

To show that the survey set up by the defendants was not protected by the proviso in the act of congress, the plaintiff offered to prove, that the warrants on which it was founded were satisfied before that entry was made. For this purpose, he offered in evidence two entries amounting to 1597 acres, on Powell's warrant, made in Powell's name, the 30th of December 1791, surveyed by Massie on the 3d of January 1792, the survey recorded on the 10th of the same month; plats and certificates taken from the office by Massie, the 11th of July 1795, and a patent issued to him on the 19th September 1799; also an entry for 403 acres, the residue of Powell's warrant, made in the name of Nathaniel Massie, on the 27th of January 1795, surveyed on the 27th December 1796, the survey recorded on the 9th of June 1797; the plat and certificate, together with the warrant supposed to be satisfied, taken out of the office by Massie, on the 14th of June 1797, and a patent issued to his heirs, on the 3d of December 1814. He also offered in evidence, an entry for fifty acres made on Thomas Goodwin's, warrant, in the name of John Walker, assignee, the 17th of September 1795, surveyed the 30th of March 1820, and patented on the 19th of November 1825; also an entry for 150 acres, the residue of the said warrant, made on the 16th of June 1795, in the name of the said Massie, surveyed on the 1st of July in the same year; survey recorded the 10th of the same month, and a patent issued to Massie, on the 15th of February 1800. The plaintiff also offered the deposition of Richard C. Anderson, the principal surveyor, who deposed, that the survey of 553 acres, which was given in evidence by the defendants, was illegally made, and admitted by him ignorantly and improperly, to record; and that he had marked the same on the record of his office, "error;" but he does not state the time when this mark was made. He adds, that he had refused to grant a plat and certificate of survey, being of opinion, that the whole of the warrants had been previously satisfied.

The defendants moved the court to reject the authenticated copies, and testimony aforesaid, as inadmissible evidence; which motion was granted by the court, upon the ground, that the act of congress confirmed the survey of the defendant, *and annulled the plaintiff's patent. An exception [*634 was taken to this opinion. A verdict and judgment having been given for the defendants, the plaintiff has brought the cause into this court by writ of error.

Two points have been made by the counsel for the plaintiff. They contend—1. That congress could not, rightfully, limit the time within which military warrants should be located and surveyed. 2. That the act of congress, prohibiting locations on lands already surveyed, and declaring any

patent which should be issued on such survey, void, does not comprehend the survey in this case.

The first point to be considered, is the objection to the limitation of time prescribed by congress, within which the military warrants granted by Virginia should be located. The plaintiff contends, that no limitation can be fixed. In the October session of 1783, the legislature of Virginia passed an act ceding to congress the territory claimed by that state, lying north-west of the river Ohio, under certain reservations and conditions in the act mentioned. One of these was, "that in case the quantity of good land on the south-east side of the Ohio, upon the waters of the Cumberland river, and between the Green river and Tennessee, which has been reserved by law for the Virginia troops, on the continental establishment, should, from the North Carolina line bearing in farther upon the Cumberland lands than was expected, prove insufficient for their legal bounties; the deficiency should be made up to the said troops, in good lands, to be laid off between the rivers Scioto and Little Miami, on the north-west side of the river Ohio, in such proportions as have been engaged to them by the laws of Virginia." This is not a reservation of the whole tract of country lying between the rivers Scioto and Little Miami. It is a reservation of only so much of it as may be necessary to make up the deficiency of good lands in the country set apart for the officers and soldiers of the Virginia line, on the continental establishment, on the south-east side of the Ohio. The reservation is made in terms which indicate some doubt respecting the existence of the deficiency, and an opinion, that it will not be very considerable. Subsequent resolutions of the Virginia legislature, have added very much to the amount of these bounties. The residue of the lands are ceded to the United States, for the benefit of the said states, "to be considered as a common fund for the use and benefit of such of the United States, as have become, or shall become, members of the confederation or federal alliance of the said states, Virginia inclusive, according to their usual respective proportions in the
*635] general charge and *expenditure; and shall be faithfully, and *bonâ fide*, disposed of for that purpose, and for no other use or purpose whatever."

The government of the United States, then, received this territory in trust, not only for the Virginia troops on the continental establishment, but also for the use and benefit of the members of the confederation; and this trust is to be executed "by a faithful and *bonâ fide*" disposition of the land, for that purpose. We cannot take a retrospective view of the then situation of the United States, without perceiving the importance which must have been attached to this part of the trust. A heavy foreign and domestic debt, part of the price paid for independence, pressed upon the government; and the vacant lands constituted the only certain fund for its discharge. Although, then, the military rights constituted the primary claim on the trust, that claim was, according to the intention of the parties, so to be satisfied, as still to keep in view that other object which was also of vital interest. This was to be effected only by the prescribing the time within which the lands to be appropriated by these claimants, should be separated from the general mass, so as to enable the government to apply the residue, which it was then supposed would be inconsiderable, to the other purposes of the trust. The time ought certainly to be liberal. But unless some time

might be prescribed, the other purposes of the trust would be totally defeated; and the surplus land remain a wilderness.

This reasonable, and, we think, necessary, construction, has met with general acquiescence. Congress has acted upon it, and has acted in such manner as not to excite complaints, either in the state of Virginia, or the holders of military warrants. If the right existed to prescribe a time within which military warrants should be located, the right to annex conditions to its extension follows, as a necessary consequence. The condition annexed by congress has been calculated for the sole purpose of preserving the peace and quiet of the inhabitants, by securing titles previously acquired. We are to inquire, whether the case of the defendants is within it.

2. It has been contended, that the prohibition in the act of the 2d of March 1807, to make locations on lands which had been previously surveyed, does not extend to the survey of the defendants, because that survey was made on warrants which had been previously satisfied. The word "survey," as used in the law, is not satisfied by the mere circumstance that a chain has followed a compass round a particular piece of ground; but requires that it should be made in virtue of a warrant, for the purpose of appropriating land, to which the holder of that warrant is entitled by law. The warrant can be an authority *for surveying and appropriating so much land only as it professes to grant; and this necessary limitation, could it require [*636
confirmation, is confirmed by the act of the 9th of June 1794, which regulates the manner of issuing patents on surveys for less than the whole quantity of land specified in the warrant. The act contains a proviso, "that no letters-patent shall be issued for a greater quantity of land than shall appear to remain due on such warrants." As patents had issued for the whole quantity of land specified in the warrants on which the survey of the defendants professes to be founded, previous to the entry of the plaintiff, no patent could, at that time, have been obtained by the defendants; and therefore, the saving in the statute could not have been intended for their survey.

The court has felt the weight of this argument, and has bestowed upon it the most deliberate consideration. The act of the 23d of March 1804, is the first act which prescribes the time within which the holders of military warrants shall make their locations and surveys. That act requires that the locations shall be made within three years from its passage. On the 2d of March 1807, the first act was passed giving a farther time of three years for making locations, and of five years for returning surveys. This act contains the proviso of which the defendants claim the benefit. In every act which has been since passed, prolonging the time for making entries and returning surveys on military warrants, the same proviso has been introduced. It was enacted in March 1807, and has continued in force ever since. It constitutes a limitation to the right given by all subsequent laws, to locate and survey military warrants. If it be conceded, that this proviso was not intended for the protection of surveys which were in themselves absolutely void, it must be admitted, that it was intended to protect those which were defective, and which might be avoided for irregularity. If this effect be denied to the proviso, it becomes itself a nullity. We must, therefore, inquire, to which class the survey of the defendants belongs?

Nathaniel Massie was probably the proprietor of Leven Powell's whole warrant of 2000 acres, certainly, of 403 acres, part thereof, when he made

the entry under which the defendants claim. He was also the proprietor of 150 acres, part of Thomas Goodwin's warrant. We say he was at that time the proprietor of those warrants, because he made an entry for 403 acres, part of Powell's warrant, in his own name, on the 27th of January 1795, and an entry for 150 acres, part of Goodwin's warrant, in his own name, on the 16th of June 1795; both which entries were afterwards surveyed and patented for himself and his heirs. These two entries amount to
*637] 553 acres, the *quantity for which the entry sold to the defendants was made. Being thus the proprietor of both these entries, and of the warrants on which they wore founded, he makes an entry in his own name, on the 19th July 1796, for the same quantity of 553 acres. This last entry, the warrants being satisfied, if the previous entries remained in force, was inconsistent with the two preceding entries. It ought not to have been made by him, nor allowed by the principal surveyor, unless those preceding entries were withdrawn. According to the usage of the office, as stated in *Taylor's Lessee* v. *Myers*, 7 Wheat. 23, Massie had the power to withdraw them. Had he expressed to the surveyor-general his wish to withdraw them, and to re-enter the warrants, his wish would not have been opposed. But without expressing this wish, so far as the case shows, he made the entry in question. This act was lawful, if the two preceding entries were removed; unlawful, if they stood. The officers of the government did their duty, if this entry displaced the two which preceded it; but violated their duty, if it had not this effect. Unquestionably, in an office regularly kept, the withdrawal of an entry ought to appear upon the record; but had this office been regularly kept, the last entry could not have been allowed, unless accompanied by a withdrawal of those which were inconsistent with it.

Had Nathaniel Massie transferred his right to the two last preceding entries, previous to the time of making this for the defendants, so that the contest was between purchasers; the prior entries could not have been affected by his subsequent act. But he had not transferred his right to them; the contest, had one arisen, would not have been between purchasers, but between a purchaser and the wrongdoer himself. Can it be doubted, how such a controversy would have terminated? Nathaniel Massie, being the proprietor of 553 acres of military land-warrants, enters them on lands which they might lawfully appropriate; afterwards, possessing a perfect right to cancel this entry, and locate the warrants elsewhere, he does locate them elsewhere, and sells this location to a purchaser, for a valuable consideration, without notice. It cannot, we think, be doubted, that a court of equity would, at any time, while Massie remained the owner of the prior entries, relieve such purchaser, by annulling the entries which obstructed the title of the purchaser; or decreeing that Massie should withdraw them, or enjoining him from carrying them into grant. Had the plat and certificate of survey, with the accompanying vouchers required by law, been presented by the defendants, previous to the proceedings taken by Massie to obtain patents for himself, a grant would have issued to the defendants. Their survey, then, was not an absolute nullity. It might have been supported in
*638] a *court of equity; and had the defendants, instead of trusting, as they probably did, to Massie, for a title, been diligent in the pursuit

of it themselves, they might, perhaps, have obtained one from the United States.

This was not a fictitious, but an actual, survey, made as early as the year 1796, by a regular officer, for one owning the warrants on which the entry purports to be made, and having, at the time, full power to give complete validity both to the entry and survey. No circumstance attended them, which could enable a purchaser to detect the latent defect. The survey, having every appearance of fairness and validity given to it by the regular officers of the government, is sold, at least, as early as the year 1796, to persons who take possession of it, and have retained possession ever since. Why should not the proviso in the act of congress apply to the case? The words, taken literally, certainly apply to it. "No locations shall be made on tracts of land for which patents had previously been issued, or which had been previously surveyed." Had a patent been previously issued on this very survey, this contest could never have arisen. Does the language of the clause furnish any distinction between the patent and the survey? If it be a survey, there is none. Lands surveyed are as completely withdrawn, as lands patented, from subsequent location.

It cannot be said, that the prohibition was intended only for valid and regular surveys. *They* did not require legislative aid. It was known, that the military district abounded with defective entries and surveys, which might be defeated by entries made in more quiet times, with better knowledge of the requisites of law. This clause was introduced for their protection. It was, most truly, an enactment of repose. A survey made by the proper officer, professing to be made on real warrants, bearing upon its face every mark of regularity and validity, presented a barrier to the approach of the location, which he was not permitted to pass; which he was not to liberty to examine. Had the survey been made on land not previously located, it would have been as destitute of validity, as it is now supposed to be. Yet, it is admitted, that though it should not cover one foot of the location, the land surveyed could not be appropriated by a subsequent locator. The illegality of the survey would not have been examinable by him. We cannot draw the distinction between such a case and this. Congress does not appear to have drawn it. They are both surveys made by the regular officers, on military warrants.

It may be, that the defendants may never be able to perfect their title. The land may be yet subject to the disposition of congress. It is enough for the present case, to say, that as we *understand the act of congress, it was not liable to location, when the plaintiff's entry was made. [*639

We have not noticed the testimony of the principal surveyor, because we do not think it affects the case. The word "error" was written on the face of the plat, we know not when; certainly, after it was recorded, and after the certificate exhibited by the defendant at the trial had been given. It manifests his opinion, that he acted improperly in admitting the survey to record, but that opinion cannot affect the case. The great original impropriety was in omitting to require that the previous entries made in the name of Massie, should be withdrawn expressly, when this entry was made.

This case is not, we think, like *Taylor's Lessee* v. *Myers*, reported in 7 Wheat. 23. In that case, the owner had openly abandoned his location and

survey, and had placed his warrant on other land. In such case, the land was universally considered as returning to the mass of vacant land, and becoming, like other vacant land, subject to appropriation. A person having no interest in the original survey, attempted to set it up against a subsequent locator, under the proviso in the act of congress which has been stated. The court said, "the proviso of that act, which annuls all locations made on lands previously surveyed, applies to subsisting surveys; to those in which an interest is claimed, not to those which have been abandoned, and in which no person has an interest." This survey has not been abandoned by any person having title to it, and the defendants still have an interest in it. We think, there is no error in the decree, and that it ought to be affirmed.

Decree affirmed.

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*640] *Robert Barry, Appellant, *v.* Griffith Coombe, Appellee.

Statute of frauds.

The statute of frauds, in Maryland, requires written evidence of the contract, or a court cannot decree performance; the words of the statute are, "unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized." p. 650.

A note or memorandum in writing of the agreement between parties, is sufficient, under the statute of frauds of Maryland; and in order to obtain specific performance in equity, the note in writing must be sufficient to maintain an action at law. The form is not regarded, nor the place of signature, provided it be in the handwriting of the party, or his agent, and furnish evidence of a complete and practicable agreement. A court of equity will supply no more than the ordinary incidents to such an agreement, such as the ingredients of a complete transfer, usual covenants, &c. p. 650.

An examination of the cases will show, that courts of equity are not particular, with regard to the direct and immediate purpose for which the written evidence of the contract was created; it is written evidence which the statute requires; and a note or letter, and even in one case, a letter, the object of which was to annul the contract, on a ground really not unreasonable, was held to bring a case within the provisions of the statute. p. 651.

Where, in an account stated by the parties, in the handwriting of the defendant, his name being written by him at the head of the account, a balance was acknowledged to be due by him to the complainant in the bill for a specific performance, there was the following credit, "by my purchase of your half, E. B. wharf and premises, this day agreed upon between us, $7578.63;" it was held to be a sufficient memorandum in writing, under the statute of frauds of Maryland, upon which the court could decree a specific performance of the sale of the estate referred to; other matters appearing in evidence, and by the admission of the defendant in his answer, to show the particular property designated by "your ½ E. B. wharf and premises."[1] p. 651.

Appeal from the Circuit Court of the District of Columbia. This was an appeal from a decree in equity of the circuit court for the county of Washington, against Robert Barry, the appellant, upon a bill filed by Griffith Coombe, for the specific execution of a contract for the sale of real estate in the city of Washington, and for the payment of the balance of an account, which it was alleged had been settled and agreed upon by the parties.

The material charges in the bill, and which were brought into the con-

[1] S. P. Clark *v.* Burnham, 2 Story 1; Williams *v.* Moore, 95 U. S. 456.

sideration of the court, by the counsel in argument, were—that various transactions, commencing in 1815, had taken place between the complainant and the defendant, who then resided in Baltimore, together with a certain James D. Barry, of the city of Washington, as joint proprietors of a tan-yard, *in which the business of tanning and selling leather was carried on; in the course of which, the concern became largely indebted [*641 to the complainant, and to other persons; for the payment of which securities had been given. Afterwards, in 1821, the partnership between the defendant and James D. Barry was dissolved, and the whole of the stock in trade became the property of the defendant; who, afterwards, continued the business on his own account. That about the 18th of May 1818, the complainant and the defendant purchased an estate on the eastern branch of the Potomac, in the city of Washington, upon which were erected a dwelling-house, warehouse and wharf, and which was held by the complainant and the defendant as tenants in common. Large expenditures were made by the complainant for the repairs of the property, and the defendant was considerably indebted to the complainant for his proportion and share of the same. The bill further charged, that about September 1820, a settlement of all accounts took place between the parties, upon which the defendant was found in arrears, and admitted himself to be indebted to the complainant, a stated balance of $9078.33; and for the purpose of liquidating and discharging the balance, so due by the defendant, a bargain was then concluded for the sale of the defendant's moiety of the said premises, on the eastern branch, so held by them in common; for which the complainant agreed to allow him the price of $7578.63, to be passed to his credit, in account against the stated balance; the balance of $1500 still remaining due, the defendant agreed to pay with interest, in instalments, in one, two and three years, and to give his promissory notes for the same; in consideration of which agreement on the part of the defendant, the complainant agreed to discharge the parties who had been concerned in the tan-yard, from the debt due to him, on account of a certain indorsement; and to relinquish to the defendant his interest in, and lien upon, leather which he held. Whereupon, the defendant immediately drew up, in his own handwriting, a statement of the said settlement, bargain and agreement, in the form of an account between himself as debtor, and the complainant as creditor, signed at the beginning with the defendant's name, in his own handwriting, and at the foot with the complainant's name in his handwriting, in which written statement, are set down the heads of the several accounts upon which the said balance of $9078.63, was ascertained against the defendant as aforesaid; the credit and deduction of the purchase-money, agreed to be allowed the complainant, for the defendant's moiety of the said estate and premises on the eastern branch, as aforesaid, described in said statement as "your (meaning the *defendant's) ½ E. B. (meaning eastern branch) wharf and premises;" and expressly stated as purchased by the complainant [*642 on the day of the date of said paper, with an express reference to the said agreement between the complainant and the defendant; and lastly, the said balance of $1500, remaining due, after deducting the credit for the said purchase-money as aforesaid, payable by instalments as aforesaid. The statement of the account, alleged to have been so drawn up, was as follows:—

Washington, 27th Sept. 1820.

Robert Barry To G. Coombe, Dr.

To amount of J. D. Barry's notes, taken up by me, and secured by him in tan-yard stock and leather, per bill dated 27th Dec. 1819, ...	$4209 00	
Interest on do., to this day—9 mos.	184 40	
		4393 40
To bill of leather sent you in June 1819, . . .	2846 50	
Interest to this date—15 mos.	216 65	
		3063 15
To balance due on tan-yard books, (E. E.) . . .	284 25	
To cart of hay for tan-yard	37 37	
To balance due for supplies to tan-yard, per account furnished you, ...	152 64	474 26
		7930 81
To ½ expenses of repairs on house and wharf, E. branch	1145 49	
Interest, 9 mos.	51 52	1197 01
	Cr.	9127 82
By ½ rent and wharfage, &c., of sundries, to this day on E. B. wharf		49 19
		9078 63
By my purchase of your ½ E. B. wharf and premises, this day as agreed on between us		7578 63
Balance due G. Coombe, fifteen hundred dollars,		$1500 00

Payable in one, two and three years, with interest.

(Signed) G. Coombe.

The bill charged, that this paper, each party having a copy, was, for the purposes of mutual security, delivered to Daniel Carroll, Esq., of Duddington, who was a creditor of the partnership.

It was further alleged, that the complainant went on to do and perform all that he had assumed and undertaken under *the agreement and settlement; that he took possession of the premises on the eastern branch, and had laid out and expended large sums of money in the repairs and improvements thereof; and that although he had repeatedly made efforts to obtain from the defendant, a conveyance of the property, so agreed to be conveyed to him by the defendant, it had not been made. The bill then prayed the specific relief to which the complainant alleged himself entitled in equity, under the contract; and the benefit of such a recovery, as he might have at law, by attachment or otherwise, for the debt due to him as stated in the account.

*643]

Among the documents contained in the record, was the following letter from the complainant to the defendant, and which, by the affidavit of John P. Ingle, was proved to have been delivered to the defendant, on the 5th of April 1822.

Washington City, March 26, 1822.

Mr. Robert Barry.

Sir:—It is now time that I should have your final answer, whether you

will execute the contract made between us, in presence of Mr. Carroll, for the conveyance of your moiety of the of the house, wharf and premises, eastern branch, and for the payment and security of the balance due me in money. For this purpose, I have authorized Mr. John P. Ingle to call on you in my name, and receive your conveyance, a form of which he will present you, which you will please execute, and acknowledge in due form, so as to make it effectual here. Please also pay to Mr. Ingle the instalment of $500, due in September last, with interest from 27th September 1820. Please also to execute and deliver to Mr. Ingle, your two notes for the other instalments, drafts of which he will present you. I also require of you the surrender of J. D. Barry's draft, indorsed by me, for $1000, which had been discounted in the Bank of Washington, and which you promised to take up and release me from. I must notify you, that if you persist in refusing to comply with the terms of your contract, according to your pledged faith, in presence of the respectable witness above mentioned, I shall hold you accountable in money, for the whole balance due me, according to our settlement, and shall merely hold the house, wharf, &c., which you were to have conveyed to me, as collateral security for the entire balance ascertained by that settlement, and for the expenses since laid out in repairs and improvements of the same, under the faith of your contract. Respectfully, your obedient servant.

GRIFFITH COOMBE.

*The defendant, Robert Barry, denied in his answer, the liabilities to which, by the bill of the complainant, he was said to have been [*644 under, as connected with the tan-yard, and the concern with James D. Barry; and after stating other matters, not necessary to be inserted, admitted, in the language of the answer, that in the year 1820, he had a conversation with the complainant about settling their accounts, "including the debt alleged to have been secured by the pretended bill of sale aforesaid, and the complainant then proposed to purchase from this defendant, his undivided moiety of the lots and wharf aforesaid, and that the amount of purchase-money should be considered as a payment to the complainant, in part of the amount which he then alleged was owning to him; and the defendant, at the request of the complainant, who alleged the badness of his handwriting, as an excuse for making that request, copied from a written memorandum furnished by the complainant, the statement of the account referred to, in which the defendant's name was written by him, only for the purpose of stating him as debtor to the complainant, in compliance with his request, not as signing any contract or agreement. And that the said statement, so written by him, at the instance and request of the complainant, being signed by him, was delivered to this defendant, for the purpose of considering, whether, after due examination, he would assent to the terms therein proposed, and was not deposited in the hands of Daniel Carroll, as the complainant alleges. For this defendant declares, that he did not then assent to the correctness of the several charges and estimates in the said statement, although he expressed his willingness to sell his undivided moiety of the said wharf and premises for the price proposed by the complainant, if this defendant should be satisfied, on examination, that he would actually receive a compensation fully equal in value to the said price; and therefore, the said statement was delivered to this defendant, for the purpose of examination and considera-

tion as aforesaid; and has always since been, and now is, in possession of this defendant; and in reference to the said verbal agreement, and explanatory of the condition on which this defendant was willing to carry the same into effect, this defendant, a few days after he received the same statement, having discovered a part of the representations made to him, as aforesaid, to be incorrect, wrote a letter to the complainant, representing the said conditions so far as they were affected by the discovery then made, a copy of which letter this defendant herewith exhibits, which he prays may be received as a part of this his answer; which letter was, as this defendant believes, delivered to the complainant, and was read by him, and is probably in his possession, or in his power to produce; and this defendant prays that the said original letter may be here produced." The answer also stated,

*645] *that upon subsequent examination, the account which was made out, and in which was the entry of "E. B. wharf, &c.," had been found erroneous in many particulars. The answer submitted to the decision of the court, whether the account set forth in the complainant's bill, was "an agreement, such as is required by law and equity, to compel the defendant to make the sale and conveyance claimed and prayed by the complainant."

The letter referred to, in the defendant's answer, was as follows:—

Baltimore, 7th October 1820.

Mr. Griffith Coombe,

Sir:—Having agreed to sell you my undivided half interest in the eastern branch wharf and premises, at Washington, lately deeded to you and to me, by James D. Barry, I hereby bind myself to give you a good and sufficient conveyance of all my right and title, in law and equity, for the same, as soon as you send me, or that I receive, the stock of leather now working out at the tan-yard (the same being a part of the consideration for my right to said property), or otherwise place the proceeds thereof at my disposal, as far as you have, or can, or shall have, the right or power to do, or cause to be done, agreeably to the inventory lately given me by Mr. Edmund Rice, of said stock and materials, which inventory must embrace a quantity of finished leather, amounting to about eight hundred and six dollars, removed by him to his brother William's store; and as this lien to you is blended with a lien to others, I further engage, on receipt of said stock of leather, to provide likewise for the lien held thereon by Mr. Daniel Carroll, of Dud. for about eighteen hundred dollars, and also for the payment of a lien on said stock of leather, to secure the amount of a note due to Edmund Rice, or indorsed by him, at the Patriotic Bank, for about twelve hundred dollars; and, in other respects, to settle for any balance I may owe you on the account you have furnished me, agreeable to the principles of equity and justice. I remain, &c., Yours respectfully.

P. S.—The effect of the paper signed by you, and deposited with Mr. Carroll, will, of course, remain suspended, subject to its conditions, for the purpose of carrying the foregoing into effect, and which will, by me, be complied with in good faith.

The evidence before the circuit court, consisting of the examinations of

*646] Mr. Pleasanton, Mr. Carroll and others, and *what is contained in the record, is sufficiently stated in the opinion of the court.

The case was argued for the appellant, by *Cox* and *Worthington;* and by *Jones*, for the appellee.

The *appellant* contended: 1st. That there was no final agreement between the parties. 2d. If there was, it was void under the statute of frauds. 3d. Supposing an agreement fully concluded, it was obtained by misrepresentation, and fraudulent concealment. 4th. It was without consideration.

The counsel for the appellant cited the following authorities: 13 Ves. 76; Prec. Chan. 560; 1 Atk. 12, 449; Ibid. 497; 2 Desauss. 145; 1 Johns. Ch. 149, 279, 283; 1 Cox 222; 1 P. Wms. 771 n.; Sugd. on Vend. 71, 86, 91; 1 Eq. Cas. Abr. 20; 4 Taunt. 754; Jones on Cont. 167; 1 Sch. & Lef. 22; 1 Ves. jr. 236, 336; 2 Sch. & Lef. 7, 557; 3 Ves. 185, 379; 6 Ibid. 39; 1 Edw. 516; 8 Com. Dig. 362; Show. 705; Ld. Raym. 1410; 2 Camp. 308; 2 Atk. 488; 3 Ibid. 493; 15 East 7; 3 T. R. 757, 761; 2 P. Wms. 217; 3 Atk. 283-6; 1 Desauss. 257; 2 Sch. & Lef. 554; 18 Ves. 10; 2 Ball & Beat. 369; 1 Ibid. 256; 2 Wheat. 336; 7 Ves. 341; 5 Eng. C. L. 485; 2 Caines 241; 4 Johns. 251; 2 Ibid. 300; 16 Ibid. 54.

For the *appellee*, it was argued: 1. That the original agreement was sufficiently certain and precise in its terms; and was ascertained by a sufficient memorandum in writing, under the statute of frauds.

2. That, if the original memorandum in writing were, at all, defective, the case is taken out of the statute by the answer; which fully admits the agreement charged in the bill, without pleading, or in any manner relying on the statute.

3. That the collateral matters of pretended equity, set up in the answer, by way of avoidance, are, for the most part, utterly foreign to the merits of a specific execution of the agreement; and in so far as they are at all material to any question between the parties to this cause, required substantive proof to support the answer: of not one of which has the appellant offered or pretended any manner of proof; but has turned his back on the most obvious means and ample opportunities, challenging him to the proof from accessible and unfailing sources of evidence, if there had been any truth in his averments; which, moreover, have been positively contradicted, in every material circumstance, and conclusively disproved by the evidence in the cause.

4. That the appellee is entitled to a specific execution of the agreement, upon principles wholly independent of all the solemnities required by the statute, in consequence of an equitable obligation, affecting the conscience of the appellant, beyond *the mere force of an express contract, and combining, in this case, all the equitable circumstances; any one of [*647 which was sufficient to bring a specific execution of the contract within the appropriate jurisdiction of equity to relieve against fraud. 1st. Because the appellant practised finesse to evade the instantaneous execution of the agreement, by promising that he would, in a few days, reduce it to the more solemn and consummate form of a regular conveyance for the land, and of promissory notes for the balance of account remaining due, after taking credit for the purchase-money of the land; and in the meantime, drew from the appellee, upon the faith of that promise, all the valuable equivalents of

the agreement. 2d. Because the contract has been completely executed, on the part of the purchaser, by payment of all the purchase-money, and, in part, executed on both sides, by an exclusive, long-continued, and unquestioned possession in the purchaser, under the contract. 3d. Because the purchaser has made large expenditures, in extensive and beneficial improvements of the property, upon the faith of the contract.

JOHNSON, Justice, delivered the opinion of the court:—This appeal brings up for revision a decree of the circuit court of this district, by which this appellant has been required to execute specifically, an agreement for the sale of land. The bill sets up a certain written instrument, as a sufficient memorandum in writing; but not relying solely on that, goes on to make out one of those cases, in which a court of equity exercises this branch of its jurisdiction, in order that the statute of frauds may not be made a cloak for fraud; that is a case of performance on the part of the complainant. This has caused the question on the right to relief, in a case within the provisions of the statute, to be mixed up with a great deal of extraneous matter, which need not have been set out, had the claim to relief been confined to the one ground alone.

The memorandum set up is in the form of a stated account, wholly in the handwriting of the appellant, Barry, the defendant below, and acknowledged to be a copy made by him of another, also made out in his handwriting, actually signed by Coombe, the appellee, and now in the hands of Barry. So that Barry's name is in the caption, if it may be so called, and Coombe's, at the foot of the memorandum. The item of the account, which relates to the bargain or agreement for the sale of the land, is in these words, letters and figures:

"By my purchase of your ½ E. B. wharf and premises, this day as agreed on between us;" and the credit is carried out in figures $7578.63, and deducted from the amount charged to Barry. *Then follows this memorandum, "balance due G. Coombe fifteen hundred dollars, payable in one, two and three years, with interest. G. COOMBE."

*648]

The defence set up in the answer is, that the transaction was not final; that it amounted to nothing more than a treaty in progress; that so far as it proceeded, it was obtained by false and fraudulent suggestions on the part of the complainant; and that the name of defendant was signed, if signed at all, only to state an account, not to acknowledge a contract; and the answer concludes with submitting to the court, whether it be "an agreement such as is required by law and equity, to compel the defendant to make the sale and conveyance claimed, and prayed for, by complainant." It is under these words alone, that the protection of the statute of frauds is set up by defendant. But in the view which this court will take of this subject, it is unnecessary to inquire, whether the case required or admitted, that it should be more formally pleaded, since we will dispose of the cause, under the admission, that he has entitled himself by his answer to the full benefit of the statute, if the facts of the case would maintain the defence.

And first, it is obvious, that it would be idle to consider the form and effect of the instrument, if the treaty was never brought to a conclusion. On this fact, the answer has put the complainant upon proof, and two witnesses have been examined to the point. Mr. Pleasanton, the first witness,

swears, that in the year 1820, the defendant showed him a statement of accounts, which he believes was a copy of one exhibited by the complainant, and informed him, that he had made a settlement of accounts with com plainant, that the account so shown exhibited a balance against the defendant of $500 or $1500, that it was in Barry's own handwriting, and that he stated, as an inducement to make it, that Coombe had made a sacrifice to obtain it. The account so shown to Mr. Pleasanton, could have been no other than the original of that which Coombe had exhibited, and the facts to which this witness testifies, are strongly indicative of a final transaction.

The next witness, Mr. Carroll, is still more positive. He was present at the transaction, and as he testifies, at the request of both parties, became the depository of several documents relating to it; and on the subject of the conclusive character of the transaction, his language is, "that he understood the settlement to be final and absolute." But there were other facts to which Mr. Carroll was examined, and it is argued, that his testimony as to those facts goes to prove, that he was mistaken in the view which he took *of the transactions; that they go prove that there was something yet to be done, before the agreement should be closed. Coombe, [*649 it seems, insisted, that Barry should give his note for the balance stated, and a deed for the property, before he left Washington. This Barry resisted, and finally left Washington, without doing either, and returned to his home at Baltimore. It cannot be denied, that this does conduce to prove an unfinished treaty, but the inference is repelled by various considerations.

And 1st, preparing the deed might require time, his business may have pressed for his return home, or he may have wished his own counsel or scrivener to draw up the deed. 2d. As to the notes, giving them made no part of the agreement reduced to writing; the balance stated was to have been paid in one, two and three years, but it does not express that notes are to be given for it, and he may have had his reasons for declining to give his notes, or for taking advice upon it. If there should prove to be errors in the stated accounts, upon more deliberate examination, these errors might more conveniently have been adjusted upon the stated balance, than upon notes, which might have found their way into several hands, and thus have multiplied litigation. 3d. It does not appear from Mr. Carroll's testimony, that Barry refused generally to give either deed or notes, but only to give them, before he went to Baltimore; on the contrary, he appears to have resented Coombe's seeming to act upon a doubt that he would then execute and send them, and to this Mr. Carroll bears positive testimony, when he says "that he understood that the notes and deed were as certainly to be sent on from Baltimore, as if executed on that day."

But what is conclusive in this part of the cause is, that the transaction was followed up by an act on the part of Barry, which no honest man could have done, otherwise than on the supposition that it was a finished transaction. It appears, that Coombe, together with Mr. Carroll and Mr. Rice, held a mortgage of a quantity of leather, to the value of $7000, given to secure to them certain sums advanced on behalf of one James D. Barry; that the defendant, Robert Barry, had assumed the debts of James D. Barry, and thereby required a resulting use, or equity of redemption, in this leather. That the sum for which Coombe held his lien on the leather, to

wit, $4209, was one of the items of account in the exhibit upon which the complainant relies, to obtain a decree for specific performance. But as a balance of $1500 still remained due to Coombe upon the stated account, the leather was still pledged to him for that amount. This interest Coombe was induced to release to Barry, and which he, accordingly, did, by an
*650] indorsement upon the *instrument of writing by which the lien was created. And Mr. Carroll testifies, "that the defendant did receive, at the tan-yard in Washington, all the leather mentioned in the bill of sale, in consequence of complainant's release." It is true, an attempt was afterwards made in this suit to arrest the leather in the hands of Barry, but it was not on the ground that the treaty was *in fieri*, or the release not final; but to subject the leather to the debt, which would be due to the complainant, if he could not obtain the specific execution of the sale of the wharf, as the acknowledged balance. It is obvious, then, that in reducing the leather into possession, Mr. Barry must either have acted fairly, on the idea of a finished transaction, or unfairly, by entering upon the fruition a fraud practised to obtain the release.

We will consider him as having acted fairly, upon the ground of a treaty final and concluded, to be carried into execution according to its terms. But the statute of frauds in Maryland requires written evidence of the contract, or a court cannot decree performance. Is this such written evidence of a "contract or sale of lands," as satisfies the exigency of that statute? The words of the statute are, "unless the 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 by some other person, by him thereunto lawfully authorized." A note or memorandum in writing, of the agreement, therefore, is sufficient; and there is no question, that in order to obtain a specific performance in equity, the note in writing must be sufficient to maintain an action at law. The form is not regarded, nor the place of signature, provided it be in the handwriting of the party, or his agent, and furnish evidence of a complete and practicable agreement. A court of equity will supply no more than the ordinary incidents to such an agreement; such as the ingredients of a complete transfer, usual covenants, &c.

At first view, this would seem to be an anomalous case, but it is only necessary to reduce it to its elements, in order to discover, that it is one known to the adjudications of courts of equity on this statute. As to the balance stated, it is final and conclusive between these parties, and *insimul computassent* might be maintained upon it, by Coombe, for the amount. And in an action by him, going to claim the whole amount charged to Barry, it would be good evidence, in the hands of Barry, to reduce Coombe's demand down to the balance stated. It is then equivalent to a mutual and reciprocal receipt between these parties; on the one hand, Coombe signs a receipt for the price of the premises in controversy, in account with
*651] *Barry, and Barry, on the other, signs a receipt to Coombe, acknowledging that he has received the price stipulated, in full of the purchase-money of the same. This is the real purport and effect of the writing in evidence, and had the instrument, signed by the parties, been expressed in these terms, there could not have been a doubt of its sufficiency. 12 Ves. 466; 9 Ibid. 234.

But it is argued, that this was not the intent with which the writing was concocted. That it was to state an account, and not to note an agreement for the sale of property, that it was drawn up and signed. An examination of the cases on this subject, will show that courts of equity are not particular with regard to the direct and immediate purpose for which the written evidence of a contract was created. It is written evidence which the statute requires, and a note or letter, and even in one case, a letter, the object of which was to annul the contract, on a ground really not unreasonable (1 Atk. 12; 1 Sch. & Lef. 22), has been held to bring a case within the provisions of the statute. But in the present instance, although not the sole object of creating the instrument, it really was an object, and an important one, inasmuch as the balance of account, the immediate object of the stated account, mainly depended upon the item for the sale of these premises. It could not be stated, without acknowledging, that the one had agreed to sell and the other to purchase these premises, at a stated price. On this part of the cause, the case of *Stokes* v. *Moore*, has been cited (1 Cox 218), and insisted on, as furnishing an argument against the sufficiency of the signature of Barry in this cause. But in the case of *Stokes* v. *Moore*, it must be observed, that both the judges who sat in that cause admit, that this was not the principal question in the cause, and it was decided upon the ground, that the memorandum was proved not to express the entire agreement between the parties. But if considered as authority in this point, it is only necessary to advert to the ground upon which the opinion is expressed, "that the name there was not a sufficient signature, under the statute," in order to discover, that it does not impugn the opinion entertained by this court in the present cause. The rule there laid down is, "that the signature is to have the effect of giving authenticity to the whole instrument;" and in this instance, we hold it to be in its proper place, for that purpose. If so, the court there further observes, "that it does not signify much in what part of the instrument it is to be found."

It remains to examine, whether the memorandum is sufficiently full and explicit, to admit of a decree for specific performance. The words are, "by my purchase of your ½ E. B. wharf and premises, this day, as agreed on between us, $7578.63." Brief as it is, this memorandum contains a condensed summary of all the *essentials to a complete contract. By the use of the present tense, it speaks of a thing final and concluded. [*652 By reference to the date at the head of the account, the use of the words "this day" gives a date to the transaction. By the use of the pronouns *your* and *us*, the parties are distinctly introduced. By carrying out the price, the consideration is expressed with absolute precision, and by deducting it from the sum acknowledged due by Barry, the receipt of the consideration is acknowledged; nor is there a single ingredient of a complete contract deficient, unless the description of the property contracted for be insufficient. If that description be fatally ambiguous, it is certainly a sufficient ground to refuse relief. The ambiguity here, arises from the use of the capital letters E. B., in the description of the premises; and if those letters stood alone, and unconnected with anything that could give them a definitive signification, there would be much reason to doubt, whether the defect would be curable. The words are, "your ½ E. B. wharf and premises," and it is argued, that this is one of those ambiguities, generally

designated by the epithet *patent*, and as such, admitting of no explanation from extrinsic evidence.

Sir Francis Bacon, in his elements of common law (Regula 23), is the author usually referred to on this distribution of ambiguities, into *patent* and *latent;* the former appearing on the face of the instrument, and not to be removed by extrinsic evidence, but only, in the language of the author, "to be holpen by construction or election;" the latter raised by reference to extrinsic circumstances, and remediable by the same means. It would, perhaps, be a more convenient, and certainly, a more intelligible distribution of the doctrine on this subject, if the cases were divided into positive, relative and mixed; the positive corresponding to the patent; and the relative to the latent ambiguities of the authors who treat of the subject. The mixed, would consist of those cases in which, although the ambiguity is suggested on the face of the instrument, the face of the instrument also suggests the medium by which the ambiguity may be removed.

The facts of this case will bring it either within the second or third class; within the second, because, for anything that appears on the face of the instrument, E. B. wharf, may be as definitive a description of locality as F street, and then, the ambiguity could only arise, if it be shown that the bargainor had more than one house in F street, like the two manors of Sale, put by several authors.

Perhaps, this case belongs more properly to the third class, since the description suggests several circumstances of identity, by reference to which, the premises in question are distinguishable from all others; first, it is a wharf; secondly, a wharf, *the property of Barry; thirdly, a wharf of which he owns a moiety; and connected with these descriptive circumstances, the letters E. B. became, in fact, the initials of the name of a place; and the case is analogous to that of a will, in which the devisee is designated as my son A., my nephew B. C., or my uncle D. E., in which the circumstance of relationship, will let in evidence to fill up the names designated by the initials. In fact, the cases on this point have gone much further, and without committing ourselves on the correctness of the following two, it will be found, by referring to them, such evidence has been let in to supply names, in cases where the indentification was by no means as circumstantial as the present. In the case of *Price* v. *Page*, 4 Ves. 679, the entire Christian name was supplied on parol evidence, without any initial, Price the son of Price, being the only designation. In the case of *Abbot* v. *Massie*, 3 Ves. 148, the devise was to A. G. and Mrs. G., and evidence ordered to be received, to identify the legatees.

*653]

If ever extrinsic evidence may be admitted to carry out the initials of a name, it is impossible that a case can occur, to furnish evidence more full or unexceptionable in its character, than the present. The bill alleges, that the letters E. B. mean eastern branch, and the defendant not only admits in his answer, that the treaty had relation to his moiety of a wharf and premises on the eastern branch of the Potomac, but voluntarily, although *altero intentii*, introduces a letter from himself to complainant, in which it is explicitly acknowledged. "Having agreed to sell you my individual half-interest in the eastern branch wharf and premises," is his language in the letter. Besides which, the original deed is spread upon the record, by which it appears that the defendant held a moiety, as tenant in common with the

plaintiff, of a wharf and premises on the eastern branch of the Potomac river, which is well known in common parlance as the eastern branch, without the addition of Potomac or river. We are therefore of opinion, that the ambiguity is fully removed, and legally, since it is by reference to a medium of explanation, suggested on the face of the memorandum ; and on evidence, which, while it neither adds to, detracts from, nor varies the note in writing, supplies every exigency of the statute of frauds.

The only remaining question arises on the effects of Coombe's letter of the 26th of March 1822, which the defendant insists amounted to a relinquishment of the contract of sale, and this appears to some of the court, to present the greatest difficulty in the cause. For it cannot be denied, that the letter is not confined in its import to a demand of a fulfilment of the contract. It does not intimate an intention to enforce the contract ; *but on the contrary, concludes with a declaration, that if Barry does not comply [*654 with this contract on his part, the complainant will hold himself exonerated, and will resort to his original money contract, as it stood prior to their entering into the contract for the sale of the premises. Nothing, therefore, but the equivocal conduct of Barry, on the receipt of that letter, as proved in the deposition of Ingle, deprives him of the benefit of this defence. To have availed himself of it, he should have adopted the alternative offered him ; and as the only unequivocal proof of it, should have tendered to Coombe the amount justly due to him, after extracting that item from the account. This he did not do, and it was too late, after the bill filed, to claim the benefit of a right thus gone by ; at least, without paying unto Coombe the amount which would have been due to Coombe upon a mutual relinquishment of the bargain.

As to the ground of misrepresentation and fraudulent concealment, we have not thought it necessary to say more, than that there is not the least evidence to support the charge set up in the answer. Nor is it necessary to examine the case, on the ground of part performance, since this court is fully satisfied of the sufficiency of the memorandum in writing to sustain the decree, so far as it requires Barry to make title to the moiety of the wharf, lot and premises.

With regard to that part of the decree which relates to the payment of the balance of the stated account, and perpetuates the injunction not to remove certain property beyond the jurisdiction of the court, until that balance be paid, we are induced to consider all objections to be waived. Yet we mean not to express any doubts of its correctness, since the defendant has nowhere put his defence upon the ground of the remedy at law ; but on the contrary, by his answer, he impeaches the conclusiveness of the stated account, and raises an issue, in equity, upon the fairness and correctness of several items, which, if expunged, would leave a balance in his favor. This defence he has failed to sustain by proof, and the court, on that ground alone, independent of its connection with the principal subject of the bill, might legally decree payment of the stated balance, and the means of enforcing payment.

Decree affirmed with costs, and cause remitted for further proceedings.

*Allison Ross, Plaintiff in error, *v.* John Doe, on the demise of Adam Barland and others.

Jurisdiction.—Ejectment.—Land law.

Both the plaintiff and defendants claimed title under the provisions of the act of congress, passed 3d March 1803, entitled "an act regulating the grants of land, and providing for the disposal of the lands of the United States, south of the state of Tennessee;" and the decision of the supreme court of the state of Mississippi was, upon the construction given to that act, by the commissioners acting under its authority: This is a case which draws into question the construction of an act of congress, and the supreme court of the United States has jurisdiction, on a writ of error, by which the decision of the court of the state of Mississippi is brought up for revision, under the 25th section of the judiciary act of 1789. p. 663.

Where, by the established practice of courts in particular states, the courts, in actions of ejectment, look beyond the grant, and examine the progressive stages of the title, from its incipient state until its consummation; such a practice will form the law of cases decided under the same, in these states, and the supreme court of the United States regard those rules of decision, in cases brought up from such states, provided that in so doing, they do not suffer the provisions of any statute of the United States to be violated.[1] p. 664.

Under the act of congress of March 3d, 1803, such lands only were authorized to be offered for sale, as had not been appropriated by the previous sections of the law, and certificates granted by the commissioners in pursuance thereof; a right, therefore, to a particular tract of land, derived from a donation certificate given under that law, is superior to the title of any one who purchased the same land at the public sales, unless there be some fatal infirmity in the certificate, which renders it void. p. 666.

The act of congress requires no precise form for the donation certificate; it is sufficient, if the proofs be exhibited to the court of commissioners, to satisfy them of the facts entitling the party to the certificate; it is sufficient, if the consideration, to wit, the occupancy and the quantity granted, appears; nothing more is necessary to certify to the government the party's right, or to enable him, after it is surveyed by the proper officer, to obtain a patent. p. 666.

The second section of the act of congress of March 3d, 1803, was intended to confer a bounty on a numerous class of individuals, and in construing the ambiguous words of the section, it is the duty of the court to adopt that construction which will best effect the liberal intentions of the legislature. p. 667.

The time when the territory over which this law operated, was evacuated by the Spanish troops, was very important; as the law was intended to provide for those who were actually, at that time, inhabitants of, and cultivated the soil within it; but whether it was in 1797 or 1798, was comparatively unimportant. The decision of the commissioners upon the period when the evacuation took place, is sufficient; and the court are disposed to adopt the construction of the act, given by the commissioners west of Pearl river, that the evacuation took place on the 30th March 1798, by which persons coming within the objects of the section, were entitled to donation certificates. p. 667.

*Congress have treated as erroneous, the construction given to the law by the commissioners to
*656] settle claims to lands east of Pearl river, who have decided, that only those who were settled on the lands within the territory, in the year 1797, were entitled to donation certificates, and who had granted to others pre-emption certificates. p. 668.

The commissioners appointed under the act of congress relative to claims to lands of the United States, south of the state of Tennessee, were authorized to hear evidence as to the time of the actual evacuation of the territory by the Spanish troops, and to decide upon the fact; the law gave them power to hear and decide all matters respecting such claims, and to determine thereon, according to justice and equity, and declared their deliberations shall be final; the court are bound to presume that every fact necessary to warrant the certificate, in the terms of it, was proved before the commissioners; and that, consequently, it was shown to them, that the final evacuation of the territory by the Spanish troops, took place on the 30th of March 1798. p. 668.

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[1] See Bryan *v.* Forsyth, 19 How. 336; Bagnell *v.* Broderick, 13 Pet. 436.

Ross v. Barland.

Error to the Supreme Court of the state of Missisippi. This action of ejectment was originally instituted in the state circuit court of Mississippi, by the lessee of the defendants in error, citizens of that state, against Allison Ross, the plaintiff in error, to recover a tract of land lying in that state. The plaintiff, in that court, obtained a verdict for the land, and on the trial of the cause, a bill of exceptions was taken to the opinion of the circuit court, upon certain instructions which were refused to be given, when required by the counsel for the defendant below. From the decision of the state circuit court, the defendant in that court, appealed to the supreme court of the state of Mississippi, and the judgment of the circuit court having affirmed in that court, he prosecuted a writ of error to this court.

The bill of exceptions sent up with the record, set forth, that the counsel for the plaintiff in error moved the circuit court to instruct the jury, that if they should be of opinion, that the defendant in the ejectment was in possession of the land in controversy, under a patent from the United States to Isaac Ross, dated 12th August 1819, and assigned to him by the said defendant, the plaintiff in the ejectment could not recover.

The patent to Isaac Ross was founded upon a certificate of the register of the land-office west of Pearl river, and was for the land in controversy; which had been sold at the sales of the lands of the United States, and purchased by Isaac Ross, who afterwards assigned the same to Allison Ross, the defendant below. The patent was of older date than the patent held by the lessors of the plaintiff below; which patent was issued to Joseph White, on a certificate of the board of commissioners, west of Pearl river, granted in pursuance of an act of congress, passed the 3d of March 1803, entitled "an act regulating *the grants of land, and providing for the sales of lands of the United States, south of the state of Tennessee." [*657

The instructions required, claimed that the elder patent of the defendant below, should prevail in the action of ejectment, in a court of law, against the junior patent of the plaintiff, although the junior patent emanated from a prior certificate of the commissioners. The court refused to give the instructions prayed for, but on the contrary, instructed them, that the junior patent of the plaintiff in the ejectment, emanating upon a certificate for a donation claim, prior in date to the patent under which the defendants claimed, would overreach the elder patent of the defendant, and in point of law should prevail against it. The plaintiff in error contended, that the court below erred in refusing the instructions prayed for, and in the instructions they gave to the jury in favor of the title of the plaintiff in the ejectment.

The case was argued by *Wirt*, Attorney-General, for the plaintiff in error; and by *Coxe*, for the defendant.

For the *plaintiff* in error.—1. The patent under which the defendants claim to hold the land, was granted under a donation certificate, issued by the board of commissioners, west of Pearl river. The land in question was sold at public sale, by the government of the United States, and was purchased by the assignor of the plaintiff in error, ignorant of any other title; the purchase-money was paid; a patent issued to him, from the general land-office, and possession was taken. The holder of the donation certificate

applied for a patent, and the land-office, not knowing of the prior patent, granted his request, and he, holding a junior patent, brought this ejectment in the state court of Mississippi. The question before that court was—whether before a court of law, the junior patent could be given in evidence? The court refused to instruct the jury that the senior patent was the best title, and gave instructions that the junior patent, in conformity with the donation certificate, gave the defendant in error the title to the land described in it.

The first question to be considered is—whether, in a court of law, the proceedings, behind the patent, can be looked at, to ascertain the validity of such a patent? Several references have been given by the opposite counsel, but they are all cases of chancery proceedings, and there is no doubt, chancery can do this. The question now is, can a court of law do it? It has been decided here, that this can be done; but this was only when the local law of the state, in which the case arose, authorized such an examination; but not
*658] *upon any principles of general law. *Polk's Lessee* v. *Wendell et al.*, 9 Cranch 87; 1 Wheat. 432; 5 Ibid. 293. The decisions of the courts of Virginia consider the prior patent conclusive, unless in case of fraud; and it is not known, that any adjudications in the courts of Mississippi have established a different principle.

2. But if the court can go into the examination of circumstances which preceded the patent, still the instruction given to the jury was wrong, as the junior patent cannot prevail, unless it is warranted by the prior steps. The certificate given by the commissioners is not a donation, but a pre-emption certificate. This is shown by a reference to the provisions of the act of congress. The act of 3d March 1803 (2 U. S. Stat. 229), is the foundation of the certificate. The second section of that act gives land to those who "actually inhabited and cultivated" the tract, on the day the Spanish troops actually evacuated the territory, on the 27th October 1797. The third section gives to persons inhabiting and cultivating a tract, at the time of the passing of the law, a pre-emption certificate for such tract. The certificate under which the plaintiffs below applied for a patent, states the occupation of the tract by the patentee, on the 13th of March 1798. This, therefore, could not be a donation certificate, which could only be granted to a person who "inhabited and cultivated" the land on the 27th of October 1797, and it must have been given under the third section, which authorizes the issuing of pre-emption certificates. The certificate granted to the holder of the junior patent, states, that he "occupied" the land, and this does not, *ex vi termini*, mean inhabit and cultivate. It was the duty of the plaintiff to make out a good title, and if he does not show, that by the course of decisions in Mississippi you can look behind the patent, he has failed to do so.

The period at which the territory was actually evacuated by the Spanish troops, is not known to the court, otherwise than as stated in the act of congress; which affirms the same to have been on the 27th of October 1797. Congress have legislated as to the lands east of Pearl river, but there has been no legislation as to those which lie west of the same. The court have here nothing to do, but to decide whether this certificate is a donation certificate, within the second section of the law; and to do this, they must decide upon facts which were for the jury alone.

Coxe, for the defendant in error.—1. This is not a case in which the supreme court can entertain jurisdiction. It is a writ of error directed to the highest *court of the state of Mississippi; and the 25th section of the judiciary act furnishes the only rule by which to determine the [*659 question of jurisdiction. The plaintiff in error has not produced the clause in the constitution, the treaty or statute, under which he claims this proceeding; nor can he designate it. The court below being of opinion, that the case of the defendant in error was within the provisions of the act of congress, decided the case upon general principles, and held that his title is, in law and equity, paramount to that of his opponent. Had the court decided differently, this court would have had jurisdiction; but the constitution and judiciary act do not confer this jurisdiction in every case in which the plaintiff in error claims title under a patent from the United States; which is the only ground upon which it is pretended to exist here. Should this doctrine meet the sanction of the court, it will be difficult to conceive a case of ejectment that can be brought in any of our states, in which this court may not entertain jurisdiction; for nearly every title is derived from, or depends upon, a patent from the United States.

Again, what question can this court decide, admitting it to possess jurisdiction? The same 25th section expressly declares, that no error shall be assigned, or regarded as a ground of reversal, but such as appears on the face of the record, and immediately respects the before-mentioned questions of validity or construction of the said constitution, &c. No such question is presented on this record. The construction of the 25th section has been frequently before this court, and may be considered as settled. *Inglee* v. *Coolidge*, 2 Wheat. 368, decides, that the error contemplated in the statute, must be apparent on the record. *Matthews* v. *Zane*, 7 Wheat. 164; *Martin* v. *Hunter*, 1 Ibid. 357; *Montgomery* v. *Hernandez*, 12 Ibid. 132; *Hickie et al.* v. *Starke et al.*, at this term (*ante* p. 94).

The case is clear upon the merits, should the court examine them. The title of defendant in error is based upon the 2d section of the act of March 3d, 1803, c. 340 (2 U. S. Stat. 229). To every person, &c., who did, on that day of the year 1797, when the Mississippi territory was finally evacuated by the Spanish troops, actually inhabit and cultivate a tract of land in the said territory, &c., the said tract of land, thus inhabited and cultivated, shall be granted. The objection is, that the certificate of the board of commissioners under which this title is derived, shows an occupancy on and before the 30th of March 1798. It is admitted, that this is, *primâ facie*, erroneous, and that it is incumbent on the party claiming under such a donation certificate, to show that it is warranted by the fair construction of the statute. The design of congress in this section, was to secure the titles *of [*660 actual occupants, who had taken possession under Spanish authorities; and the period up to which such occupancy should be entitled to this protection, is fixed by two circumstances—it must be on a day in the year 1797; and on the day when the Spanish troops finally evacuated this territory, the right to which had been so long contested between the two nations, and which was finally settled by the treaty of 1795.

It is certainly true, that congress, at the date of this law, were ignorant of the precise day when this evacuation occurred, and were mistaken as to the year. The Spanish troops finally evacuated the territory, on the 30th of

March 1798, as is stated by an eye-witness of the fact. Ellicott's Jour. 176. Under the act of 1803, two boards of commissioners were created, the one for the lands east of Pearl river, the other, for the lands west of the same stream. These boards were organized, and proceeded to business in the latter part of the same year. The board to the west of Pearl river, discovered the incongruity in the statute. This board proceeded to execute their duties, and all their donation certificates, amounting in number to near 300, have reference to an occupancy on and before the 30th March 1798. This construction of the law, it is apprehended, is not only correct in itself, but has received the implied sanction of the legislature. In consequence of the diversity of opinion and of practice between the two boards, congress passed another law, on the 21st of April 1806, ch. 46 ; the 4th section of which enacts, that whenever it shall appear, to the satisfaction of the register and receiver of the district east of Pearl river, that the settlement and occupancy, by virtue of which a pre-emption certificate had been granted by the commissioners, had been made and taken place prior to the 30th of March 1798, they shall be authorized to grant to the party a donation certificate in lieu of such pre-emption. This was a legislative sanction, given to the opinion of the board of commissioners, west of Pearl river, who had, in the cases contemplated in this provision, considered the parties as within the 2d section of the act of 1803, and therefore, entitled to a donation certificate ; and a legislative repudiation of the construction given by the other board, who had considered such cases as coming within the 3d section of the act of 1803, and the parties entitled only to a pre-emption title. On the 31st of March 1808, congress passed another law, c. 40, the 2d section of which re-enacts and extends the benefit of the 4th section of the act of April 21st, 1806.

Independently, however, of these legislative provisions, it is the only fair interpretation of which, under the circumstances, the 2d section of the act of 1803 is susceptible. A literal compliance with the act is impossible, as there was no day in *the year 1797, in which the Spanish troops *661] finally evacuated the Mississippi territory. Either some latitude of construction must be admitted, or this section must become a dead letter, and every title dependent upon its provisions, annulled. The obvious meaning of the act was, to make the period of evacuation the *punctum temporis*, to which the occupancy should refer, and as the one incident or the other must yield, in order to carry the whole design of the legislature into operation, the expunging of the words "in the year 1797," involves the least sacrifice, and tends more effectually than anything else to further the intentions of the legislature.

In settling this question of construction, the practice of the government, and of its lawfully authorized agents is entitled to much consideration. This construction has received the sanction of the board of commissioners, who were invested not only with ministerial, but judicial functions ; and who, throughout the whole period of their existence, so interpreted the law. It has received the sanction of the land-office, and of the executive, for patents have invariably been granted on such certificates.

In *Edwards's Lessee* v. *Darby*, 12 Wheat. 210, this court seems to recognise the importance of recurring to such sources of information. In order to arrive at the true construction of a statute, or even to enable it correctly

to interpret the provisions of the constitution, the court will refer to, and judicially notice the historical facts which are essential to their correct interpretation. This was done in the case of *Gibbons* v. *Ogden*, 9 Wheat. 1.

If, then, this form of certificate be correct, under the law, what is its operation? The 2d section says, that the land thus occupied shall be granted to the occupant; this does look as if congress designed some ulterior act to be done to vest the title. The language of the 8th section amounts, however, to a present legislative grant. It provides, that so much of the five millions of acres, reserved for that purpose, as may be necessary to satisfy various classes of claims, enumerating particularly those which are embraced by the 2d section of the act, "be and the same is hereby appropriated." This language is more definite than that which this court, in *Sims* v. *Irvine*, 3 Dall. 425, construed to confer a legal title as effectually as a patent. Also 2 Wheat. 196. If this view of the case be correct, it follows, that the title of the plaintiff in error is, radically and intrinsically, a nullity. The patent under which he claims, cannot be valid even at law, if, at the period of its emanation, the United States had no title. *Polk's Lessee* v. *Wendell*, 9 Cranch 87, 94; *Patterson* v. *Winn*, 11 Wheat. 304. *Neither the language, nor the policy of any law, limits the time within which we were to call for the patent. No money was to be paid beyond the mere official fee for the paper. No person could be injured by the delay; and in this view, nearly all the patents emanating on donation certificates, bear date about the same period of time. [*662

The case is, therefore, relieved from the difficulties presented by the question, whether the court will look behind the elder patent, and investigate the prior rights of the parties. The various decisions on that question relate exclusively to cases in which no other than an equitable title existed before the patent, and where the patent itself properly issued. Even in such cases, this court has adopted the practice of the state courts where the land was situated, and have decided either for or against the conclusiveness of the patent, as to the legal title, according to the varying ideas of the state courts. In this case, it is incumbent on the plaintiff in error to show, affirmatively, that the state court has erred. *Kirk* v. *Smith*, 9 Wheat. 241. And to do this, he must show, that under the law of Mississippi, the patent is the only and conclusive evidence of the legal title. No authority to this point, can, it is believed, be produced.

Trimble, Justice, delivered the opinion of the court.—This was an action of ejectment, originally instituted in a circuit court of the state of Mississippi. Upon the trial of the cause, in the court of original jurisdiction, the defendant excepted to the opinion of the court, in overruling instructions moved on his part, to be given to the jury, and also to the instructions given by the court, at the trial of the cause. In the bill of exceptions tendered by the plaintiff in error, in the court below, are inserted the titles of the parties to the land in controversy, and the facts upon which the questions of law arise, which were decided by the court. A verdict and judgment were rendered against the defendant, from which he appealed to the supreme court of the state, being the highest court of law therein, where the judgment was affirmed; and the case is now brought before this court, by writ of error to the supreme court of the state.

The material facts of the case are the following : The lessors of the plaintiffs in the action of ejectment, claimed the land in controversy under and by virtue of a patent from the United States, dated the 13th day of October 1820, which was given in evidence. This patent emanated upon a certificate of the board of commissioners west of Pearl river, organised under the provisions of the act of congress, of the 3d of March 1803, entitled "an act regulating the grants of land, and providing *for the disposal *663] of the lands of the United States, south of the state of Tennessee ;" which certificate was also given in evidence, and bears date the 13th day of Febuary 1807. The important parts of the certifiate are in the following words, to wit : "Joseph White claims a tract of six hundred and forty acres of land, situated in Claiborne county, on the waters of Bayou Pierre, by virtue of the occupancy of the claimant on and before the 30th of March in the year 1798. We certify, that the said Joseph White is entitled to a patent therefor, from the United States, by virtue of the recited act." The defendant claimed and held possesion of the land, under and by virtue of a patent from the United States, dated the 12th day of August 1819, for 553 acres of land. This patent is founded upon a purchase at the general sale of the lands of the United States, at Washington, Mississippi ; under the authority of the before-recited act of congress.

Upon this state of facts, the counsel for the defendant moved the court to instruct the jury : "That in such a case, the older patent of the defendant, under which he claimed possession, should prevail in the action of ejectment in a court of law, against the said junior patent of the plaintiff ; although the said junior patent of the plaintiff emanated upon a prior certificate of the board of commissioners west of Pearl river ; but the court refused to give such instructions in point of law to the jury, but on the contrary, instructed them, that the junior patent of the said plaintiff, emanating upon a certificate of a donation claim, prior in date to the patent under which the defendant claims, would overreach the patent of the defendant, and in point of law, should prevail against such prior patent of the defendant." These opinions having been affirmed upon appeal to the supreme court of the state, the object of this writ of error is to have them reviewed in this court.

It has been objected, that this court has not jurisdiction of the case. By the second section of the third article of the constitution, it is declared, "that the judicial power shall extend to all cases arising under this constitution, the laws of the United States and treaties made, or to be made, under their authority, &c." By the 25th section of the judiciary act of 1789, made in pursuance of this provision of the constitution, it is enacted, "that a final judgment or decree in any suit, in the highest court of law or equity of a state in which a decision in the suit could be had, where is drawn in question the construction of any statute of the United States, and the decision is against the title or right, &c., specially set up or claimed by either party, &c., under such statute, &c., may be re-examined and *reversed or *664] affirmed, by the supreme court of the United States, upon a writ of error." In this case, the titles of both parties are derived under an act of congress ; the construction of the statute is drawn directly in question ; and the decision of the highest court of law of the state is against title and right of the party, specially set up in his defence, under the statute. This

case is not distinguishable from the case of *Matthews* v. *Zane*, 4 Cranch 382, in which the jurisdiction of this court was maintained.

For the plaintiff in error, it is argued, that the state court erred in deciding that the elder grant should not prevail in the action of ejectment. It is undoubtedly true, that upon common-law principles, the legal title should prevail in the action of ejectment, upon the same grounds that the legal right prevails in other actions in courts of law. It is so held in those states in which the principles of the common law are carried into full effect, and the course of proceeding in the action of ejectment is according to those principles. In the states where these principles prevail, it is held, that in a trial at law, the courts will not look behind, or beyond, a grant, to the rights upon which it is founded ; nor examine the progressive stages of the title, antecedent to the grant. But in other states, the courts of law proceed upon other principles. In the action of ejectment, they look beyond the grant, and examine the progressive stages of the title, from its incipient state, whether by warrant, survey, entry or certificate, until its final consummation by grant ; and if found regular and according to law, in the progressive stages, the grant is held to relate back to the inception of the right, and to have dignity accordingly. This latter course seems to be the one adopted and pursued by the courts of Mississippi. It is enough for us to say, that in so doing, and in applying their peculiar mode of proceeding to titles derived through and under the laws of the United States, they violated no provisions of any statute of the United States.

The important question in the case is this : In applying its own principles and practice in the action of ejectment, as might well be done to this case, has the court misconstrued the act of congress, in deciding that the grant of the plaintiff, emanating upon the donation certificate of the board of commissioners west of Pearl river, set forth in the record, would overreach the defendant's grant, and should prevail against it in the action of ejectment? This draws in question the construction of the act of congress of 1803, and gives this court jurisdiction of the case. *It is well known, that prior to the treaty of San Lorenzo, of the 27th of [*665 October 1795, controversies had long existed between the United States and his Catholic Majesty, on the subject of the boundaries which separated the United States and the Spanish provinces of East and West Florida. The second article of that treaty declares, "that the southern boundary of the United States, which divides their territory from the Spanish colonies of East and West Florida, shall be designated by a line beginning on the Mississippi river, at the northernmost part of the thirty-first degree of latitude, north of the equator, which, from thence, shall be drawn due east to the middle of the river Appalachicola," &c. And it is agreed, that if there should be any troops, garrisons or settlements of either party, in the territory of the other, according to the above-mentioned boundaries, they should be withdrawn from the said territory, within the term of six months after the ratification of this treaty, or sooner, if it be possible. It is matter of public history, that there were Spanish troops, garrisons and settlements, north of this boundary, and within the territory of the United States, which were not withdrawn, till long after the time stipulated by the treaty.

By the second section of the before-recited act of congress, of the 3d of March 1803, it is enacted, "that to every person, or to the legal representa-

tive or representatives of every person, who, either being the head of a family, or of twenty-one years of age, did, on that day of the year 1797, when the Mississippi territory was finally evacuated by the Spanish troops, actually inhabit and cultivate a tract of land in the said territory, &c., the said tract of land thus inhabited and cultivated, shall be granted: provided, however, that not more than one tract shall be thus granted to any one person, and the same shall not contain more than 640 acres; and provided, that this donation shall not be made to any person who claims any other tract of land in the said territory, by virtue of any British or Spanish grant or order of survey." The sixth section of the act provides for the establishment of two boards of commissioners, one east and the other west of Pearl river, in said territory, "for the purpose of ascertaining the rights of persons claiming the benefit of the articles of agreement and cession between the United States and state of Georgia, or of the three first sections of this act. And each board, or a majority of each board, shall, in their respective districts, have power to hear and decide, in a summary manner, all matters respecting such claims; also to administer oaths and examine witnesses, and such other testimony as may be adduced, and to determine thereon, according to justice and equity; which determination, so far as relates to any rights *666] *derived from the articles of agreement aforesaid, or from the three first sections of this act, shall be final." The eleventh section provides, "that the lands for which certificates of any description whatsoever shall have been granted by the commissioners, in pursuance of the provisions of this act, shall, as soon as may be, be surveyed; and the said surveyor shall cause all the other lands of the United States, in the Mississippi territory, to be surveyed." And the twelfth section provides, that all the lands aforesaid, not otherwise disposed of or excepted, by virtue of the provisions of the preceding sections of this act, shall (with certain other reservations and exceptions) be offered for sale.

As such lands only were authorized to be offered for sale, as had not been appropriated by the previous sections of the law, and certificates granted by the commissioners, in pursuance thereof; it follows, incontestably, that the right of the plaintiff in the ejectment, derived from a donation certificate, is superior to that of the defendant, derived from a purchase at the sales, unless there is some fatal infirmity in the certificate, which renders it void. This has not been contested. But it is objected to this certificate: 1. That it is not a donation certificate. 2. That it is not sufficiently precise, and does not aver all the facts necessary to authorize the commissioners to grant a certificate. 3. The period of occupancy is alleged to be the 30th of March 1798.

The answer to the first objection is, that the certificate is granted for 640 acres of land, the precise quantity for which a donation certificate was authorized. This is sufficient evidence of the intention of the board of commissioners to grant a donation certificate. The period of occupancy, too, fits the case of a donation certificate or note; and if necessary, fortifies the conclusion of its being granted as a donation certificate.

To the second objection, it may be answered, that the law requires no precise form in the certificate. It is sufficient, if the proofs be exhibited to the board of commissioners, to satisfy them of the facts entitling the party to the certificate. The facts need not be spread upon the record. It is suf

ficient, if the consideration, to wit, the occupancy, and the quantity granted, appear. Nothing more is necessary to certify to the government of the party's right; or to enable him, after it is surveyed by the proper officer, to obtain a patent.

The objection, that the occupancy is stated to be on the 30th of March 1798, produces more difficulty. *The language of the second section of the act of congress, authorizing these donation claims, is, that the [*667 persons, who on that day of the year 1797, when the Mississippi territory was finally evacuated by the Spanish troops, &c. This language is very peculiar, and shows plainly, that, although congress, at the time of passing the law, was certain of the fact of evacuation by the Spanish troops, that body was not informed of the precise time when the evacuation took place. The law was intended to confer a bounty on a numerous class of individuals; and in construing the ambiguous words of the section, it is the duty of the court, to adopt that construction which will best effect the liberal intentions of the legislature. To interpret this section literally, that land should be granted to those, who, on the same day of the year 1797, occupied a tract of land, provided the Spanish troops finally evacuated the territory, and on that very day of that very year 1797, would totally defeat the operation of the law, and the bounty intended by it; if it should have happened, that the final evacuation of the territory, by the Spanish troops, took place on the first day of January 1798, or on any subsequent day. If an individual had inhabited and cultivated a tract of land every day in the year 1797, still, according to the letter of this section, he was not entitled to the bounty of the government, because the Spanish troops had not evacuated the territory any day of that year, but some day of the next year; and although the party continued to occupy the land, until the day of the actual evacuation, still, he could not be entitled, according to the letter of the act, because that day was not any day of the year 1797.

This could not be the intention of congress. The country had been settled, during the conflict on the subject of boundaries between Spain and the United States, by the citizens and subjects of both governments. It was a weak and exposed frontier of the United States. The manifest general intent of the act of congress is, to confer a bounty upon the inhabitants and cultivators of the soil, who elected to remain in the country, at the time of the actual evacuation by the Spanish troops. In this view of the subject, the time of the actual evacuation was very important, but whether it was on some day in the year 1797 or 1798, was comparatively unimportant. If the fact be supposed, and it must be supposed, for the sake of the argument, that the actual evacuation took place on the 30th of March 1798, then something must be rejected in the construction and interpretation of the act of congress to make the provisions of the law effectual. Either the words *"of the year 1797," must be rejected, as inconsistent with the main [*668 scope and general intent of the law, or the claims to donations of all the inhabitants and cultivators, west of Pearl river, must be defeated. This would but defeat the manifest general intent of the law.

It was said at the bar, that all the donation certificates, west of the Pearl river, express to be for occupancy on the 30th day of March 1798, and a certificate from the commissioners of the general land-office, to that effect, was produced. It is not necessary to decide, whether we can, or cannot, notice

this certificate, as evidence of the fact that the evacuation took place on that day, or as evidence of the construction given by the board of commissioners west of Pearl river. It is sufficient, if they were authorized to give such construction to the act, in the event supposed, that the event happened; or in other words, that the actual evacuation took place on the 30th of March 1798, as supposed in the argument; and that the construction of the 2d section of the act of congress, which we are disposed to adopt, is the true construction in the estimation of congress itself, we think, may fairly be inferred from the act of congress of the 21st of April 1806. The 4th section of that act provides, that "wherever it shall appear to the satisfaction of the register and the receiver of the district east of Pearl river, that the settlement and occupancy, by virtue of which a pre-emption certificate had been granted by the commissioners, had been made and taken place prior to the 30th of March 1798, they shall be authorized to grant to the party a donation certificate, in lieu of such pre-emption." It appears, from this section, that the commissioners east of Pearl river had adopted the construction of the act of 1803, contended for by the plaintiff in error; and that, instead of granting donation certificates, to the inhabitants and settlers, down to the period of the 30th of March 1798, under the 2d section of the act, they had granted pre-emption certificates, under the provisions of the 3d section. Congress treat this as a mistaken construction of the law, by directing donation certificates to be made out in lieu of the pre-emption certificates. The act of 1803 puts the settlers east and west of Pearl river on precisely the same footing, and it is inconceivable, that congress could have any motive for giving those east of Pearl river any preference by the act of 1806; or that the act could have any other object, than to continue upon the same footing the settlers east and west of Pearl river.

The certificate granted in the case before us, is sufficient evidence that the commissioners west of Pearl river adopted a more liberal construction; such as we think they were *warranted in adopting, and such as, we think, *669] is manifestly sanctioned by congress, in the act of 1806. It is the opinion of this court, that the comissioners were authorized to hear evidence as to the time of the actual evacuation of the territory by Spanish troops, and to decide upon the fact. The law gave them "power to hear and decide all matters respecting such claims, and to determine thereon, according to justice and to equity;" and declares their determination shall be final. We are bound to presume, that every fact necessary to warrant the certificate, in the terms of it, was proved before the commissioners; and that, consequently, it was shown to them, that the final evacuation of the territority by the Spanish troops took place on the 30th of March 1798.

Upon the whole, it is the unanimous opinion of this court, that the supreme court of the state of Mississippi has not misconstrued the act of congress, from which rights of the parties are derived; and that the judgment of the supreme court be affirmed.

This cause came on, &c.: On consideration whereof, it is the opinion of this court, that the supreme court of the state of Mississippi has not misconstrued the act of congress on which the plaintiff below relies; and it is, therefore, adjudged and ordered by this court, that the judgment of said supreme court of the state of Mississippi be and the same is hereby affirmed, with costs.

*Ann Pray, executrix, J. J. Maxwell and George Waters, executors, of John Pray, deceased, Appellants, *v.* George G. Belt, trustee, and James P. Heath, *prochein ami.*

Construction of will.—Clause of forfeiture, in case of invocation of judicial action.—Action for legacy.—Parties.

The testator, in his will, said, " whereas, my will is lengthy, and it is possible, I may have committed some error or errors, I, therefore, authorize and empower, as fully as I could do myself, if living, a majority of my acting executors, my wife to have a voice as executrix, to decide in all cases, in case of any dispute or contention; whatever they determine is my intention, shall be final and conclusive, without any resort to a court of justice." Clauses of this description have always received such judicial construction as would comport with the reasonable intention of the testator. p. 679.

Even where the forfeiture of a legacy has been declared to be the penalty of not conforming to the injunction of a will, courts of justice have considered it, if the legacy be not given over, rather as an effort to effect a desired object, by intimdiation, than as concluding the rights of the parties. If an unreasonable use be made of such a power, so given in a will, one not foreseen, and which could not be intended, by the testator, it has been considered as a case, in which the general power of courts of justice to decide on the rights of parties ought to be exercised.[1] p. 680.

There cannot be such a construction given to such a clause in a testator's will, as will prevent a party who conceives himself injured by the construction, from submitting his case to a court of justice; a court must decide, whether the construction of the will adopted by those who are named, is the right construction, or the grossest injustice might be done. p. 680.

Where a legacy, for which suit is instituted, is given jointly to several persons in different families, and the legatees take equally, the number in either family being ascertained by the will, all the claimants ought to be brought before the court; the right of each individual depends on the number who are entitled, and this number is a fact, which must be inquired into, before the amount to which any one is entitled can be fixed; if this fact were to be examined in every case, it would subject the executors to be harassed by a multiplicity of suits, and if it were to be fixed by the first decree, would not bind persons who were not parties. p. 681.

Appeal from the Circuit Court of the United States for the District of South Carolina. The appellees, complainants in the court below, on behalf of Jane Heath, the wife of James P. Heath, and of her children, filed a bill in the chancery side of the circuit court of the United States for the district of South Carolina, against Ann Pray, executrix, J. J. Maxwell and George Waters, executors, of the last will of John Pray, deceased, for the recovery of a legacy to which Jane Heath was entitled under the will. The clauses of the will of John Pray, brought under the notice and consideration of the court, and exhibited by the record, were:

[1] Clauses or provisions in a will, revoking and annulling all devises, legacies and other provisions made in favor of any child, legatee or devisee, who shall dispute, contest or litigate any devise, bequest or other testamentary provision in the will, are to be construed strictly, as they go to divest estates already vested. Where such provisions are merely denounced against disputing a will, without a devise over, they are only to be considered *in terrorem*, and not as fixing intestacy on the share of the litigating devisee. But where there is a devise over, in case of a violation of such provision, to some person named, or a provision that the share thus limited shall fall into the residue of the estate for distribution, the devise thus limited will so pass, upon breach of the condition, unless there exist *probabilis causa litigandi*, or where it would be a mere penalty and really subversive of the real intent of the testator. Chew's Appeal, 45 Penn. St. 228. And see Jackson *v.* Westerfield, 61 How. Pr. 399, 407; Rhodes *v.* Muswell Hill Land Co., 20 Beavan 560; Powell *v.* Morgan, 2 Vern. 90; Morris *v.* Burroughs, 1 Atk. 404; Lloyd *v.* Spillet, 3 P. Wms. 345.

*"Item 51. Whereas, I hold ten bonds, given by John J. Maxwell, payable by ten instalments, the first on the tenth of January next, and the others on the tenth of January in each year after. It is my will, and I direct, that the bonds payable tenth of January 1820, 1821 and 1822, say the three first, shall be applied in aid of the payment of my just debts, if any due, and in the payment of the legacies by me left. It is my request, that my executors do also apply all funds which I may possess at my decease, as also dividends on all my bank-stock (except that part of dividends which I have directed to go immediately to some of my legatees), and also to apply all moneys due to me, as soon as collected, and also all rents and crops of rice and cotton; first, to pay any debts, and then legacies, any heretofore left, or which I may hereafter leave to be paid. It is my will, and I do direct, that my executors do pay up the one-half of all the cash legacies by me left to my relations, out of the first fund they can command from my estate, except those I may have directed to be paid immediately, and after they have paid the one-half to my relations, thereafter it is my will, that they do pay up, in equal proportions, agreeably to sums left, to all my other legatees; and be it understood, and it is my will and intention, that after they have paid the one-half to my relations, that they will continue to pay them the other half in equal proportions with my other legatees; my object and intention is, to place them on the same footing with my other legatees, after the payment of one-half to my said relations. It is my will and request, that my executors do pay all my debts and legacies, as soon as possible after my death; but be it explicitly and plainly understood, that no interest whatever is to be allowed on any legacy by me left to any one of my legatees, as in all probability the resources and funds of my estate will be equal to the payment of my debts and legacies, before the three bonds mentioned of John J. Maxwell may fall due and be collected. In case all debts and legacies can be paid, before the three aforesaid bonds can be collected, then and in that case, whatever balance may remain to be collected on the three aforesaid bonds, principal and interest, it is my will, that the same shall be equally divided, as collected, between the following persons, share and share alike: To my executors, in trust for the use and benefit of my aunt Turpin, my uncle's present wife; it is my intention to keep it from being subject to my uncle's debts, that I leave it in trust; in case of no risk, my executors will pay it over to my aunt. My god-daughter, Mary Jane Pray Hines, wife of Lewis Hines. The children of Thomas Mann, by his present wife, as also Ann and Jane, now in New
*672] Providence; any part *which the children of Harriet Mann, Thomas Mann's wife, may be entitled to, is to be ascertained by the number she may have, at the time these bonds are collected, and my executors are ready to pay over. In case all is not applied on my debts and legacies, and if Harriet hath any child, after the payment, then such child to receive such proportion as the other children, out of the part paid to such as she before had, or has, at the time the same is paid. My executors will be governed in the distribution, by the number of children Harriet has, on the day they are ready to make a distribution. In case of any surplus left on said bonds, the said children's parts to be paid to their legal representatives, so it is not their father (I omitted the word Mann, after the words Ann and Jane, above). And to Richard K. Heath, in trust for the benefit of Jane Heath,

wife of James P. Heath, and such children as she may have when that surplus may be collected, in case of there being any.

"It is my will, and I direct, that all my estate, both real and personal, shall be kept and continued together, until all my just debts and legacies are paid, debts, if any, first, and as soon after as possible, to be disposed of as hereinafter directed.

"In case of accident by fire, at any time before or after my executors pay my debts and legacies, it is my will, that my wife receive the amount of insurance to aid in rebuilding; and in case of accidents by fire on lots in Nos. 6 and 7, before my debts and legacies are paid, it is my will, in such case, that my executors hold all my estate together, until they can add $10,000 to what may be received on insurance; and they are requested to put on fire-proof buildings on said lots, to both these amounts, and if these sums are insufficient, they are authorized to raise any balance for erecting proper buildings, on the credit of my wife; this balance, if any required, be it understood, is to come out of my wife's portion of my estate left her.

"In case of such an accident, if necessary, in order not to delay rebuilding, my executors will resort to a loan from the bank or banks. Whereas, there is no doubt but there must be a considerable surplus fund of my estate, by debts due, or crops on hand, or near made, after my executors have paid all my debts and legacies, which my wife will come in for, if my executors discover that, by such surplus, that the same will not be equal to $10,000, in that case, it is my will, that they continue all my estate together, until they can make up $10,000; and it is my request, that they will, as soon as possible after raising the aforesaid sum, proceed to put up fire-proof buildings on the aforesaid lots.

"Whereas my will is lengthy, and it is possible, I may have committed some error or errors. I do, therefore, authorize and *empower, as fully as I could do myself, if living, a majority of my acting executors, [*673 my wife to have a voice as executrix, to decide in all cases, in case of any dispute or contention: whatever they may determine is my intention, shall be final and conclusive, without any resort to a court of justice."

The defendants, John J. Maxwell and George M. Waters, in their separate answers, alleged, "That, in the month of December, in the year 1819, the defendants qualified as executors of the will of John Pray, and having ascertained that there was a sufficient sum of money to be raised from the crops which had been made that year, as also from debts due the estate of said John Pray, the testator, on bonds, notes and other securities, which could soon thereafter be realized, to satisfy all the unpaid legacies of the said testator, commenced a delivery of some portions thereof to those claiming and entitled under the will. That, in the meantime, after they had commenced a division of the estate of said testator, and before its completion, to wit, on the tenth day of January, in the year 1820, the accident occurred, which had been guarded against by the sixty-first item of the will of said testator, as set forth in the complainant's bill; and the buildings on lots No. 6 and 7 were destroyed by fire; that, at the time when this event occurred, the debts of said testator, which were small, may have been, and as this defendant believes, were all paid and discharged, but the legacies remained partially unpaid and unsatisfied, although, as this defendant believes, at the time, and as previously stated in this answer, there was a

sufficiency of funds to be realized from the means already pointed out, to discharge and pay the remaining unsatisfied legacies, and which the executors, when they commenced the division of the estate, as aforesaid, intended to apply to the payment of said unpaid legacies ; that previously also to the said conflagration, by which the said buildings on lots No. 6 and 7 were destroyed, the first bond of the said John J. Maxwell had been collected, and applied to the payment of the debts and legacies. That the funds which were to be realized from the crops, bonds and notes, as aforesaid, by the executors, and which had been deemed adequate to the payment of the unpaid legacies, were insufficient for that purpose, and the payment of the said $10,000 bequeathed to the said Ann Pray in the said sixty-first item of said will, in the event of the destruction of the buildings on the said lots six and seven, which actually occurred : that the two remaining of the three bonds of the said John J. Maxwell, which were directed by the fifty-first item of the said will to be appropriated in aid of the payment of the said debts and legacies, were then resorted to by the executors, from which, in *674] addition to the available *effects already specified, a fund was realized equal to the payment of the legacies, and the sum of $10,000, which was appropriated to the use of said Ann Pray, as directed in sixty-first item of said will ; that the said appropriation of the two remaining bonds of the said John J. Maxwell, was made after the division of the estate had commenced, as already shown, but before its completion.

"That if the estate of the said testator had been kept together, after the conflagration aforesaid, a sufficient time, funds may have been realized sufficient to pay all debts and legacies, and to meet the aid authorized and directed for the said Ann Pray ; but this defendant declares, that it would have required the estate to have been kept together four or five years for this purpose, without resorting to the said bonds ; in the mean time, the said bonds would have become due, and been realized ; the one being due on the — day of January 1821, and the other on the — day of January 1822. That in and by the fifty-first item of the said will, the said bonds are expressly directed to be appropriated in aid of the payment of the debts and legacies, and only to be distributed among the legatees therein named, in the event of the debts and legacies being paid out of the funds, made subject by the will to that purpose, before the said bonds should become due or could be collected. That if the said estate of the said testator had been kept together, until the necessary funds for the relief of the said Ann Pray, and the payment of the legacies had been raised from the annual proceeds, the benefit arising to the said Jane Heath and her children, by receiving their proportion of the real estate of said testator devised to them, must have been delayed four or five years ; whilst, by the early division of said estate, they were greatly benefited, having realized, at that time, from this means, $3500. And this defendant admits, that the complainants have applied to the executors of said testator, on the subject of the proportion of Jane Heath in said bonds, and to which they supposed her entitled. That the division of the estate having been commenced, and a portion of the property delivered to the devisees and legatees, and a fund sufficient to pay the legacies, and which was to come into the hands of the executors, having been reserved for that purpose, they consider themselves bound in justice to the legatees and devisees, who had not received their proportion of the estate, to proceed in

the completion of the division of the estate; and therefore, conceived the estate, so far as regarded their power to continue it together until the $10,000 could be raised to relieve the said Ann Pray, from the annual proceeds, as having been in effect divided." *No answer to the bill of the appellees was filed by Mr. Pray. [*675

The case was heard on the bills and answers, and the circuit court determined, that the executors had misapplied the proceeds of the bonds of J. J. Maxwell, on which the legacies claimed were charged; and that Mrs. Pray would have to refund to the value of the residue bequeathed to her, and ratably also, according to the interest and income of the property specifically bequeathed to her. An order of reference was made, and thereupon, the master was ordered to make certain statements of the condition of the estate, and of other facts necessary to a final decree. These reports having been afterwards made by the master, the circuit court, on the 9th of May 1826, made the following decree:

"This cause came on to be heard, on the master's report, pursuant to a reference at the last term, on the following points: 1st. A statement of the debts due by the testator. 2d. A statement of the pecuniary and other legacies, and how and when paid. 3d. Of the funds applicable to the debts and legacies. 4th. Of the receipts and expenditures of the executrix and executors. 5th. Of the value of the residue bequeathed to Mrs. Pray. 6th. Of the value or amount of the income which the estate would have produced, had it been kept together specifically. Of the several amounts claimed by these complainants, in behalf of those whom they represent as legatees, and his own views of the correctness of those claims, with reference to the principles on which they are calculated. And he, the said master, having duly made and submitted his report upon all the matters so referred to him, and it appearing from said report, that the proportion of the funds of the said testator, to which, under his will, the complainants are entitled, amounts to the sum of $12,111, as by reference to said report of file in the registry of this court will more fully apppear. It is ordered, adjudged and decreed, that George M. Waters and John J. Maxwell, executors, and Ann Pray, executrix, do pay to the said complainants, the sum of $12,111. And it is further ordered, decreed and adjudged, that the said sum, when collected by force and virtue of this decree, be paid into the hands of the clerk of this court, and on the receipt of the said sum, he is hereby ordered and directed, so soon as the same can be effected, to invest the said sum in purchase of United States stock, or bank-stock of the United States' Bank, as may appear most advantageous to the complainants; and it is further ordered, adjudged and decreed, that the defendants do pay the *costs of this suit, and interest on the principal sum decreed, to be computed from the service of this decree. [*676

WILLIAM JOHNSON."

By agreement of counsel, a part of the master's record was afterwards corrected, and the number of persons among whom the amount of John J. Maxwell's bonds were to be distributed, being accurately stated, the sum to which the complainants below were entitled, according to the principles of the decree of the circuit court, was found to be $9909, instead of $12,111, as stated in the report.

The case was argued by *Berrien*, for the appellants; and by *Key*, for the appellees.

The following points were made by the appellants: 1. There is no sufficient evidence on which to found a decree for any specific sum. 2. The necessary parties were not before the circuit court. 3. The proceeds of the three bonds of John J. Maxwell were well applied to the payment of debts and legacies, and among others, to the payment of the contingent legacy to Ann Pray. 4. The decision of the executors, is the will of the testator, by the express provision of the will; and cannot be questioned by the legatees.

MARSHALL, Ch. J., delivered the opinion of the court.—This suit was brought in the circuit court for the district of Georgia, by George G. Belt, the trustee for Jane Heath and her children, who are infants, and by James P. Heath, husband of the said Jane, and father of her children, against the executors of John Pray, deceased, and Ann Pray, his widow, to recover a legacy bequeathed to them and others, by the said John Pray. The executors resist the demand, on the principle that the bonds for which the suit is instituted, were required to pay the debts and legacies due from the testator and to raise the $10,000 to replace the buildings on lots 6 and 7, which were consumed by fire. They also contend, that their testator has submitted the construction of his will, absolutely, to their judgment, and that their decision against the claim of the legatees, is final. The circuit court established the claim of the plaintiffs, and decreed to them the proportion of the three bonds, which was estimated to be their part. From this decree, the executors have appealed to this court.

In argument, several formal objections have been taken to the decree, which will be considered. The question on the *merits, depends on *677] the construction of the will. The will is very inartificially drawn. It is, in some parts, rendered more confused than it would otherwise be, by a recurrence in different places to the same subject. In item 51, he says, in the first instance, that the three bonds which are the subject of controversy "shall be applied in aid of the payment of his just debts, if any due, and in the payment of the legacies by him left." He adds, "it is my request, that my executors do also apply all funds which I may possess at my decease, as also dividends on all my bank-stock (except that part of dividends which I have directed to go immediately to some of my legatees), and also to apply all moneys due to me, as soon as collected, and also all rents and crops of rice and cotton, first to pay any debts, and then legacies," &c.

The language of this part of the will, in relation to these bonds, shows an intention to apply them to debts and legacies, if necessary; but indicates, we think, the expectation that it would not be necessary. They are to be applied in aid of the payment of his just debts, and in the payment of legacies. They are then to aid another fund. That fund is afterwards described in terms which show it to be a large one. There is some reason to suppose, from this part of the will, that these three bonds were not comprehended in it, because the testator introduces the enunciation of its items by saying, "it is my request, that my executors do also apply all funds, &c." Again, he assigns as a reason for withholding interest from his legatees,

"that in all probability the resources and funds of his estate will be equal to the payment of his debts and legacies, before the three bonds mentioned of John J. Maxwell, may fall due and be collected." This shows, unequivocally, the belief of the testator, that these bonds would not be required for the debts and legacies. He then adds, "in case all debts and legacies can be paid, before the three aforesaid bonds can be collected, then, and in that case, whatever balance may remain to be collected, shall be equally divided between the following persons," &c. This bequest does not depend on the fact, that the debts and legacies should be actually paid, before these three bonds were collected, but on the sufficiency of the fund for the object. Should the fund be sufficient, its application must be made; and whether made in fact or not, the right to the bonds vests in the legatees.

The testator then proceeds to say, "it is my will, and I direct that all my estate, both real and personal, shall be kept and continued together, until all my just debts and legacies are paid." This whole item 51, shows the opinion, that the profits of his *estate, including dividends on his stock, added to the debts actually due at the time, were sufficient for [*678 the payment of debts and legacies. Yet his estate is to be kept together till they shall be paid. The profits are, of course, to be applied to that object. If this fund amounted, before the 10th day of January 1820, when the first bond from J. J. Maxwell fell due, to a sufficient sum for the payment of debts and legacies, the right of the legatees to the three bonds then vested; if it was not sufficient on that day, it may be doubted, whether such part of the first bond as was necessary for this primary object might be brought to its aid immediately. We suppose it might. A codicil to the will is dated the 18th day of June 1819, and the will and codicil were proved on the 27th of the succeeding month. The executors qualified in the month of December; having ascertained, they say in their answer, the adequacy of the fund provided for debts and legacies, they commenced the division of the estate.

So far as the will has been considered, it is obvious, that the right of the legatees, to whom the two parts of the first three bonds due from Maxwell were bequeathed, was vested. Their right to the first bond may be more questionable. If part of the fund, which was applicable in the first instance to debts and legacies, could not be made available immediately, and the first bond or any part of it was substituted for debts which could not be collected, it cannot be doubted, that those debts, when collected, ought to replace the bond so substituted. The testimony in the cause does not show, with sufficient certainty, how this fact stands. It is remarkable, that this first bond was applied by the executors, before the 10th of January 1820, when it became due. They state this fact in their answer. But we are decidedly of opinion, that this precipitate appropriation of the bond, could not affect the rights of the parties. They must remain, as they would have stood, had the bond remained uncollected, till it became payable.

The contest in this suit would either not have arisen, or would have been confined to the first bond, had things remained as they stood before the 10th day of January 1820. But on that day, the buildings on lot Nos. 6 and 7 were consumed by fire. In that event, the testator had directed that his executors should, for the purpose of replacing the buildings, hold all his estate together until they can add $10,000 to what may be received on

insurance. He adds, "in case of such an accident, if necessary, not to delay rebuilding, my executors will resort to a loan from the bank or banks." "Whereas, there is no doubt, but there must be a considerable surplus fund of my estate, by debts due or crops on hand, or near *made, after my executors have paid all my debts and legacies, which my wife will come in for; if my executors discover that, by such surplus, that the same will not be equal to $10,000, in that case, it is my will, that they continue all my estate together, until they can make up $10,000."

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Instead of conforming to this direction of the will; instead of keeping the estate together; the executors have applied the remaining two bonds, payable the 10th of January 1821, and the 10th of January 1822, to this object. They say, that having commenced the delivery of the estate, before this event took place, they thought themselves bound to complete it; and considered themselves in the same situation as if it had been completed before the buildings were consumed. Suppose, this opinion to be correct, ought they not also to have considered the bonds as delivered? This also was a specific legacy; and after being vested, stands, we conceive, on equal ground with other specific legacies. These bonds do not constitute the fund on which the testator charges these $10,000, in the unlooked-for event that the surplus of his estate should not be sufficient to raise it. He does not charge this sum on the principal, but on the profits of his estate; and the whole is to be kept together in order to raise it. It is obvious, from the whole will, that these bonds do not constitute a part of that surplus, comprehending debts; and in this particular part of it, when he speaks of debts, it is of debts due. No one of these bonds was due at the date of the will, or of the death of the testator. It is, then, we think, apparent, that the application of these bonds towards raising the sum of $10,000, was a misapplication of assets. If the estate had really been delivered when the event occurred, the executors ought to have retained their rights upon it, to satisfy this contingent claim, and we presume, that the property would have been liable to it, in the hands of devisees and legatees.

But the plaintiffs in error contend, that should they have misconstrued the will of their testator, still their misconstruction binds the legatees, because the testator says: "Whereas, my will is lengthy, and it is possible, I might have committed some error or errors. I therefore authorize and empower, as fully as I could do myself, if living, a majority of my acting executors, my wife to have a voice as executrix, to decide in all cases, in case of any dispute or contention: whatever they determine is my intention shall be final and conclusive, without any resort to a court of justice." Clauses of this description have always received such judicial *construction, as would comport with the reasonable intention of the testator. Even when the forfeiture of the legacy has been declared to be the penalty of not conforming to the injunction of the will, courts have considered it, if the legacy be not given over, rather as an effort to effect a desired object by intimidation, than as concluding the rights of the parties. If any unreasonable use be made of the power, one not foreseen, and which could not be intended, by the testator, it has been considered as a case in which the general power of courts of justice to decide on the rights of parties ought to be exercised. This principle must be kept in view, in construing the clause now under consideration.

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The acting executors and executrix are empowered, in all cases of dispute or contention, to determine what is the intention of the testator; and their decision is declared to be final. This power is given, in the apprehension that he may have committed error. It is to be exercised, in order to ascertain his intent in such cases. It certainly does not include the power of altering the will. It cannot be contended, that this clause would protect the executors in refusing to pay legacies altogether, or in paying to A. a legacy bequeathed to B., or in any other plain deviation from the will. In such case, what would be the remedy of the injured party? Is he concluded by the decision of the executors, or may he resort to a court of justice? But one answer can be given to these questions. So gross a departure from the manifest intent of the testator, cannot be the result of an honest endeavor to find that intent; and must be considered as a fraudulent exercise of a power, given for the purpose of preserving peace, and preventing expensive and frivolous litigation. But who is to determine what is a gross misconstruction of the will, if the party who conceives himself injured may not submit his case to a court of justice? And if his case may be brought before a court, must not that court construe the will rightly?

This is not the only objection which the plaintiffs in error must encounter, in supporting their construction of this clause. The executors have not, we think, this power, unaided by the executrix. It is given to a majority of the acting executors, "his wife to have a voice as executrix." Her participating in the decision, is indispensable to its validity. If this power was given to her solely, in her character as executrix, it is seriously doubted, whether it can be exercised, till she assumes that character. Even had she united with the executors, this would certainly *be a case which might [*681 well be considered as an exception from the general operation of the power. The bonds to which it was applied, are the bonds of one of the executors, and it was exercised, by bestowing them on the executrix, instead of the persons to whom they were bequeathed by the testator. In doing this, the executors have plainly misconstrued the will. The testator had not charged the $10,000, which were to be raised in order to rebuild the houses that were destroyed by fire, on these bonds, but on a different fund. It is, therefore, the very case put, of paying to the executors the legacy bequeathed to other persons. It may also be observed, that neither of the executors, nor Mrs. Pray, say in their answer, that this diversion of these bonds to a different purpose from that directed by the testator, was made from a belief that it was his intention, in the event which had occurred. They refer to the clause, and rely upon it, as if it had empowered them to do whatever they thought best, in the progress of their administration; instead of doing what, in their best judgment, they believed to be his intention.

But however correctly the will of the testator may have been construed in the circuit court, and we think it was construed correctly, at least, so far as respects the last two bonds mentioned in item 51 of the will of John Pray, deceased; other objections have been taken to the proceedings in the circuit court, which seem to be well founded.

The legacy for which this suit is instituted, is given jointly to several persons in different families. The legatees take equally, and the numbers in neither family are ascertained by the will. Under such circumstances, we think all the claimants ought to be brought before the court. The rights of

each individual depend upon the number who are entitled, and this number is a fact, which must be inquired into, before the amount to which any one is entitled can be fixed. If this fact were to be examined, in every case, it would subject the executors to be harassed by a multiplicity of suits, and if it were to be fixed by the first decree, that decree would not bind persons who were not parties. The case cannot be distinguished from the rule which is applied to residuary legatees. The bill filed in this case, does not even state the number of persons belonging to the different families, nor to that family in whose behalf the suit is brought; nor does it assign any reason for not making the proper parties. It does not allege, that the other legatees refuse to join, as plaintiffs, or that they cannot be made defendants. For this cause, the decree must be reversed, and the case remanded to the circuit court, that the plaintiffs may amend their bill.

*682] *The objections to the report, are not entirely unfounded, and it is not quite satisfactory. It does not, we think, show with sufficient clearness, whether the plaintiffs in that court were entitled to the first bond. But as the case must go back, to amend the bill, a new report will, of course, be made; and if that shows, that the funds of the estate were sufficient to pay the debts and legacies, without applying this bond to that purpose, the plaintiffs below will be entitled to that also.

This cause came on, &c.: On consideration whereof, it is decreed and ordered by this court, that the decree of the circuit court in this cause be and the same is hereby reversed and annulled; and it is further ordered, that the cause be remanded to the said circuit court, for further proceedings to be had therein, and that the plaintiffs may amend their bill.

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*683] *William B. Alexander, Francis Swann and Thomas Swann, Plaintiffs in error, *v.* Elisha Brown, Defendant in error.

Execution.—Forthcoming bond.

Under the law of Virginia, which directs the sheriff holding an execution against the goods and effects of defendants, to take forthcoming bonds for the property levied upon by the execution, and authorizes execution to issue for the amount of the debt due upon the original execution, after ten days' notice to the obligors in the bond, of the motion for execution, the property levied on not having been re-delivered according to the condition of the bond; if the notice given to the obligors, of the plaintiff's intention to proceed is sufficiently explicit to render mistake impossible, it will be sustained, although the whole of the defendants in the original execution, may not be named in the notice. Nice and technical objections to the notice, where every purpose of substantial justice is effected, ought not to be favored. p. 684.

Error to the Circuit Court for the District of Columbia.

This case was argued by *Swann*, for the plaintiffs; and *Jones*, for the defendant. The material facts of the case appear in the opinion of the court.

Marshall, Ch. J., delivered the opinion of the court.—This was a motion to the circuit court for the district of Columbia, sitting in Alexandria, for an award of execution upon a forthcoming bond, taken in pursuance of the execution law of Virginia. That law directs, that if the owner of any goods or chattels, which shall be taken by virtue of a writ of *fieri*

facias, shall tender sufficient security to have the same goods and chattels forthcoming, at the day of sale; it shall be lawful for the sheriff or other officer, to take bond from such debtor and sureties, payable to the creditor, reciting the service of such execution, and the amount of the money or tobacco due thereon, and with condition to have the money or tobacco forthcoming, at the day of sale appointed by such sheriff or other officer; and shall thereupon suffer the said goods and chattels to remain in the possession, and at the risk of the debtor, until that time. And if the owner of such goods and chattels shall fail to deliver up the same, according to the condition of the bond, or pay the money or tobacco mentioned in the execution, such sheriff or other officer, shall return the bond to the office of the clerk of the court, from whence the execution issued, to be there safely kept, and to have the force *of a judgment; and thereupon, it shall be lawful for the court, where such bond shall be lodged, upon the motion of the person to [*684 whom the same is payable, his executors or admistrators, to award execution for the money and tobacco therein mentioned, with interest thereon from the date of the bond, till payment, and costs; provided the obligors, their executors or administrators, or such of them against whom execution is awarded, have ten days' previous notice of such motion.

In this case, the condition of the bond recited a *fieri facias* against William B. Alexander and Richard B. Alexander, but was levied on the property of William B. Alexander only. The bond was executed by William B. Alexander, and his sureties. The notice of the motion to award execution on this bond, was addressed to the obligors, and imported that the motion was to award execution on their forthcoming bond, bearing date, &c., and taken by virtue of a writ of *fieri facias* issued, &c., "in my name, against William B. Alexander, &c." On the motion, the forthcoming bond, and the execution on which it was taken, were shown to the court; and the proceedings were regular in all respects, except that the notice stated the bond to be taken by virtue of a writ of *fieri facias*, issued against William B. Alexander, whereas, it was in fact issued against William B. Alexander and Richard B. Alexander. It was admitted, that this was the execution on which the forthcoming bond was taken, and the only execution in which the said William B. Alexander was a party. The counsel for the defendants took exceptions to the notice, but the court gave judgment on the motion; which judgment is brought before this court by a writ of error.

The act of assembly prescribes, that the forthcoming bond shall recite the material parts of the execution on which it is taken, but gives no other direction respecting the notice, than that it shall be served ten days before the motion. Its sole purpose is to inform the party, that the motion is to be made, thereby enabling him to show that the money has been paid; or, that for any other reasons, execution ought not to be awarded. If it gives him the information, which enables him to do this, it effects all the substantial purposes of justice. A false recital of the execution would be fatal, because it might mislead the obligor; but in this case, the execution was against William B. Alexander, though not against him alone. He could not mistake the case in which the motion was to be made, because, it is admitted, that this was the execution on which the bond was taken, and the only execution in which the said William B. Alexander was a party.

After judgment has been rendered, an execution issued thereon and

levied, the property restored to the debtor, on this bond *to produce it on the day of sale, and his failure to do so, we do not think, that nice and technical objections to the notice, where every purpose of substantial justice is effected, ought to be favored. The law only requires notice, and where the notice is sufficiently explicit, to render mistake impossible, we think it justifies the award of execution. The judgment is affirmed, with costs and damages, at the rate of six per centum per annum.

Judgment affirmed.

*686] *Richard Biddle, Administrator of John Wilkins, *v.* James C. Wilkins.

Action on judgment by administrator.—Pleading.—Profert.

The plaintiff, as administrator of W., had brought a suit in the district court of the United States for the western district of Pennsylvania, and recovered a judgment; he instituted a suit in the district court of the United States of the state of Mississippi, against the defendant in the original suit; the defendant pleaded, that, by the orphans' court of Adams county, in the state of Mississippi, where the defendant resided, he had been appointed the administrator of W., and had continued to act in that capacity; *Held*, that the debt due upon the judgment obtained in Pennsylvania, by the plaintiff, as administrator of W., was due to him in his personal capacity, and it was immaterial, whether the defendant was or was not administrator of W., in the state of Mississippi; that would not, in any manner, affect the right of the plaintiff; the plea tenders an immaterial issue, and is bad on demurrer. p. 691.

Where the court in which judgment is rendered, has not jurisdiction over the subject-matter of the suit, or where the judgment, upon which suit is brought is absolutely void, this may be pleaded in bar; or may, in some cases, be given in evidence, under the general issue, in an action brought upon the judgment.[1] p. 691.

The general rule is, that there can be no averment in pleading against the validity of a record, though there may be against its operation; and it is upon this ground, that no matter of defence can be pleaded in such case, to a suit on a judgment, which existed anterior to the judgment. p. 692.

It has become a settled practice, in declaring in an action upon a judgment, not, as formerly, to set out in the declaration the whole of the proceedings in the original suit, but only to allege generally, that the plaintiff by the consideration and judgment of that court, recovered the sum mentioned therein, the original cause of action having passed *in rem judicatam*. p. 692.

In an action upon a judgment recovered in favor of an administrator, the plaintiff is not bound to make a *profert* of the letters of admininistration; that it is not necessary, in actions upon such judgments, that the plaintiff name himself as administrator, follows, from his not being bound to make *profert* of the letters of administration, and when he does so name himself, it may be rejected as surplusage. p. 692.

After judgment recovered in a suit by an administrator, the debt is due to the plaintiff in his personal capacity, and he may declare that the debt is due to himself. p. 693.

Error to the District Court of the United States for the Mississippi district. This was an action of debt, brought in the court below, upon a judgment obtained by the plaintiff, as administrator, against the defendant in

[1] In an action upon the judgment of a court of another state, the defendant may show by plea, that the court had no jurisdiction either of the person or subject-matter. Shumway *v.* Silliman, 4 Cow. 292; s. c. 6 Wend. 447; Starbuck *v.* Murray, 5 Id. 148; Thompson *v.* Whitman, 18 Wall. 457. Though the record show a return of personal service upon the defendant, it may be disproved, in an action on the judgment, to show want of jurisdiction. Knowles *v.* Logansport Gas-light and Coke Co., 19 Wall. 58.

the district court of the United States for *the western district of Pennsylvania.

The declaration was in the common form, averring the recovery by plaintiff, as administrator, &c. The defendant pleaded three pleas in bar. 1. *Ne unques administrator.* 2. That in January 1817, in the orphans' court of the county of Adams, in the state of Mississippi, the defendant was duly appointed sole administrator, and has continued to act in that capacity. 3. That the judgment was obtained *per fraudem.* The plaintiffs replied to the third plea, on which issue was joined; and demurred specially to the first and second, assigning as causes of demurrer, (1.) The said pleas set up matter which, if true, existed anterior to the judgment on which the suit was brought; and might have been urged, if effectual at all, against the original recovery. (2.) The said matters should have been pleaded in abatement, and not in bar. (3.) They contain averments against the record. (4.) That the matters therein contained are immaterial, and could not be set up after judgment, to avoid its effects, in the state from which the record came. (5.) They are in other respects uncertain, informal, and insufficient. Joinder in demurrer. The judgment of the district court was in favor of the defendant, sustaining both pleas as sufficient.

Coxe, for the plaintiff in error, contended:—1. The first plea is clearly defective. The plaintiff, in his representative character, had sued in the state of Pennsylvania, and recovered a judgment. In this subsequent action, brought upon that judgment, the demand is a personal one. He need not name himself administrator, but may sue and recover in his own name. 2 Ld. Raym. 1215; 1 Doug. 4; 2 T. R. 126; 2 Phil. on Ev. 290. He need not make *profert* of the letters of administration, and in this case, no such *profert* is in fact made. Even in action for an escape out of execution, on a judgment obtained as administrator, he need not style himself administrator, nor make *profert.* Hob. 38. In such cases, if he do sue in the second action, in his representative character, and so designate himself, it will be held mere surplusage, and can in no degree vary the relative rights of the parties. 1 Vern. 119; 16 Mass. 71; Ibid. 533. It would be a bad plea, that plaintiff had not been appointed administrator in the state where the second action is brought, (16 Mass. 533), for in such case, his right to sue is derived from the judgment which he has obtained, and is wholly independent of the letters of administration. 9 Cranch 151.

The judgment obtained in the district court of Pennsylvania, is conclusive evidence of the representative character of *the plaintiff, as well as of the amount of the debt. At common law, in an action of debt [*688 on the judgment, or in *scire facias*, the defendant can plead nothing which existed anterior to the original judgment, or might have been pleaded in bar to the original recovery. 1 Chit. Pl. 250; 8 Johns. 77; 2 Ld. Raym. 853; Cro. Eliz. 283; 6 Com. Dig. 306–7, tit. Plead. 2 D. 1. A judgment obtained in one of the courts of the Union, has the same validity in other federal courts, as a judgment in a state court has at common law, within the same jurisdiction, or as it possesses under the constitution and law of the United States, in a sister state. *Montford* v. *Hunt*, 3 W. C. C. 28; *Bryant* v. *Hunter*, Ibid. 48. The true test by which the validity of the plea is to be settled, is to ascertain whether it would have been held good in an action

brought on the judgment, in the same court where the judgment was had. The cases already cited are decisive of that question.

2. The second plea is open to the same objections which exist against the first, and is otherwise informal and defective. It is argumentative; the mere fact that he was appointed administrator of James C. Wilkins, by the orphans' court in Adams county, furnishes no exemption from suit. It leaves the whole substance of the defence set up, to be made out by inference and argument, to wit, that plaintiff was not such administrator; which however, is only thus inferentially denied. This, if substantially a defence, should have been pleaded to the original action; and therefore, cannot avail the party in the present stage of the proceedings. Even if treated now as a plea to the original demand, it is essentially defective, inasmuch as it does not aver that the defendant had obtained letters of administration, prior to the institution of the suit in Pennsylvania. It would be a monstrous doctrine to introduce, that a party, after a suit has been instituted against him in one jurisdiction, may defeat all the beneficial results of a judgment, by obtaining letters of administration in another state.

3. The first plea, which in terms traverses the fact that plaintiff is administrator, and the second, which argumentatively rests upon the same ground, are both bad, as pleas in bar. In the case of *Childress* v. *Emory et al.*, 8 Wheat. 642, this court recognised the doctrine, that the objection that plaintiffs were not executors, must be taken advantage of by plea in abatement.

Baldwin and *Jones*, for defendant.—It will be admitted, that the first plea is defective, and no effort will be made to sustain the judgment of the district court in reference to that.

The second plea is, however, considered as furnishing a valid *689] *defence, and its character and effects have been wholly misapprehended by the adverse counsel. The demurrer admits, that defendant was the sole administrator of Wilkins, from 1817 till the institution of this suit. Under the testamentary system of Mississippi, where he resided, a debt due to the deceased is assets in the hands of the administrator, and is included in the inventory, as so much money. The plaintiff sued as administrator, and the defendant was, at the time, administrator, within the jurisdiction in which the action was instituted. Every cause of action existing there, was necessarily embraced in the powers of the party, who was alone recognised there as the personal representative of the deceased. He was bound there to account for it, and to distribute it; he was prohibited by law from sending the assets out of the state; he could not legally pay any debt, without the sanction of the court. That which he is prohibited from doing directly, he will not be compelled to do indirectly. If sued by creditors and distributees, upon his official bond, he must be responsible to them for the whole amount of the inventory; and he cannot be discharged, by showing payment to plaintiff. There is no such thing as an auxiliary administration. 9 Mass. 355. Each administrator is independent of the other; each derives his power from a competent authority, and each is independent of the other, within his own sphere. The residence of the deceased may determine the rule of distribution, and the relative rights of those entitled to the estate; but the concession that final distribution is to

be made according to the law of Pennsylvania, though the record is wholly silent as to the place of his residence, leaves the question before the court entirely open.

But the courts in Pennsylvania have no jurisdiction over the defendant. He derives his power from the Mississippi court; to it, and to it alone is he responsible. He cannot be cited to account, or to pay over to creditors or distributees there; all this is to be done in Mississippi. This debt, therefore, which the defendant is answerable for, in his own state, and in the manner prescribed by the local law, cannot be assets in the hands of the Pennsylvania administrator.

The objection of the plaintiff that these matters existed anterior to the first judgment, and should have been pleaded in bar to the first action, is inapplicable. It is admitted, that the record is conclusive, upon all the matters which the judgment professes to decide. But if the Pennsylvania court had no cognisance of the subject-matter, if it belonged exclusively to another tribunal, if the alleged debt or claim was exclusively *within the jurisdiction of the orphans' court of Mississippi, or if defendant [*690 acted in such a capacity, that no court of common-law jurisdiction could decide between the parties upon the subject-matter of controversy, then the question presented is one of jurisdiction, and it is well settled, that a court, when called upon to enforce the judgment of another tribunal, may examine into and decide upon the question of jurisdiction. 4 Cranch 269.

The district court of Pennsylvania has admiralty jurisdiction; if this suit was brought on an admiralty decree, or on a stipulation, or on a bond to the marshal, and it should appear on the record, that the admiralty had no jurisdiction over the original cause of action, set forth in the libel, the objection might be urged anywhere, and at any time. The whole proceedings would be a nullity. 3 Cranch 331. So, if the objection on this ground appeared incidentally, the effect would be the same. In this case, then, the plea discloses a case beyond the proper jurisdiction of the court in Pennsylvania, and this we are permitted to do with effect.

It is said, these matters should have been pleaded in abatement, and not in bar. Pleas in abatement are such as go to the place where suit is brought, to any personal privilege of defendant, or to the form or species of action. If the party fails to plead in abatement, it is a submission to the process, and admits the jurisdiction, so far as that he is rightfully before the court. But if the plaintiff cannot sue anywhere, if his cause of action is not cognisable in the court where he sues, even express consent cannot give jurisdiction. The objection is fatal, and wherever it is shown to exist.

Thompson, Justice, delivered the opinion of the court.—This case comes up from the district court of the United States for the Mississippi district, upon a writ of error. The action, in the court below, was founded upon a judgment obtained in the district court of the United States for the western district of Pennsylvania, in the term of October, in the year 1823, for the sum of $32,957.34. The declaration is in the usual form of an action of debt on a judgment. The defendant pleads in bar—1. That the plaintiff is not, and never was, administrator of John Wilkins, deceased. 2. That at the January term, in the year 1817, of the orphans' court for the county of Adams, and state (then territory) of Mississippi, he, the defendant, was

duly appointed sole administrator of John Wilkins, deceased, and entered into bond with surety, and took the oath prescribed in such case, according to the *statute in such case made and provided; and that he *691] took upon himself the duty and office of administrator, and has continued to act as such administrator ever since. 3. That the judgment in the declaration mentioned, was obtained by fraud. To the first two pleas, a special demurrer was interposed, and issue to the country taken upon the third, and judgment rendered for the defendant, upon the demurrer; to reverse which, the present writ of error has been brought.

The first plea of *ne unques administrator*, has been abandoned, as altogether untenable; and the counsel on the part of the defendant in error, have rested their argument entirely on the validity of the second plea; and have treated this as a plea in bar to the jurisdiction of the court in which the judgment was rendered. It is a little difficult, to discover what is the true character of this plea; it can, in substance, amount to nothing more than an allegation, that the plaintiff was not the lawful administrator of John Wilkins. And in that respect, is but a repetition of the same matter set up in the first plea, and that too, in a more exceptionable form. For the conclusion is drawn argumentatively from the fact set up in the plea, that he, the defendant, was duly appointed sole administrator of John Wilkins in the orphans' court of the county of Adams, in the state of Mississippi; and thence to infer, that the plaintiff could not be the lawful administrator in Pennsylvania. Such a plea will not stand the test of a special demurrer. If it was intended, by this plea, to set up that the defendant was the first, and only rightful administrator of John Wilkins, and that the debt due from him, thereby became assets in his hands, the plea is defective, in not alleging when administration was granted to the plaintiff. The declaration alleges, that John Wilkins died a citizen of Pennsylvania; and from anything that appears to the contrary, administration might have been granted to the plaintiff, before it was to the defendant.

The simple fact that administration had been granted to the defendant in Mississippi, would not raise any question with respect to the jurisdiction of the court; and if it furnished any matter of defence on the merits, against the recovery, on the ground, that it was taking out of his hands assets, the administration of which belonged to him, it should have been set up in the original action. Nothing appears to invalidate the judgment upon which the present action is founded. The cause of action does not appear, and we cannot say, that the subject-matter was not within the jurisdiction of the court, when it was rendered; or that there was any disability in the plaintiff, to sue in that court; or that the judgment was void for any cause whatever. When the court in which the judgment is *rendered has *692] not jurisdiction over the subject-matter of the suit, or when the judgment is absolutely void, this may be pleaded in bar, or may, in some cases, be given in evidence under the general issue. But the general rule is, that there can be no averment in pleading against the validity of a record, though there may be against its operation. And it is upon this ground, that no matter of defence can be pleaded in such a case, which existed anterior to the judgment. 1 Chit. Pl. 481. Hence, it has become a settled practice in declaring, in an action upon a judgment, not (as formerly) to set out in the declaration the whole of the proceedings in the former suit; but

only to allege, generally, that the plaintiff, by the consideration and judgment of that court, recovered the sum mentioned therein. Chit. 354.

The original cause of action having passed *in rem judicatam*, how far the circumstance, that the defendant had taken out letters of administration in Mississippi, would have availed as a defence, against a recovery of the original judgment, cannot now be inquired into. It should have been set up in the former suit. But if the first administrator acquired a right to this debt as assets, and that matter was now open to inquiry, there is nothing appearing on this record, to show that the defendant had acquired any such priority. When letters of administration were taken out by the plaintiff, does not appear; nor was he bound to show that in his declaration. He was not bound to make *profert* of the letters of administration. This was so decided in the case of *Crawford, Administrator of Hargrave*, v. *Whittal*, 1 Doug. 4, note *a*. It was an action of *indebitatus assumpsit*, upon a judgment recovered by the plaintiff, as administrator, against the defendant, in the mayor's court at Calcutta. And the declaration alleged, that the defendant was indebted to the plaintiff, as administrator, in the sum therein mentioned, which had been adjudged to him as administrator, &c. The defendant demurred specially, and showed for cause, that there was no *profert* of letters of administration. But the court said, this was unnecessary, because in this action (upon the judgment), the plaintiff had no occasion to describe himself as administrator. If, then, it was a fact of any importance, in deciding the legal rights of the parties in this case, that administration had been first granted to the defendant in Mississippi, that should have been alleged in the plea, and no objection can be taken to the declaration, as containing the first fault in pleading.

That it is not necessary, in cases like the present, for the plaintiff to name himself as administrator, follows as matter of course, from his not being bound to make *profert* of *letters of administration, and that when he does so name himself, it may be rejected, as surplusage, is well settled by numerous authorities. In the case of *Bonafous* v. *Walker*, 2 T. R. 126, it was objected, that the action ought to have been brought by the plaintiff, as administratrix; because the judgment on which the party had been committed in execution, had been obtained by her as administratrix of her husband. But the court said, that it was unnecessary, for the instant the plaintiff recovered the judgment, it became a debt due her, on record, and was assets in her hands, for which it was not necessary for her to declare as administratrix. (See also Hob. 301; 2 Ld. Raym. 1215.) The case of *Talmage, Administrator, &c.*, v. *Capel and others*, 16 Mass. 71, decided in the supreme judicial court of Massachusetts, is very full and explicit on this point. The plaintiff declared as administrator, &c., in debt upon a judgment recovered by him as administrator, in a court of common pleas, in the state of New York. The defendant pleaded in bar, that the parties, at the time of rendering the judgment, were all inhabitants of the state of New York, and that the plaintiff was appointed administrator in that state, and had not been so appointed in Massachusetts. To which plea, there was a demurrer and joinder, and the court held the plea bad. That the action, being on a judgment already recovered by the plaintiff, it might have been brought by him, in his own name, and not as administrator. For the debt was due to him, he being answerable for it to the estate of the

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intestate, and it ought to be considered as so brought; his style of administrator being merely descriptive, and not essential to his right of recovery. That it was important to the purposes of justice, that it should be so; for an administrator appointed in Massachusetts could not maintain an action upon this judgment, not being privy to it; nor could he maintain an action upon the original contract, for the defendants might plead in bar the judgment recovered against them in New York. The debt sued for is, in truth, due to the plaintiff, in his personal capacity, and he may well declare, that the debt is due to himself.

If in the case before us, the judgment is considered a debt due to the plaintiff in his personal capacity, it is totally immaterial, whether the defendant was, or was not, administrator of John Wilkins, in the state of Mississippi. That could not, in any manner, affect the rights of the plaintiff. The plea, therefore, tenders an immaterial issue, and is bad on demurrer. In whatever light, therefore, we consider this plea, whether as to the matter tself set up, or to the manner in which it is pleaded, it cannot be sustained as a bar to the present action.

We are accordingly of opinion, that the judgment of the court *694] *below must be reversed, and the cause sent back, with directions to allow the defendant to plead *de novo*, if he shall elect so to do.

This cause came on, &c.: On consideration whereof, it is adjudged and ordered by this court, that the judgment of the district court in this cause be and the same is hereby reversed and annulled; and it is further ordered, that the cause be remanded to the said district court, with directions to permit the defendant to plead *de novo*, if he elect so to do.

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9. A stranger to the drawer and indorser of a non-accepted bill of exchange, may intervene, *supra* protest, to pay the same for the honor of an indorser or drawer. *Konig* v. *Bayard*.*250
10. It is no objection to this intervention, that it has been done at the request and under

the guarantee of the drawees of the bill; who had refused to accept or pay the same. The arrangements made by the payer of the dishonored bill, with the drawee, by which he was to be protected from loss, do not affect the liability of the party to the bill for whose honor it has been paid ..... *Id.*

11. If A., at the request of the drawee of a bill of exchange, and under his guarantee, accept and pay the bill, *supra* protest, for the honor of the indorser, the party against whom suit is brought for the amount paid, may avail himself of every defence which he could have had, if the bill had been paid *supra* protest for the honor of the indorser, by the drawee, and suit brought for the same... *Id.*

12. The court confirm the principle established in the case of Coolidge *v.* Payson, 2 Wheat. 75, that a letter, written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill, on the credit of the letter, a virtual acceptance, binding the person who makes the promise. *Schimmelpennich* v. *Bayard*.. *264

13 If the drawees of a bill of exchange, who refuse to honor the bill, and thus deny the authority of the drawer to draw upon them, were bound in good faith to accept or pay the bill, as drawees, they will not be permitted to change the relation in which they stood to the parties on the bill, by a wrongful act; they can acquire no right, as the holders of the bill paid *supra* protest, if they were bound to honor it, in the character of drawees..... *Id.*

14. A bill of exchange was drawn against shipments made to the drawee, but no letter of advice was written by the shipper, to the consignees of the property, and drawees of the bill, ordering the proceeds of the shipment to be applied to the discharge of the bill; but directions were given to charge the bill, generally, to the account of the shipper: *Held*, that the drawees were not bound to accept or pay the bill, in consequence of the proceeds of the shipment being received by them..... *Id.*

15. A merchant has a right, by the usage of trade, to draw on effects placed in the hands of the drawee, by shipment; and the consignee must pay the bills, if the shipment places funds in his hand..... *Id.* *288

See Promissory Notes.

BILLS OF LADING.

1. By the well-settled principles of commercial law, the consignee is the authorized agent of the owner, whoever he may be, to receive the goods; and by his indorsement of the bill of lading to a *bonâ fide* purchaser, for a valuable consideration, without notice of any adverse interest, the latter becomes, as against all the world, the owner of the goods; this is the result of the principle, that bills of lading are transferrible by indorsement, and thus may pass the property. *Conard* v. *Atlantic Insurance Co.* *386

2. Strictly speaking, no person but the consignee can, by any indorsement of the bill of lading, pass the legal title to the goods; but, if the shipper be the owner, and the shipment be on his own account and risk, although he may not pass the title by virtue of a mere indorsement of the bill of lading, unless he be the consignee, or the goods be deliverable to his order; yet, by an assignment on the bill of lading, or by a separate instrument, he can pass the legal title to the same; and it will be good against all persons, except purchasers for a valuable consideration, without notice, by indorsement on the bill of lading itself. Such an assignment by the owner, passes the legal title against his agents or factors, and creditors, in favor of the assignee..... ... *Id.*

BONDS.

See Pleas and Pleading, 8.

BOTTOMRY AND RESPONDENTIA.

See Respondentia.

CHANCERY AND CHANCERY PRACTICE.

1. Where a bill had been filed against a trustee of real estate, and after his death, administration had been granted to A., who, on the petition of creditors interested in the trust, was also appointed by the court, the substituted trustee; and the court went on to decree, that A., as trustee, should execute certain conveyances; the decree was held to be invalid; the course of proceeding being rather to make the decree against A., in the character of administrator, because he claimed, as administrator under a title derived from the original trustee, and was the person designated by law, to represent him; or that a supplemental bill, in the nature of a bill of revivor, should have been filed against the substituted trustee; in which, all the proceedings should have been stated, and he required to answer the charges contained in the original and supplemental bill. *Greenleaf* v. *Queen*..... *318

2. A decree of a court of chancery is erroneous, which, after ordering certain acts to be

done, to enable a party to execute certain duties assigned to him, dismisses the bill, as it puts the cause out of court, and renders the decree ineffectual; and it is no answer to this objection, that it appears by the record in the case, that the acts ordered to be done, have been performed; since the error is in the decree itself, and not in its execution..... *Id.*

3. A bill may be dismissed, where the plaintiff, when called upon to make proper parties, refuses, or is guilty of unreasonable delay in doing so; but this must be done, on demurrer, plea or answer, pointing out the person or persons whom, the defendant insists, ought to be made parties..... *Id.*
4. Where a debtor had conveyed to a trustee, real estate, to be sold for the benefit of creditors, and the trustee dying before the conveyance of the property to a purchaser, another trustee was appointed by the court, upon the application of the creditors, to execute the trust; in a proceeding, relative to the execution of the trust, and the conveyance of the estate, it is necessary, that the heirs-at-law of the first trustee, shall be parties to the same, as the legal title to the estate did not pass to the substituted trustee, by the appointment, but remained in the legal heirs..... *Id.*
5. A court of chancery is not the proper tribunal to enforce a forfeiture; the remedy for the same being at law. *Horsburg* v. *Baker*..... .....*232
6. After an answer and discovery, the rule is, that a suit brought merely for discovery, cannot be revived; the object is obtained, and the plaintiff has no motive for reviving it..... *Id.*
7. A bill had been filed, originally for discovery. and afterward became a bill for relief; the relief prayed for, was a forfeiture, which might be enforced at law: under such circumstances, it was proper to dismiss the bill, so far as it sought for relief against the forfeiture; but the dismissal should have been without prejudice to the legal rights of the parties, as an absolute dismissal might be considered as a decree against the title the plaintiff claimed, and which, by the bill and the evidence obtained under it, he sought to establish..... .....*Id.*
8. If, in a case where the loss of a deed or other instrument, is made the ground for coming into a court of equity, for discovery and relief, an affidavit of its loss must be made and annexed to the bill, and the absence of such affidavit is good cause of demurrer to the bill; yet, if the party charged by the bill fail to demur for such cause, but answer over to the bill, or permit it to be taken for confessed, by default, against him; it seems, that the absence of the affidavit is not a sufficient cause for the reversal of the decree. *Findlay* v. *Hinde*.....*241
9. Where, in a bill filed for discovery and relief, the party relied upon a deed said to have been lost, but which had never been formally executed to convey the real estate; and upon a receipt of the purchase-money, binding the party to convey the estate; the person alleged to have executed the lost deed, and who gave the receipt, should have been made a party to the proceeding; although he had, subsequently, by a legal and formal conveyance, duly executed, conveyed the estate to others; and thus, so far as he could, divested himself of all title in the same..... *Id.*
10. The decree of the circuit court directed two of the defendants, in whom was the legal title to the lot of ground claimed by the plaintiff in the bill, to convey the same; and awarded costs, generally, against all the defendants; all the defendants appealed together, to this court, some of whom held the legal title to the lot, and all the defendants had an interest in defending this title, standing as they did, in the relation of vendors and warrantors, and vendees; although the defendants, against whom there was a decree for costs only, could not appeal from this decree for costs; yet, the reversal of the decree of the circuit court was made general, as to all of the appellants, and the whole case opened..... .....*Id.*
11. Although it seems to be a general rule, that a court of chancery will not decree a specific performance of contracts, except for the purchase of lands, or things which relate to the reality, and are of a permanent nature; and that where contracts are for chattels, and compensation can be made in damages, the parties may be left to their remedy at law; yet, notwithstanding this distinction between personal contracts for goods, and contracts for lands, there are many cases to be found, where specific performance of contracts relating to personalty, have been enforced in chancery; and courts will only weigh with greater nicety, contracts of this description, than such as relate to lands. *Mechanics' Bank of Alexandria* v. *Seton*.*299
12. Although an objection for want of proper parties, may be taken at the hearing, yet the objection ought not to prevail, upon the final hearing of an appeal; except in very strong cases, and where the court perceives a necessary and indispensable party is wanting..... .....*Id.*
13. All persons materially interested in the subject of a suit in chancery, ought to be made parties, either plaintiffs or defendants; but

this is a rule established for the convenient administration of justice, and is more or less within the discretion of the court; and it should be restricted to parties whose interests are in the issue, and to be affected by the decree. The relief granted will always be so modified, as not to affect the interests of others.....*Id.*

14. It is a well-settled rule, that a court is not bound to take notice of any interest acquired in the subject-matter of the suit, pending the dispute.....*Id.*
15. If a bill charges a defendant with notice of a particular fact, an answer must be given without a special interrogatory to the matter; but a defendant is not bound to answer an interrogatory, not warranted by some matter contained in a former part of the bill. *Mechanics' Bank of Alexandria* v. *Lynn* ..*376
16. The rules which govern the practice of the circuit courts in chancery, have been prescribed by this court; and ought to be observed. *McDonald* v. *Smalley*.....*620

CONCEALMENT.

See Insurance, 15, 16.

CONSIGNMENT AND CONSIGNEES.

See Bills of Lading, 1, 2.

CONSTRUCTION OF STATUTES.

1. It is a general rule in the construction of public statutes, that the word "may," is to be construed "must," in all cases where the legislature mean to impose a positive and absolute duty, and not merely to give a discretionary power. But in all cases, the construction should be such as carries into effect the true intent and meaning of the legislature in the enactment. *Minor* v. *Mechanics' Bank of Alexandria*.....*46
2. In the construction of the registry act of Ohio, the term "purchasers" is usually taken in its limited legal sense; it means a complete purchaser, or in other words, a purchaser clothed with a legal title. *Steele's Lessee* v. *Spencer*.....*552
3. Construction of the act of congress, passed March 2d, 1807, entitled "an act to extend the time for locating Virginia military warrants, for returning surveys thereon to the office of the secretary of the department of war, and appropriating lands for the use of schools, in the Virginia military reservation, in lieu of those heretofore appropriated." *Jackson* v. *Clark*.....*628
4. The reservation made by the law of Virginia of 1783, ceding to congress the territory north-west of the river Ohio, is not a reservation of the whole tract of country between the river Scioto and Little Miami; it is a reservation of only so much of it, as may be necessary to make up the deficiency of good lands, in the country set apart for the officers and soldiers of the Virginia line, on the continental establishment, on the south-east side of the Ohio; the residue of the lands are ceded to the United States, as a common fund for those states, who were, or might become members of the Union, to be disposed of for that purpose.....*Id.*
5. Although the military rights constituted the primary claim upon the trust, that claim was, according to the intention of the parties, so to be satisfied, as still to keep in view the interests of the Union, which were also a vital object of the trust; this was only to be effected, by prescribing the time in which the lands to be appropriated by these claimants, should be separated from the general mass, so as to enable the government to apply the residue to the general purposes of the trust..*Id.*
6. If the right existed in congress to prescribe a time within which military warrants should be located, the right to annex conditions to its extension, follows as a necessary consequence.....*Id.*
7. If it be conceded, that the proviso in the act of 2d March 1807, was not intended for the protection of surveys which were in themselves absolutely void; it must be admitted, that it was intended to protect those which were defective, and which might be avoided for irregularity; if this effect be denied to the proviso, it becomes itself a nullity...*Id.*
8. Lands surveyed are, under the law, as completely withdrawn from the common mass, as lands patented. It cannot be said, that the prohibition, that "no location shall be made on tracts of land for which patents had previously been issued, or which had been previously surveyed," was intended only for valid and regular surveys; they did not require legislative aid; the clause was introduced for the protection of defective entries and surveys, which might be defeated by entries made in quiet times.....*Id.*

See District of Columbia: Jurisdiction, 1: Lands and Land Titles: Mechanics' Bank of Alexandria.

CONTRACTS.

1. In contracts for the sale of land, by which one agrees to purchase, and the other to convey, the undertakings of the respective parties are always dependent, unless a contrary inti-

mation clearly appears. *Bank of Columbia* v. *Hagner* *455
2. Although many nice distinctions are to be found in the books, upon the question whether the covenants or promises of the respective parties to the contract, are to be considered independent or dependent; yet it is evident, the intimation of courts have strongly favored the latter construction, as being obviously the most just..... *Id.*
3. In such cases, if either vendor or vendee wish to compel the other to fulfil his contract, he must make his part of the agreement precedent, and cannot proceed against the other, without actual performance of the agreement on his part, or a tender and refusal ..... *Id.*
4. An averment of performance is always made in the declaration, upon contracts containing dependent undertakings, and that averment must be supported by proof..... *Id.*
5. The time fixed for the performance of a contract is, at law, deemed the essence of the contract, and if the seller be not ready and able to perform his part of the agreement on that day, the purchaser may elect to consider the contract at an end; but equity, which, from its peculiar jurisdiction, is enabled to examine into the cause of delay in completing a purchase, and to ascertain how far the day named was deemed material by the parties, will, in certain cases, carry the agreement into execution, although the time appointed has elapsed..... *Id.*
6. It may be laid down as a rule, that, at law, to entitle the vendor to recover the purchase-money, he must aver in his declaration, performance of the contract on his part, or an offer to perform, at the day specified for the performance; and this averment must be sustained by proof; unless the tender has been waived by the purchaser..... *Id.*
7. If, before the period fixed for the delivery of a deed for lands, the vendee has declared he would not receive it, and that he intended to abandon the contract, it may render a tender of the deed, before the institution of a suit, unnecessary; but this rule can never apply, except in cases where the act which is construed into a waiver, occur previous to the time for performance ..... *Id.*
8. The taking possession of property by the vendee, before conveyance, is a circumstance from which may be inferred, that he considered the contract closed, but will not deprive him of the right to relinquish the property, if the vendor cannot make a title, or neglected to do so; after a relinquishment for such causes, the vendee can sustain an action to recover back the purchase-money, if it has been paid..... *Id.*
9. Where the legal title cannot be conveyed to the vendee by the vendor, and the vendee must resort to a court of equity to establish his title, notwithstanding a conveyance of all the right of the vendor to him, the court will not compel him to pay the purchase-money; it would be compelling him to take a lawsuit, instead of the land..... *Id.*
10. When no specific time for the payment of money is fixed in a contract, by which the same is to be paid by one party to the other, in judgment of law, the same is payable on demand..... *Id.*
11. In an action upon a written contract, said to have been lost or destroyed, and not for deceit and imposition, the plaintiff's right to recover is measured principally by the contract; and the secondary evidence must prove it as laid in the declaration. The conversation which preceded the agreement, forms no part of it, nor are the propostions or representation which were made at the time, but not introduced into the written contract, to be taken into view, in construing the instrument itself. Had the written paper stated to be lost or mislaid, been produced, neither party could have been permitted to show the party's inducements to make it, or to substitute his understanding for the agreement itself; if he was drawn into it by misrepresentation, that circumstance might furnish him with a different action, but cannot affect this. *Tayloe* v. *Riggs* *591
12. When a written contract is to be proved, not by itself, but by parol testimony, no vague uncertain recollection concerning its stipulations, ought to supply the place of the written instrument itself; the substance of the agreement ought to be proved satisfactorily; and if that cannot be done, the party is in the condition of every other suitor in court, who makes a claim which he cannot support..... *Id.*
13. Where parties reduce their contracts to writing, the obligations and rights of each are described by the instrument itself; the safety which is expected from them would be much impaired, if they could be established upon unknown and vague impressions, made by a conversation antecedent to the reduction of the agreement..... *Id.*

See CHANCERY AND CHANCERY PRACTICE.

CORPORATION.

1. A subsequent board of directors of a bank, is to be considered as knowing all the circumstances communicated, or known, to a previous board. *Mechanics' Bank of Alexandria* v. *Seton* *299

COURTS.

1. It is, doubtless, within the province of a court, in the exercise of its discretion, to sum up the facts in the case to the jury; and submit them, with the inferences of law deducible therefrom, to the free judgment of the jury; but care must be taken, in all such cases, to separate the law from the facts, and to leave the latter in unequivocal terms to the jury, as their true and peculiar province. *McLanahan* v. *Universal Insurance Co*.....*170
2. Little stress ought to be laid upon general expressions falling from judges, in the course of trials; where the facts are not disputed, the judge often suggests, in a strong and pointed manner, his opinion as to their materiality and importance, and his leading opinion of the conclusion to which the facts ought to conduct the jury; this ought not to be deemed an intentional withdrawal of the facts, or the inferences deducible therefrom, from the cognisance of the jury, but rather as an expression of opinion, addressed to the discretion of counsel, whether it would be worth while to proceed further in the cause; and the like expression, in summing up any cause to the jury, must be understood by them merely as a strong exposition of the facts, not designed to overrule their verdict, but to assist them in forming it. And there is the less objection to this course, in the English practice; because, if the summing up has had an undue influence, the mistake is put right by a new trial, upon an application to the discretion of the whole court; this is so familiarly known, that it needs only to be stated, to be at once admitted.....*Id.*
3. Where the defendant had reserved a right to move the court to exclude any part of the plaintiff's evidence, which he might choose to designate as incompetent, and it did not appear from the bill of exceptions, that he designated any particular piece or part of the evidence as objectionable, and moved the court to exclude the whole, or to instruct the jury, that it was insufficient to prove title in the lessors of the plaintiff; this could not be done, on the ground of incompetency, unless the whole was incompetent. The court is not bound to do more than respond to the motion, in the terms in which it is made; courts of justice are not obliged to modify the propositions submitted by counsel, so as to make them fit the case; if they do not fit, that is enough to authorize their rejection. *Elliott* v. *Peirsol*.....*328
4. The construction of words belongs to the court, and the materiality of an alteration in a deed is a question of construction. *Steele's Lessee* v. *Spencer*.....*552
5. Whether erasures and alterations in a deed are material or not, is a question of law to be decided by the court.....*Id.*
6. A special verdict was found by the jury, upon which judgment was to be entered, according as the opinion of the court might be upon the construction of a certain deed, which deed was referred to, and made part of the special finding of the jury, but was not contained in the record thereof; a deed formed a part of a bill of exceptions taken to the opinion of the court, upon a motion for a new trial; which bill of exceptions, with the said deed, was contained in the record: the court cannot judicially know that this is the same deed which is referred to in the verdict of the jury, or what are the other evidences of title connected with it. *McArthur* v. *Porter*.*626

COURTS OF THE SEVERAL STATES.

1. If the court of a state had jurisdiction of a matter, its decision would be conclusive; but this court cannot yield assent to the proposition, that the jurisdiction of a state court cannot be questioned, where its proceedings were brought, collaterally, before the circuit court of the United States. *Elliott* v. *Peirsol*.....*328
2. Where a court has jurisdiction, it has a right to decide any question which occurs in the cause; and whether its decision be correct, or otherwise, its judgments, until reversed, are regarded as binding in every other court. But if it act without authority, its judgments and orders are regarded as nullities; they are not voidable, but simply void; and form no bar to a remedy sought in opposition to them, even prior to a reversal; they constitute no justification: and all persons concerned in executing such judgments or sentences, are considered, in law, as trespassers.....*Id.*
3. The jurisdiction of any court, exercising authority over any subject, may be inquired into in every other court, when the proceedings of the former are relied on, and brought before the latter, by a party claiming the benefit of such proceedings.....*Id*
4. The jurisdiction and authority of the courts of Kentucky, are derived wholly from the statute law of the state.....*Id*
5. The clerk of Woodford county court had no authority to alter the record of the acknowledgment of a deed, at any time after the record was made.....*Id.*
6. A decree of the supreme court of Ohio ordered that the patentee of a certain tract of land, should within six months, make a deed, &c., with covenants of warranty, conveying a portion of the land held under a patent, to the complainants in that suit, and on the failure

of A. to make the said deed, &c., "that then and in that case, the complainant shall hold, possess and enjoy the said portion of land, in as full and ample a manner, as if the same had been conveyed to him;" the decree of the supreme court of Ohio by which a conveyance of land is directed to be made, the decree being according to the laws of Ohio, vested in those to whom the deed was ordered to be made, such a legal title to the land to have been conveyed by the deed, as would have been vested by a deed of equal date; and the registry act of Ohio applies as well to a title under such a decree, as it would do, if the party held under a *bonâ fide* deed, of the same date with the patent of the land, and the decree gives a legal title as ample as a deed. *Steele's Lessee* v. *Spencer*.....*552

7. It has been the uniform course of this court, with respect to titles to real property, to apply the same rule that is applied by the state tribunals in like cases. *Waring* v. *Jackson*.*570
8. Where, by the established practice of courts in particular states, the courts, in actions of ejectment, look beyond the grant, and examine the progressive stages of the title, from its incipient state until its consummation; such a practice will form the law of cases decided under the same in these states; and the supreme court of the United States regard those rules of decision in cases brought up from such states, provided that in so doing, they do not suffer the provisions of any statute of the United States to be violated. *Ross* v. *Barland*.....*655

COURTS OF THE UNITED STATES.

1. The course of prudence and duty, in judicial proceedings in the United States courts, when cases of difficult distribution as to power and right present themselves, is to yield rather than encroach; the duty is reciprocal, and will no doubt be met in the spirit of moderation and comity; in the conflicts of power and opinion, inseparable from our very peculiar relations, cases may occur, in which the maintenance of principles, and the administration of justice, according to its innate and inseparable attributes, may require a different course; and when such cases do occur, our courts must do their duty; but until then, it is administering justice in the spirit of the constitution, to conform as nearly as possible to the administration of justice in the courts of the several states. *Fullerton* v. *Bank of the United States*.....*604

See COURTS OF THE SEVERAL STATES: JURISDICTION: PRACTICE.

DEEDS.

1. If a deed has not been proved, acknowledged and recorded, and would, therefore, be insufficient against subsequent purchasers, without notice, parties who claim under such deed, have a right to come into a court of equity for a discovery, upon the ground of notice; and if notice should be brought home to subsequent purchasers, the complainants have a right to relief, by a decree quieting the title. *Findlay* v. *Hinde*.....*241
2. The privy examination and acknowledgment of a deed, by a *feme covert*, so as to pass her estate, cannot legally be proved by parol testimony. *Elliott* v. *Peirsol*.....*328
3. In Virginia and Kentucky, the modes of conveyance by fine and common recovery, have never been in common use; and in these states, the capacity of a *feme covert* to convey her estate by deed, is the creature of the statute law; to make her deed effectual, the forms and solemnities prescribed by the statutes must be pursued.....*Id.*
4. By the Virginia statute of 1748, "when any deed has been acknowledged by a *feme covert*, and no record made of her privy examination, such deed is not binding upon the *feme* and her heirs;" this law was adopted by Kentucky, at her separation from Virginia; and is understood never to have been repealed.....*Id.*
5. The provisions of the laws of Kentucky, relative to the privy examination of a *feme covert*, in order to make a conveyance of her estate valid.....*Id.*
6. It is the construction of the act of 1810, that the clerks of the county court of Kentucky, have authority to take acknowledgments and privy examinations of *femes covert*, in all cases of deeds made by them and their husbands. *Id.*
7. What the law requires to be done, and appear of record, can only be done, and made to appear, by the record itself, or an exemplification of it. It is perfectly immaterial, whether there be an acknowledgment or privy examination in form, or not, if there be no record made of the privy examination; for, by the express provisions of the law, it is not the fact of privy examination only, but the recording of the fact, which makes the deed effectual to pass the estate of a *feme covert*.....*Id.*
9. A deed from *baron* and *feme*, of lands in the state of Kentucky, executed to a third person, by which the land of the *feme* was intended to be conveyed for the purpose of a reconveyance to the husband, and thus to vest in him the estate of the wife, was indorsed by the clerk of Woodland county court, "acknowledged by James Elliott, and Sarah G. Elliott, September 11th, 1816," and was

certified as follows:—"Attest, J. McKenny, Jun., Clerk."

"Woodford County, ss.

September 11th, 1813.

"This deed from James Elliott, and Sarah G. Elliott his wife, to Benjamin Elliott was this day produced before me, and acknowledged by said James and Sarah to be their act and deed, and the same is duly recorded.

"John McKenny, Jun., C. C. C."

Held, that subsequent proceedings of the court of Woodford county, by which the defects of the certificate of the clerk to state the privy examination of the *feme* (which by the laws of Kentucky, is necessary to make a conveyance of the estate of a *feme covert* legal), were intended to be cured, upon evidence that the privy examination was made by the clerk, will not supply the defect, nor give validity to the deed..... *Id.*

9. Whether erasures and alterations in a deed are material or not, is a question for the court. *Steele's Lessee* v. *Spencer*.....*552
10. The provisions of the laws of Kentucky relative to the acknowledgment of deeds. *Elliott* v. *Peirsol*..... .....*328

See Feme Covert, 1.

DEPOSITIONS.

1. The authority given by the act of congress of 24th September 1789, ch. 20, to take depositions of witnesses, in the absence of the opposite party, is in derogation of the rules of the common law, and has always been construed strictly; and therefore, it is necessary to establish, that all the requisites of the law have been complied with, before such testimony is admissible. *Bell* v. *Morrison*.....*351
2. The certificate of the magistrate taking the deposition, is good evidence of the facts stated therein, so as to entitle the deposition to be read to the jury; if all the necessary facts are there sufficiently disclosed.....*Id.*
3. It should plainly appear, from the certificate of the magistrate, that all the requisites of the statute have been fully complied with: and no presumption will be admitted, to supply any defect in the taking the deposition.....*Id.*

DEVISE.

1. The testator devised to his son, Joseph Eden, certain portions of his estate in New York, among which were the premises sought to be recovered, to him, his heirs, executors and administrators for ever; in like manner, he devised to his son Medcef, his heirs and assigns, certain other portions of his property; and added the following clause: "It is my will, and I do order and appoint, that if either of my said sons should depart this life, without lawful issue, his share or part shall go to the survivor; and in case of both their deaths, without lawful issue, I give all the property aforesaid to my brother, John Eden, of Lofters, in Cleveland, in Yorkshire, and my sister, Hannah Johnson, of Whitby, in Yorkshire, and their heirs." Medcef Eden died without issue, having devised his estate to his widow, and other devisees named in his will. According to the established law of New York, nothing passed under the ulterior devise over to John Eden and Hannah Johnson; Medcef Eden, on the death of his brother Joseph Eden, became seised of an estate in fee-simple absolute. *Waring* v. *Jackson*.....*570
2. Adverse possession taken and held under a sheriff's sale, by virtue of judgments and executions against Joseph Eden, will not, according to the decisions of the courts of New York, prevent the operation of a devise by another, in whom the title to the estate was vested by the death of the defendant in the execution.....*Id.*
3. Testator, residing and owning real and personal estate in the county of Alexandria, district of Columbia, by his will, gave "all his estate, real and personal, to his wife, during her life, for the use and purpose of raising and educating his children," each child, at the age of twenty-one, to be entitled to an equal portion of his estate, real and personal; subject each to a deduction of one-third for the maintenance of his wife; he recommended his wife to sell the negroes, for a term of years, and directed "an appraisement" only of "his estate" should be made; that no sale of the furniture should be made; and then stated, "that he is indebted to no one, and proposes to continue so," that he was surety for his brother, for whom he held a deed of trust on his property, sufficient, he hopes, to pay the same, and directs that his "estate shall not be sold to pay these debts, until the property so divided shall be sold," when his "estate must be charged with any deficiency, and directs that his executors shall not give security, as his own estate did not require it:" this will does not charge the real estate of the testator with his debts. *Archer* v. *Deneale*.....*585
4. The word "estate" is sufficiently comprehensive to embrace property of every description, and will charge lands with debts, if used with other words which indicate an intention to charge them; but if used alone, without such intent, they will not have such operation..... .....*Id.*

DISTRICT OF COLUMBIA.

1. The act of the legislature of Maryland, passed 19th December 1791, entitled "an act concerning the territory of Columbia, and the city of Washington," which, by the 6th section, provides for the holding of lands by "foreigners," is an enabling act; and applies to those only who could not take lands without the provisions of that law; it enables a "foreigner" to take in the same manner as if he were a citizen. *Spratt* v. *Spratt*. *343
2. A foreigner, who becomes a citizen, is no longer a foreigner, within the view of the act; thus, after-purchased lands, vest in him as a citizen, not by virtue of the act of the legislature of Maryland, but because of his acquiring the rights of citizenship. *Id.*
3. Land in the county of Washington and district of Columbia, purchased by a foreigner, before naturalization, was held by him under the law of Maryland, and might be transmitted to the relations of the purchaser, who were foreigners; and the capacity so to transmit those lands, is given absolutely, by this act, and is not affected by his becoming a citizen; but passes to his heirs and relations, precisely as if he had remained a foreigner..... *Id.*
4. The supreme court of the United States has jurisdiction of appeals from the orphans' court, through the circuit court for the county of Washington, by virtue of the act of congress of February 13th, 1801; and by the act of congress subsequently passed, the matter in dispute, exclusive of costs, must exceed the value of $1000, in order to entitle the party to an appeal. *Nicholls* v. *Hodges*. *562

EQUITY.

1. It is a principle of equity, that when an instrument is drawn and executed, which professes, or is intended, to carry into execution an agreement, whether in writing or by parol, previously entered into; but which, by mistake of the draftsman, either in fact or in law, does not fulfil, or which violates the manifest intention of the parties to the agreement; equity will correct the mistake, so as to produce a conformity of the instrument to the agreement. *Hunt* v. *Rousmaniere*..... *1
2. The execution of instruments, fairly and legally entered into, is one of the peculiar branches of equity jurisdiction; and a court of equity will compel a delinquent party to perform his agreement, according to the terms of it, and to the manifest intention of the parties..... *Id.*
3. So, if the mistake exist, not in the instrument which is intended to give effect to the agreement, but in the agreement itself, and is clearly proved to have been the result of ignorance of some material fact, a court of equity will, in general, grant relief, according to the nature of the particular case in which it is sought..... *Id.*
4. If an agreement was not founded on a mistake of any material fact, and if it was executed in strict conformity with itself, it would be unprecedented, for a court of equity to decree another security to be given, different from that which had been agreed upon; or to treat the case as if such other security had, in fact, been agreed upon and executed..... *Id.*
5. Courts of equity may compel parties to execute their agreements, but they have no power to make agreements for them; the death of one of the parties, and the consequent inefficiency of a security selected and intended to be valid and complete, but which was not so, will not give the right of interference. *Id.*
6. A mistake arising from ignorance of law, is not a ground for reforming a deed founded on such mistake; except in some few cases, and those of peculiar character..... *Id.*
7. If the obligee of a joint bond, by two or more, agree with one obligor to release him, and do so, and all the obligors are thereby discharged at law, equity will not afford relief against the legal consequences; although the release was given under a manifest misapprehension of the legal effect of it, in relation to the other obligors..... *Id.*
8. It seems, that there may be cases in which a court of equity will relieve against a plain mistake, arising from ignorance of law; but where parties, upon deliberation and advice, reject one species of security, and agree to select another, under a misapprehension of the law as to the nature of the security thus selected, a court of equity will not, on the ground of misapprehension, and the insufficiency of the security, in consequence of a subsequent event not foreseen, direct a security, of a different character, to be given, or decree that to be done, which the parties suppose would have been effected by the instrument, which was finally agreed upon. The court would be much less disposed to interfere in such a case, in favor of a particular creditor, against the general creditors of an insolvent estate..... *Id.*
9. Where the vendee of real estate, had purchased it, subject to the dower of the widow, of which dower he might have been informed if he had used proper diligence, a court of equity will not interfere, to release the vendee; but will leave him to such legal remedy, as he may be entitled to, in case his title should, at any future time, be disturbed. *Greenleaf* v. *Queen*..... *138
10. A court of equity ought not to decree speci-

fic performance of a contract to the letter, where, from change of circumstances, mistake or misapprehension, it would be unconscientious so to do; the court may so modify the agreement, as to do justice, so far as circumstances will permit; and refuse specific execution, unless the party seeking it will comply with such modifications as justice requires. *Mechanics' Bank of Alexandria* v. *Lynn*. *376

11. If a bill charge a defendant with notice of a particular fact, an answer must be given, without special interrogatory, to the matter; but a defendant is not bound to answer an interrogatory, not warranted by some matter contained in a former part of the bill..... *Id.*

12. When a judgment-debtor comes into a court asking protection, on the ground that he has satisfied the judgment, the door is fully open for the court modify or grant the prayer, upon such conditions as justice demands..... *Id.*

13. In an appeal, under the testamentary law of Maryland, the court being satisfied by an examination of the evidence contained in the record of the proceedings of the orphans' court of the county of Washington, relative to a claim made upon the estate of the testator by the executor, that such evidence was too loose and indefinite to sanction the claim, disallowed the same; and reversed the decree of the orphans' court which allowed the same. *Nicholls* v. *Hodges* *562

See CHANCERY PRACTICE, 1–3: PAROL EVIDENCE.

EVIDENCE.

1. Where one party to an agreement, signed by the other contracting party, had delivered to such party a copy of the agreement, in his own handwriting, but not signed by him, and from the nature of the instrument, it was to be fairly presumed, the original was in his custody, notice to produce the original paper, in order to give the copy in evidence, is not necessary; such a copy, when offered to charge the party by whom the same was made, and who, by the tenor of the agreement, was to perform certain acts therein stated, may be considered, not as a copy, but as an original, in relation to the obligations of the party giving the copy, and be so given in evidence. *Carroll* v. *Peake*.....*18

2. Where letters, a part of the evidence in the court below, have become lost or mislaid, everything is to be presumed to have been contained in them, to support the opinion of the court, in relation to their contents; and the party who denies that the letters authorized the decision of the court upon them, must show, by evidence, their contents ..... *Id.*

3. If, in any case, in which testimony was offered by a plaintiff, the court ought to instruct the jury that he had no right to recover, such instruction certainly ought not to be granted, if any possible construction of the testimony would support the action. *Bank of Washington* v. *Triplett*.....*25

4. The cross-examination of a witness by the opposite party, is considered as a waiver of exceptions to the regularity of his deposition. *Mechanics' Bank of Alexandria* v. *Seton*. *299

5. By the rules of this court, "in all cases of equity and admiralty jurisdiction, no objection shall be allowed to be taken to the admissibility or any deposition, deed, grant or other exhibit, found in the record, as evidence, unless objection was taken thereto in the court below; but the same shall otherwise be deemed to have been taken by consent."..*Id.*

6. Where the general agent of parties carrying on business in a tan-yard, instead of a journal of hides received for the parties from day to day, gave, at considerable intervals, certificates of the total amount of hides received from the last preceding settlement, up to the periods when the certificates bore date; such certificates are equally binding, as certificates detailing the separate transactions of each day; and may be read in evidence, to charge the parties, whose agent the person giving the certificates was. *Barry* v. *Foyles*..*311

7. Where the suit is brought upon a partnership transaction, against one of the partners, and the declaration stated a contract with the partner who is sued, and gave no notice that it was made by him with another person, evidence of a joint *assumpsit* may be given, to support such a declaration; and the want of notice has never been considered as justifying an exception to such evidence at the trial.....*Id.*

8. Depositions, how taken under the provisions of the act of congress of 24th September. *Bell* v. *Morrison*..... .....*351

9 The authority given by the act of congress of 24th September 1789, ch. 20, to take depositions of witnesses, in the absence of the opposite party, is in derogation of the rules of the common law, and has always been construed strictly: and therefore, it is necessary to establish, that all the requisites of the law have been complied with, before such testimony is admissible.....*Id.*

10. The certificate of the magistrate taking the deposition, is good evidence of the facts stated therein, so as to entitle the deposition to be read to the jury; if all the necessary facts are there sufficiently disclosed.....*Id.*

11. It should plainly appear, from the certificate of the magistrate, that all the requisites of the statute have been fully complied with; and no presumption will be admitted to sup-

ply any defects in the taking of the deposition..... .....*Id.*

12. A letter from a deceased member of a family, stating the pedigree of the family, and sworn by the wife, to have been written by her husband, who also swore, in her deposition, that the facts stated in the letter had been frequently mentioned by her husband in his lifetime, is legal evidence; as is also the deposition of the witness, on a question of pedigree. *Elliott* v. *Peirsol*.....*328

13. The rule of evidence, that in questions of pedigree, the declarations of aged and deceased members of the family, may be proved, and given in evidence, has not been controverted... .....*Id.*

14. In a case where a controversy had arisen, or was expected to arise, between parties, concerning the validity of a deed, against which one of the parties claimed, but no controversy was then expected to arise about the heirship; a letter written about the time, stating the pedigree of the claimants, was not considered as excluded, by the rule of law which declares, that declarations relating to pedigree, made *post litem motam*, cannot be given in evidence.....*Id.*

15. Where the defendant had reserved a right to move the court to exclude any part of the plaintiff's evidence, which he might choose to designate as incompetent, and it did not appear, from the bill of exceptions, that he designated any particular piece or part of the evidence as objectionable, and moved the court to exclude the whole, or to instruct the jury, that it was insufficient to prove title in the lessors of the plaintiff; this could not be done, on the ground of incompetency, unless the whole was incompetent. The court is not bound to do more than respond to the motion, in the terms in which it is made; courts of justice are not obliged to modify the propositions submitted by counsel, so as to make them fit the case; if they do not fit, that is enough to authorize their rejection.....*Id.*

16. A joint and several bond, where it was not understood to be offered as general evidence as to all the parties to it, but only as to one of the obligors, and was connected with a title derived from that obligor; was properly permitted to go to the jury, upon proof of the execution of the bond, by that obligor alone; as, under the circumstances, it was *primâ facie* evidence of his execution of the instrument. *Conard* v. *Atlantic Insurance Co.* *388

17. Under the law of the state of Kentucky, and the decisions of their courts, a will, with two witnesses, is sufficient to pass real estate; and the copy of such a will, duly proved and recorded in another state, is good evidence of the execution of the will. *Davis* v. *Mason* *503

18. It is a settled rule in Kentucky, that although more than one witness is required to subscribe a will disposing of lands, the evidence of one may be sufficient to prove it.....*Id.*

19. The rule of law is, that the best evidence must be given, of which the nature of the thing is capable; that is, that no evidence shall be received, which pre-supposes greater evidence behind, in the party's possession or power; the witholding of that better evidence raises a presumption, that, if produced, it might not operate in favor of the party who is called upon for it; for this reason, a party who is in possession of an original paper, is not permitted to give a copy in evidence, or to prove its contents. *Tayloe* v. *Riggs*.....*591

20. The affidavit of a party to the cause, of the loss or destruction of an original paper, offered in order to introduce secondary evidence of the contents of the paper, is proper, if such affidavit could not be received of the loss of a written contract, the contents of which are well known to others, or a copy of which can be proved, a party might be completely deprived of his rights, at least, in a court of law.....*Id.*

21. It is a sound general rule, that a party cannot be a witness in his own cause; but many collateral questions arise in the progress of a cause, to which the rule does not apply; questions which do not involve the matter in controversy, but matter which is auxiliary to the trial, and which facilitates the preparation for it, often depend on the oath of the party; an affidavit of the materiality of a witness, for the purpose of obtaining a continuance, or a commission to take depositions, or an affidavit of his inability to attend, is usually made by the party, and received without objection; on incidental questions, which do not affect the issue to be tried by the jury, the affidavit of the party is received.....*Id.*

22. The testimony which establishes the loss of a paper, is addressed to the court, and does not relate to the contents of the paper; it is a fact which may be important, as letting the party in to prove the justice of the cause, but does not itself prove anything in the cause .....*Id.*

23. In an action upon written contract, said to have been lost or destroyed, and not for deceit and imposition, the plaintiff's right to recover is measured principally by the contract; and the secondary evidence must prove it, as laid in the declaration. The con-

versation which preceded the agreement forms no part of it, nor are the propositions or representations which were made at the time, but not introduced into the written contract, to be taken into view, in construing the instrument itself; had the written paper stated to be lost or mislaid, been produced, neither party could have been permitted to show the party's inducements to make it, or to substitute his understanding for the agreement itself. If he was drawn into it by misrepresentation, that circumstance might furnish him with a different action, but cannot affect this..... .....*Id.*

24. When a written contract is to be proved, not by itself, but by parol testimony, no vague uncertain recollection concerning its stipulations ought to supply the place of the written instrument itself; the substance of the agreement ought to be proved satisfactorily; and if that cannot be done, the party is in the condition of every other suitor in court, who makes a claim which he cannot support.....*Id.*

25. When parties reduce their contracts to writing, the obligations and rights of each are described by the instrument itself. The safety which is expected from them would be much impaired, if they could be established upon uncertain and vague impressions, made by a conversation antecedent to the reduction of the agreement.....*Id.*

EXECUTION.

1. Under the law of Virginia, which directs the sheriff holding an execution against the goods and effects of defendants, to take forthcoming bonds, for the property levied upon by the execution, and authorizes execution to issue for the amount of the debt due upon the original execution, after ten days' notice to the obligors in the bonds, of the motion for execution, the property levied on not having been re-delivered, according to the condition of the bond, if the notice given to the obligees, of the plaintiff's intention to proceed, is sufficiently explicit to render mistake impossible, it will be sustained, although the whole of the defendants in the original execution may not be named in the notice; nice and technical objections to the notice, where every purpose of substantial justice is effected, ought not to be favored. *Alexander* v. *Brown*.....*683

EXECUTORS AND ADMINISTRATORS.

1. The orphans' court, by the testamentary laws of Maryland, has a general power to administer justice in all matters relative to the affairs of deceased persons, according to law. The commission to be allowed to an executor or administrator, is submitted to the discretion of the court, and is to be not under five per cent., nor exceeding ten per cent. on the amount of the inventory. *Nicholls* v. *Hodges*.....*562

2. If the executor has a claim on the estate of the deceased, it stands on an equal footing with other claims of the same nature ....*Id.*

3. On a plenary proceeding, if either party require it, the court will direct an issue or issues to be made up, and sent to a court of law to be tried; and any person conceiving himself aggrieved by any judgment, decree, decision or order, may appeal to the court of chancery, or to a court of law; and in Maryland, the decision of the court to which the appeal is made is final.....*Id.*

4. The court being satisfied by an examination of the evidence contained in the record of the proceedings of the orphans' court of the county of Washington, relative to a claim made upon the estate, of the testator by the executor, that the said evidence was too loose and indefinite to sanction the claim, disallowed the same; and reversed the decree of the orphans' court which allowed the claim.....*Id.*

5. The commission to be allowed to the executor or administrator is submitted by law to the discretion of the court, upon a consideration of all the circumstances, and it was obviously the intention of the legislature, that the decision of the orphans' court should be final and conclusive... .....*Id.*

FEME COVERT.

1. By the law of Maryland, a married woman cannot dispose of real property, without the consent of her husband; nor can she execute a good and valid deed to pass real estate, unless he shall join in it. The separate examination and other solemnities required by law are indispensable, and must not be omitted; a deed, therefore, executed by a married woman, of real property, acquired by her while a *feme sole* trader, while she was abandoned by her husband, is void. *Rhea* v. *Rhenner*. *105

2. The privy examination and acknowledgment of a deed, by a *feme covert*, so as to pass her estate, cannot be legally proved by parol testimony. *Elliott* v. *Peirsol*.....*328

3. In Virginia and Kentucky, the modes of conveyance by fine and common recovery, have never been in common use; and in these states, the capacity of a *feme covert* to convey her estate by deed, is the creature of the statute law; and to make her deed effectual,

the forms and solemnities prescribed by the statutes must be pursued ..... *Id.*

4. By the Virginia statute of 1748, "when any deed has been acknowledged by a *feme covert*, and no record made of her privy examination, such deed is not binding upon the *feme* and her heirs;" this law was adopted by Kentucky, at her separation from Virginia; and is understood never to have been repealed..... *Id.*
5. The provisions of the laws of Kentucky, relative to the privy examination of a *feme covert*, in order to make a conveyance of her estate valid..... *Id.*
6. It is the construction of the act of 1810, that the clerks of the county court of Kentucky, have authority to take acknowledgments and privy examinations of *femes covert*, in all cases of deeds made by them and their husbands. *Id.*
7. What the law requires to be done, and appear of record, can only be done, and made to appear by the record itself, or an exemplification of it. It is perfectly inmaterial, whether there be an acknowledgment or privy examination in form, or not, if there be no record made of the privy examination; for, by the express provisions of the law, it it not the fact of privy examination only, but the recording of the fact, which makes the deed effectual to pass the estate of a *feme covert*..... *Id.*
8. A deed from *baron* and *feme*, of lands in the state of Kentucky, executed to a third person, by which the land of the *feme* was intended to by conveyed, for the purpose of a re-conveyance to the husband, and thus to vest in him the estate of the wife, was indorsed by the clerk of Woodford county court, "acknowledged by James Elliott and Sarah G. Elliott, September 11th, 1816," and was certified as follows: "Attest–J. McKenney, Jun., Clerk."

"Woodford county, ss.

September 11th, 1813.

"This deed from James Elliott and Sarah G. Elliott, his wife, to Benjamin Elliott, was this day produced before me, and acknowledged by said James and Sarah to be their act and deed, and the same is duly recorded.

John McKenney, Jun., C. C. C."

Held, that subsequent proceedings of the court of Woodford county, by which the defects of the certificate of the clerk to state the privy examination of the *feme* (which, by the laws of Kentucky, is necessary to make a conveyance of the estate of a *feme covert* legal), were intended to be cured, upon evidence that the privy examination was made by the clerk, will not supply the defect, nor give validity to the deed..... .....*Id.*

See FEME SOLE TRADERS.

FEME SOLE TRADERS.

1. The law seems to be settled, that when a wife, left by the husband, without maintenance and support, has traded as a *feme sole*, and has obtained credit as such, she ought to be liable for her debts; and the law is the same, whether the husband is banished for his crimes, or has voluntarily abandoned the wife. *Rhea* v. *Rhenner*..... ...*105

FLORIDA.

1. The treaty with Spain, by which Florida was ceded to the United States, is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights and immunities of the citizens of the United States; they do not, however, participate in political power; they do not share in the government, until Florida shall become a state. In the meantime, Florida continues to be a territory of the United States, governed by virtue of that clause in the constitution, which empowers "congress to make all needful rules and regulations, respecting the territory or other property belonging to the United States." *American Insurance Company* v. *Canter*..... *511
2. The powers of the territorial legislature of Florida extend to all rightful objects of legislation; subject to the restriction, that their laws shall not be "inconsistent with the laws and constitution of the United States."..... *Id.*
3. All the laws which were in force in Florida, while a province of Spain, those excepted which were political in their character, which concerned the relations between the people and their sovereign, remained in force, until altered by the government of the United States; congress recognizes this principle, by using the words "laws of the territory now in force therein." No laws could then have been in force but those enacted by the Spanish government; if, among them, there existed a law on the subject of salvage, and it is scarcely possible, there should not have been such a law, jurisdiction over it was conferred by the act of congress relative to the territory of Florida, on the superior court; but that jurisdiction was not exclusive. A territorial act, conferring jurisdiction over the same cases as an inferior court, would not have been inconsistent with the seventh section of the act, vesting the whole judicial power of the territory in two superior courts, and in such inferior courts, and justices of the peace, as the legislative council of the territory may from time to time establish."..... *Id*

4. The judges of the superior courts of Florida hold their offices for four years; these courts, then, are not constitutional courts, in which the judicial powers conferred by the constitution on the general govenment can be deposited; they are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty, which exists in the government; or in virtue of that clause which enables congress to make laws regulating the territories belonging to the United States. The jurisdiction with which they are invested is not a part of that judicial power, which is defined in the third article of the constitution, but is conferred by congress in the exercise of its powers over the territories of the United States.....*Id.*
5. Although admiralty jurisdiction can be exercised in the states, in those courts only which are established in pursuance of the third article of the constitution, the same limitation does not extend to the territories; in legislating for them, congress exercises the combined powers of the general and state government.....*Id.*
6. The act of the territorial legislature of Florida, erecting a court which proceeded, under the provisions of the law, to decree, for salvage, the sale of a cargo of a vessel which had been stranded, and which cargo had been brought within the territorial limits, is not inconsistent with the laws and constitution of the United States, and is valid; and consequently, a sale of the property made in pursuance of it changed the property.....*Id.*

FLORIDA TREATY.

1. The object of the treaty with Spain, which ceded Florida to the United States, dated 22d May 1819, was to invest the commissioners with full power and authority to receive, examine and decide upon the amount and validity of asserted claims upon Spain, for damages and injuries. Their decision, within the scope of this authority, is conclusive and final, and is not re-examinable; the parties must abide by it, as the decree of a competent tribunal of exclusive jurisdiction; a rejected claim cannot be brought again under review, in any judicial tribunal. But it does not naturally follow, that this authority extends to adjust all conflicting rights, of different citizens, to the fund so awarded; the commissioners are to look to the original claim for damages and injuries against Spain itself; and it is wholly immaterial, who is the legal or equitable owner of the claim, provided he be an American citizen. *Comegys* v. *Vasse*.....*193
2. After the validity and amount of the claim has been ascertained by the award of the commissioners, the rights of the claimant to the fund, which has passed into his hands and those of others, are left to the ordinary course of judicial proceedings, in the established courts of justice.....*Id.*
3. The treaty with Spain recognised an existing right in the aggrieved parties to compensation; and did not, in the most remote degree, turn upon the notion of donation or gratuity; it was demanded by our government as matter of right, and as such was granted by Spain.....*Id.*

See BANKRUPT AND BANKRUPTCY.

FORFEITURE.

1. A court of chancery is not the proper tribunal to enforce a forfeiture; the remedy for the same being at law. *Horsburg* v. *Baker*.....*232

FRAUD.

1. Without undertaking to suggest, whether, in any case, the want of possession of the thing sold constitutes, *per se*, a badge of fraud, or is only *primâ facie*, a presumption of fraud; it is sufficient to say, that in case even of an absolute sale of personal property, the want of such possession is not presumption of fraud, if possession cannot, from the circumstances of the property, be within the power of the parties. *Conard* v. *Atlantic Insurance Co*.....*387
2. In cases where the sale is not absolute but conditional, the want of possession, if consistent with the stipulation of the parties, and *à fortiori*, if flowing directly from them, has never been held to be, *per se*, a badge of fraud.....*Id.*

FRAUDS.

See STATUTE OF FRAUDS.

INSOLVENCY.

1. What is the nature and effect of the priority of the United States, under the statute of 1799, ch. 128, § 65. *Conard* v. *Atlantic Insurance Co*.....*386
2. It is obvious, that the latter clause of the 65th section of the act of 1799, is merely an explanation of the term "insolvency," used in the first clause, and embraces three classes of cases, all of which relate to living debtors; the case of deceased debtors, stands wholly upon the alternative in the former part of the enactment.....*Id.*

3. Insolvency, in the sense of the statute, relates to such a general divestment of property as would in fact be equivalent to insolvency in its technical sense; it supposes, that all the debtor's property has passed from him. This was the language of the decision in the case of the United States *v.* Hooe, 3 Cranch 73; and it was consequently held, that an assignment of part of the debtor's property did not fall within the provision of the statute ..... *Id.*
4. Mere inability of the debtor to pay all his debts is not an insolvency within the statute; but it must be manifested in one of the three modes pointed out in the explanatory clause of the section ..... *Id.*

INSURABLE INTEREST.

1. The master of a vessel, to whom property shipped on board of a vessel under his command is to be consigned, in the absence of proof, that the owner of the property had not given authority to order insurance, has an insurable interest in the property on board his vessel; and this interest is sufficient to authorize the recovery of a loss on the policy. *Buck* v. *Chesapeake Insurance Co.* *151

INSURANCE.

1. To affirm, that "in policies for whom it may concern," there can be no undue concealment as to the parties interested in the property to be insured," is obviously going much too far; since the underwriter has an unquestionable right to be informed, if he makes the inquiry. The assured may be silent, it is true, if he will; and let the premium be charged accordingly; but if the inquiry, when made, should be responded to by information, contrary to the verity of the case, this obviously gives a conventional signification to the terms of the policy, which may differ from the known and received signification in ordinary cases. *Buck* v. *Chesapeake Insurance Co.* *151
2. A policy, "for whom it may concern," will, in ordinary cases, cover belligerent property ..... *Id.*
3. A knowledge of the state of the world, of the allegiance of particular countries, of the risk and embarrassments affecting their commerce, of the course and incidents of the trade on which they insure, and of the established import of the terms used in their contracts, must necessarily be imputed to underwriters ..... *Id.*
4. The term interest, as used in applications for insurance, does not necessarily imply property in the subject of insurance ..... *Id.*
5. The master of a vessel, to whom property shipped on board the vessel under his command, is to be consigned, in the absence of proof that the owner of the property had not given authority to order insurance, has an insurable interest in the property on board his vessel; and this interest is sufficient to authorize the recovery of a loss on the policy ..... *Id.*
6. As to the effect of certain instructions in a letter relative to insurance, and circumstances connected with the same, constituting a representation to vitiate a policy, made under the authority and directions of the letter .... *Id.*
7. Every ship must, at the commencement of the voyage insured, possess all the qualities of seaworthiness, and be navigated by a competent master and crew. *McLanahan* v. *Universal Insurance Co.* *170
8. Seaworthiness in port, or while lying in the offing, may be one thing; and seaworthiness for the whole voyage, quite another ..... *Id.*
9. A policy on a ship, "at and from a port," will attach, although the ship be, at the time, undergoing extensive repairs, in port, so as, in a general sense, for the purposes of the whole voyage, to be utterly unseaworthy. *Id.*
10. What is a competent crew for the voyage? at what time such crew should be on board? what is proper pilot ground? what is the course and usage of trade, in relation to the master and crew being on board, when the ship breaks ground, for the voyage? are questions of fact dependent upon nautical testimony, and exclusively within the province of the jury ..... *Id.*
11. The contract of insurance is one of mutual good faith; and the principles which govern it, are those of an enlightened moral policy. The underwriter must be presumed to act upon the belief, that the party procuring insurance, is not, at the time, in possession of any fact material to the risk, which he does not disclose; and that no known loss had occurred, which, by reasonable diligence, might have been communicated to him ..... *Id.* *185
12. If a party, knowing that his agent is about to procure insurance for him, withhold information, for the purpose of misleading the underwriter, it is a fraud, and vitiates the insurance ..... *Id.*
13. Where a party orders insurance, and afterwards receives intelligence material to the risk, or has knowledge of a loss, he ought to communicate it to the agent, by due and reasonable diligence, to be judged under all the circumstances of each particular case, if it can be communicated, for the purpose of

countermanding the order, or laying the circumstances before the underwriter..... *Id.*
14. What constitutes due and reasonable diligence, is a question of fact for the jury..... *Id.*
15. The accidental concealment of the time of the sailing of a vessel would not prejudice the insurance, unless material to the risk; if fraudulently intended, it might not mislead; and whether fraudulent or not, is matter of fact for the jury..... *Id.*
16. The material ingredients of a question of the importance of concealing the time of a vessel's sailing, are mixed up of nautical skill, information and experience; and are, in no sense, judicially cognisable, as matters of law. It seems, that this question does not cease to be a question of fact, when the vessel is to sail from a port abroad ..... *Id.*
17. The question of the materiality of the time of the sailing of the ship to the risk, is a question for the jury, under the direction of the court, as in other cases. The court may aid the judgment of the jury, by an exposition of the nature, bearing and pressure of the facts; but it has no right to supersede the exercise of that judgment, and to direct an absolute verdict, as upon contested matters of fact, resolving itself into a mere point of law ..... *Id.*

JUDGMENTS.

1. Under the laws of Virginia, a confession of judgment by the defendant is a release of errors. *Mandeville* v. *Holey*.....*136

JURISDICTION.

1. In the construction of the 25th section of the judiciary act, passed 24th of September 1789, this court has never required, that the treaty or act of congress, under which the party claims, who brings the final judgment of a state court into review before this court, should have been spread upon the record. It has always deemed it essential to the exercise of jurisdiction, in such a case, that the record should show a complete title, under the treaty or act of congress, and that the judgment of the court is in violation of that treaty or act. *Hickie* v. *Starke*. *94
2. In the district court of the United States for the district of Georgia, a libel was filed, claiming certain Africans, as the property of the libellant, which had been brought into the state of Georgia, and were seized by the authority of the governor of the state, for an alleged illegal importation; process was issued against the slaves, but was not served; the case was taken by appeal to the circuit court, and the governor of Georgia filed a paper, in the nature of a stipulation, importing to hold the Africans subject to the decree of the circuit court, &c.: *Held*, that such a stipulation could not give jurisdiction in the case to the circuit court; as process could not issue legally from the circuit court against the Africans, because it would be the exercise of original jurisdiction in admiralty, which the circuit court. does not possess. *Governor of Georgia* v. *Madrazo*.....*110
3. "It may be laid down as a rule which admits of no exception, that in all cases where jurisdiction depends on the party, it is the party named in the record."..... *Id.*
4. The libel and claim exhibited a demand for money actually in the treasury of the state of Georgia, mixed up with the general funds of the state, and for slaves in the possession of the government; the possession of both of which was acquired by means which it was lawful in the state to exercise: *Held*, that the courts of the United States had no jurisdiction; the same being taken away by the 11th article of the amendments to the constitution of the United States..... *Id.*
5. In a case where the chief magistrate of a state is sued, not by his name, but by his style of office, and the claim made upon him is entirely in his official character, the state itself may be considered a party in the record ..... *Id.*
6. The complainants were stated, in the bill, to be citizens of the state of South Carolina; the defendant, the Bank of Georgia, was a body corporate, existing under an act of the legislature; but the citizenship of the individual corporators was not stated; the averment, in the original bill, was, that William B. Bullock and Samuel Hale were citizens of Georgia, and resident therein; William B. Bullock was afterwards designated in the bill, as "President of the mother bank, and Samuel Hale, as the president of the branch bank, at Augusta, in the state of Georgia:" the courts of the United States have no jurisdiction of the case; the record does not show that the defendants were citizens of Georgia, nor are there any distinct allegations that the stockholders of the bank were citizens of that state. *Breithaupt* v. *Bank of Georgia*.....*238
7. The court will not take jurisdiction of a case, where, although the whole property claimed by the lessor of the plaintiff in error under a patent, and which was recovered in ejectment, exceeded $2000, the title to a lot of ground, part of the whole tract, which was of less value than $500, was only involved in the case before the court. *Meredith* v. *McKee*..... *248

8. If the court of a state had jurisdiction of a matter, its decision would be conclusive; but this court cannot yield assent to the proposition, that the jurisdiction of a state court cannot be questioned, where its proceedings were brought, collaterally, before the circuit court of the United States. *Elliott* v. *Peirsol*.....*328
9. Where a court has jurisdiction, it has a right to decide any question which occurs in the cause; and whether its decision be correct, or otherwise, its judgments, until reversed, are regarded as binding in every other court. But if it act without authority, its judgments and orders are regarded as nullities; they are not voidable, but simply void; and form no bar to a remedy sought in opposition to them, even prior to a reversal. They constitute no justification; and all persons concerned in executing such judgments or sentences, are considered, in law, as trespassers .....*Id.*
10. The jurisdiction of any court, exercising authority over a subject, may be inquired into in every other court, when the proceedings of the former are relied on, and brought before the latter, by a party claiming the benefit of such proceedings .....*Id.*
11. The jurisdiction and authority of the court of Kentucky are derived wholly from the statute law of the state.....*Id.*
12. The clerk of Woodford county court had no authority to alter the record of the acknowledgment of a deed, at any time after the record was made.....*Id.*
13. The constitution and laws of the United States give jurisdiction to the district courts, over all cases in admiralty; but jurisdiction over the case, does not constitute the case itself. *American Insurance Co.* v. *Canter*.....*511
14. The constitution declares that "the judicial power shall extend to all cases in law and equity arising under it, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, or other public ministers and consuls; to all cases of admiralty and maritime jurisdiction:" The constitution certainly contemplates these as three distinct classes of cases; and if they are distinct, the grant of jurisdiction over one of them, does not confer jurisdiction over either of the other two; the discrimination made between them is conclusive against their identity.....*Id.*
15. A case in admiralty does not, in fact, arise under the constitution of laws of the United States; such cases are as old as navigation itself; and the law, admiralty and maritime, as it existed for ages, is applied by our courts to the cases as they arise. It is not then to the eighth section of the territorial act, that we are to look for the grant of admiralty and maritime jurisdiction in the territorial courts of Florida; consequently, if that jurisdiction is exclusive, it is not made so by the reference, in the act of congress, to the district court of Kentucky.....*Id.*
16. The supreme court of the United States has jurisdiction of appeals from the orphans' court, through the circuit court for the county of Washington, by virtue of the act of congress of February 13th, 1801; and by the act of congress subsequently passed, the matter in dispute, exclusive of costs, must exceed the value of $1000, in order to entitle the party to an appeal. *Nicholls* v. *Hodges*.*562
17. It cannot be alleged, that a citizen of one state, having title to lands in another state, is disabled from suing for those lands in the courts of the United States, by the fact that he derives his title from a citizen of the state in which the lands lie. *McDonald* v. *Smalley*.....*620
18. M., a citizen of Ohio, apprehensive his title to lands in that state could not be maintained in the state court, and being indebted to the plaintiff, a citizen of Alabama, to the amount of $1100, offered to sell and convey to him the land, in payment of the debt, stating in the letter by which the offer was made, that the title would most probably be maintained in the court of the United States, but would fail in the courts of the state; the property was estimated at more than the debt, but in consequence of the difficulties attending the title, he was willing to convey it for the debt, which was done; the plaintiff in error, after the land was conveyed to him, gave his bond to make a quit-claim title to the land, on condition of receiving $1000: *Held*, that the title acquired by the purchaser gave jurisdiction to the courts of the United States...*Id.*
19. The motives which induced M. to make the contract for the purchase of the land, can have no influence on its validity; a court cannot enter into the consideration of those motives, when deciding on its jurisdiction.....*Id.*
20. In a contract between a mortgagor and mortgagee, being citizens of different states, it cannot be doubted, that an ejectment, or bill to foreclose, may be brought in a court of the United States, by the mortgagee, residing in a different state.....*Id.*
21. Both the plaintiff and the defendant claimed title under the provisions of the act of congress, passed 3d March 1803, entitled "an act regulating the grants of land, and providing for the disposal of the lands of the United States, south of the state of Tennessee;" and the decision of the supreme court

of the state of Mississippi, was, upon the construction given to that act, by the commissioners acting under its authority: this is a case which draws into question the construction of an act of congress, and the supreme court of the United States has jurisdiction, on a writ of error, by which the decision of the court of the state of Mississippi is brought up for revision, under the 25th section of the judiciary act of 1789. *Ross* v. *Barland* *655

LACHES.

See OFFICIAL BONDS, 4: DOX *v.* POSTMASTER-GENERAL, 318.

LANDS AND LAND TITLES.

1. In order to bring himself within the protection of the act of cession by the state of Georgia to the United States, the party must show that he was "actually settled" on the land, on the 27th of October 1795, the period mentioned in the said act of cession. *Hickie* v. *Starke*.....*94
2. It seems, that a settlement made on the land by another person, who cultivated it for the proprietor, would be sufficient to constitute "an actual settlement," within the meaning of the law; though the proprietor should not reside, in person, on the estate, or within the territory .....*Id.*
3. Construction of the act of congress, passed March 2d, 1807, entitled "an act to extend the time for location Virginia military warrants, for returning surveys thereon to the office of the secretary of the department of war, and appropriating lands for the use of schools, in the Virginia military reservation, in lieu of those heretofore appropriated." *Jackson* v. *Clark*.....*628
4. The reservation made by the law of Virginia of 1783, ceding to congress the territory north-west of the river Ohio, is not a reservation of the whole tract of country between the rivers Scioto and Little Miami; it is a reservation of only so much of it as may be necessary to make up the deficiency of good lands, in the country set apart for the officers and soldiers of the Virginia line, on the continental establishment, on the south-east side of the Ohio. The residue of the lands are ceded to the United States, as a common fund for those states, who were, or might become members of the Union, to be disposed of for that purpose.....*Id.*
5. Although the military rights constituted the primary claim upon the trust, that claim was, according to the intention of the parties, so to be satisfied, as still to keep in view the interests of the Union, which were also a vital object of the trust; this was only to be effected, by prescribing the time in which the lands to be appropriated by these claimants, should be separated from the general mass so as to enable the government to apply the residue to the general purpose of the trust.....*Id.*
6. If the right existed in congress to prescribe a time within which military warrants should be located, the right to annex conditions to its extension, followed, as a necessary consequence.....*Id.*
7. If it be conceded, that the proviso in the act of 2d March 1807, was not intended for the protection of surveys which were in themselves absolutely void; it must be admitted, that it was intended to protect those which were defective, and which might be avoided for irregularitiy; if this effect be denied to the proviso, it becomes, itself, a nullity... *Id.*
8. Lands surveyed are, under the law, as completely withdrawn from the common mass, as lands patented. It cannot be said, that the prohibition, that "no location shall be made on tracts of land for which patents had previously been issued, or which had been previously surveyed," was intended only for valid and regular surveys; they did not require legislative aid. The clause was introduced for the protection of defective entries and surveys, which might be defeated by entries made in quiet times .....*Id.*
9. Under the act of congress of March 3d, 1803, entitled "an act regulating the grants of land, and providing for the disposal of the lands of the United States, south of the state of Tennessee," such lands only were authorized to be offered for sale, as had not been appropriated by the previous sections of the law, and certificates granted by the commissioners in pursuance thereof; a right, therefore, to a particular tract of land, derived from a donation certificate, given under that law, is superior to the title of any one who purchased the same land, at the public sale, unless there be some fatal infirmity in the certificate, which renders it void. *Ross* v. *Barland* *655
10. The act of congress requires no precise form for the donation certificate; it is sufficient, if proofs be exhibited to the court of commissioners, to satisfy them of the facts entitling the party to the certificate; it is sufficient, if the consideration, to wit, the occupancy, and the quantity granted, appears; nothing more is necessary to certify to the government the party's right, or to enable him, after it is surveyed by the proper officer, to obtain a patent.....*Id.*
11. The second section of the act of congress of

March 3d, 1803, was intended to confer a bounty on a numerous class of individuals, and in construing the ambiguous words of the section, it is the duty of the court to adopt that construction which will best effect the liberal intentions of the legislature..... *Id.*

12. The time when the territory over which this law operated was evacuated by the Spanish troops, was very important; as the law was intended to provide for those who were actually, at that time, inhabitants of, and cultivated the soil within it; but whether it was in 1797 or 1798, was comparatively unimportant. The decision of the commissioners upon the period when the evacuation took place, is sufficient; and the courts are disposed to adopt the construction of the act, given by the commissioners west of Pearl river, that the evacuation took place on the 30th March 1798; by which persons coming within the objects of the section, were entitled to donation certificates..... *Id.*
13. Congress have treated as erroneous the construction given to the law by the commissioners to settle claims to land east of Pearl river, who have decided, that only those who were settled on the lands within the territory, in the year 1797, were entitled to donation certificates, and who had granted to others pre emption certificates..... *Id.*
14. The commissioners appointed under the act of congress relative to claims to lands of the United States south of the state of Tennessee, were authorized to hear evidence as to the time of the actual evacuation of the territory by the Spanish troops; and to decide upon the fact; the law gave them power to hear and decide all matters respecting such claims, and to determine thereon, according to justice and equity; and declared their deliberations shall be final. The court are bound to presume that every fact necessary to warrant the certificate, in the terms of it, was proved before the commissioners; and that, consequently, it was shown to them, that the final evacuation of the territory by the Spanish troops took place on the 30th of March 1798..... *Id.*

LENGTH OF TIME.

See STATUTE OF LIMITATIONS.

LIEN.

1. Mortgages may as well be given to secure future advances, and contingent debts, as those which are certain and due; the only question that properly arises in such cases, is the *bona fides* of the transaction. *Conard* v. *Atlantic Insurance Co*..... *386
2. The case of Thelusson *v.* Smith, 2 Wheat. 396, turned upon its own particular circumstances; and it establishes no such proposition, as that a specific and perfected lien can be displaced by the mere priority of the United States..... *Id.*
3. It is not understood, that a general lien by judgment, on lands, constitutes *per se* a property or right in the land itself; it only confers a right to levy on the same, to the exclusion of other adverse interests, subsequent to the judgment; and when the levy is actually made on the same, the title of the creditor relates back to the time of the judgment, so as to cut out intermediate incumbrances; but subject to this, the debtor has full power to sell or otherwise dispose of the land..... *Id.*

LIMITATION.

See STATUTE OF LIMITATIONS.

MANDAMUS.

1. The court refused to issue a *mandamus* to the circuit court for the county of Washington, commanding that court to strike off a plea which the court had permitted the defendant to put in, and to compel the defendant to enter another plea, which the plaintiffs' counsel deemed the proper plea, under the provisions of an act of the legislature of Maryland, upon which the proceedings were founded, incorporating the Bank of Columbia. *Bank of Columbia* v. *Sweeny*..... *567

MARRIAGE.

1. By the law of Maryland, a *feme covert*, who has been abandoned by her husband, is not permitted to marry a second time, until her husband shall have been absent seven years, and shall not have been heard of during that time. *Rhea* v. *Rhenner*..... *105

MASTER OF A VESSEL.

See INSURANCE, 5.

MECHANICS' BANK OF ALEXANDRIA.

1. The provisions in the acts of congress, incorporating the "Mechanics' Bank of Alexandria," which requires that the capital stock of the bank shall consist of 50,000 shares of ten dollars each, is not a condition precedent; and the bank went legally into operation, with an actual capital less than that number

of shares. *Minor* v. *Mechanics' Bank of Alexandria* *46
2. Even if fraud had existed in the original subscription of this stock of the bank, it would be extremely difficult to maintain, that such a fraud, which was private between the origininal subscribers to the stock and the commissioners, could be set up to the injury of subsequent purchasers of the stock, who became *bonâ fide* holders of the same, without participation in, or notice thereof.... *Id.*
3. It is not a correct construction of the 3d and 21st sections of the act of congress, incorporating the Mechanics' Bank of Alexandria, that the stock of the bank shall be deemed to belong to the persons in whose names it stands upon the books of the bank, and that the bank is not bound to recognise the interests of any *cestui que trust*, and may refuse to permit the stock to be transferred, whilst the nominal holder is indebted to the bank. *Mechanics' Bank of Alexandria* v. *Seton* *299

MISTAKE.

See EQUITY, 6, 8.

MORTGAGE.

1. It is true, that in discussions, in courts of equity, a mortgage is sometimes called a lien for a debt; and so it certainly is, and something more, it is a transfer of the property itself, as security for the debt; this must be addmitted to be true at law, and it is equally true in equity, for in this respect equity follows the law; the estate is considered as a trust, and according to the intention of the parties, as a qualified estate and security; where the debt is discharged, there is a resulting trust for the mortgagor. It is, therefore, only in a loose and general sense, that it is sometimes called a lien; and then only by way of contrast, to an estate absolute and indefeasible. *Conard* v. *Atlantic Insurance Co*.... ..... *386

NEW TRIAL.

1. An application for a new trial, on motion, after verdict, addresses itself to the sound discretion of the court, and if, upon the whole case, the verdict is substantially right, no new trial will be granted, although there may have been some mistakes committed on the trial; the application is not a matter of absolute right, but rests in the judgment of the court, and is to be granted only in furtherance of justice. On a writ of error, bringing the proceedings on the trial, by bill of exception, to the cognisance of the appellate court, the directions of the court below must then stand or fall, upon their own intrinsic propriety, as matters of law. *McLanahan* v. *Universal Insurance Co* *170

NOLLE PROSEQUI.

1. According to modern decisions, a *nolle prosequi* does not a amount to a *retraxit*, but simply to an agreement not to proceed further in that suit, as to the particular person, or cause of action, to which it was applied. *Minor* v. *Mechanics' Bank of Alexandria*.....*46
2. In an action on a joint and several bond, some of parties, sureties, severed in their pleadings from the principal, and a trial and verdict were had against them; afterwards, the principal was called upon to plead, and he did so; judgment was then entered against the sureties, and a *nolle prosequi* entered against the principal; to this judgment, or the proceedings, no exception was taken in the court below, nor was a new trial asked by the sureties; the court *held*, that there is no decision exactly in point to the case; that there is no distinction between the entry of a *nolle prosequi*, before, and the entry after judgment, as applicable to this case; the decisions of the courts of the United States, upon this proceeding, have been on the ground that the question is matter of practice and convenience..... *Id.*
3. When the defendants sever in their pleading, a *nolle prosequi* ought to be allowed against one defendant; it is a practice which violates no rules of pleading, and will subserve the public convenience. In the administration of justice, matters of form, not absolutely subjected to authority, may well yield to the substantial purposes of justice.....*Id.*

NONSUIT.

1. The courts of the United States have no authority to order a peremptory nonsuit, against the will of the plaintiff, on the trial of a cause before a jury. The plaintiff may agree to a nonsuit, but if he do not so choose, the court cannot compel him to submit to it. *Elmore* v. *Grymes* *471
2. A nonsuit may not be ordered by the court, in any case, without the consent and acquiescence of the plaintiff. *De Wolf* v. *Rabaud*..... ....*476

OFFICIAL BOND.

1. The condition of an official bond that the officer who gives it shall "well and truly"

execute the duties of his office, includes not only honesty, but reasonable skill and diligence; if the duties are performed negligently and unskilfully; if they are violated from want of capacity or want of care; they can never be said to have been "well and truly executed." *Minor* v. *Mechanics' Bank of Alexandria* *46

2. No act or vote of the board of directors of a bank, in violation of their own duties, and in fraud of the rights and interests of the stockholders, will justify the cashier in acts which are in violation of the stipulation in his official bond "well and truly" to execute the duties of his office; acts done by a cashier, under the authority of such a vote, or of a usage permitted by the directors, in violation of the trust assumed by them, are on the responsibility of the cashier and of his sureties .....*Id.*

3. The official bond of a cashier must be construed to cover all defaults in duty, which are annexed to the office, from time to time, by those who are authorized to control the affairs of the bank, and the sureties in the bond are presumed to enter into the contract, with reference to the rights and authorities of the president and directors, under the charter and by-laws .....*Id.*

4. The claim of the United States, upon an official bond, and upon all parties thereto, is not released by the *laches* of the officer, to whom the assertion of this claim is intrusted by law; such *laches* has no effect whatsoever on the right of the United States, as well against the sureties as the principal in the bond. *Dox* v. *Postmaster-General*....*318

PAROL EVIDENCE.

1. The court held, that parol evidence was admissible to show an agreement relative to the place where payment of a note was to be demanded; although such agreement did not appear on the face of the note. Such an agreement is a circumstance extrinsic to the contract made by the note, and its proof, by parol, is regular. *Brent's Executors* v. *Bank of the Metropolis* *89

PARTIES.

1. The affidavit of a party to the cause, of the loss or destruction of an original paper, offered in order to introduce secondary evidence of the contents thereof, is proper. If such affidavit could not be received of the loss of a written contract, the contents of which are well known to others, or a copy of which can be proved, a party might be completely deprived of his rights, at least, in a court of law. *Tayloe* v. *Riggs*.....*591

2. It is a sound general rule, that a party cannot be a witness in his own cause; but many collateral questions arise in the process of a cause, to which the rule does not apply; questions which do not involve the matter in controversy, but matter which is auxiliary to the trial, and which facilitates the preparation for it, often depends on the oath of the party. An affidavit of the materiality of a witness, for the purpose of obtaining a continuance, or a commission to take depositions, or an affidavit of his inability to attend, is usually made by the party, and received without objection; on incidental questions which do not affect the issue to be tried by the jury, the affidavit of the party is received .....*Id.*

See CHANCERY PRACTICE, 3, 9, 12, 13.

PARTNER AND PARTNERSHIP.

1. One partner, during the continuance of the partnership, cannot bind the other partner to a submission of the interests of both, to arbitration; but he may bind himself, so as submit his own interests to such decision. *Karthaus* v. *Ferrer*.....*222

See PLEAS AND PLEADINGS, 14.

PAYMENT.

1. When no specific time for the payment of money is fixed in a contract, by which the same is to be paid by one party to the other, in judgment of law, the same is payable on demand. *Bank of Columbia* v. *Hagner*.*455

PEDIGREE.

1. A letter from a deceased member of a family, stating the pedigree of the family, and sworn by the wife, to have been written by her husband, who also testified, in her deposition, that the facts stated in the letter had been frequently mentioned by her husband, in his lifetime, is legal evidence; as is also the deposition of the witness, on a question of pedigree. *Elliott* v. *Peirsol*.....*328

2. The rule of evidence, that in questions of pedigree, the declarations of aged and deceased members of the family, may be proved, and given in evidence, has not been controverted.....*Id.*

3. In a case where a controversy had arisen, or was expected to arise, between parties, concerning the validity of a deed, against which one of the parties claimed, but no contro-

versy was then expected to arise about the heirship; a letter then written, stating the pedigree of the claimants, was not considered as excluded, by the rule of law, which declares, that declarations relating to pedigree, made *post litem motam*, cannot be given in evidence ..... *Id.*

PLEAS AND PLEADINGS.

1. Surplusage in pleading, does not, in any case, vitiate, after verdict. *Carroll* v. *Peake*. *18
2. In a declaration upon an agreement, by way of lease, by which the lessor stipulated to let a farm, from the first of January 1820, to remove the former tenant, and that the lessor should have the tenancy and occupation of the farm from that day, free from all hindrance; the assignment of breaches was, that, although specially requested, on the said 1st of January, the defendant refused and neglected to turn out the former tenant, who then was, or had been, in the possession and occupancy of the land, and to deliver possession thereof to the plaintiff: this assignment is sufficient ..... *Id.*
3. It is sufficient, that the averment should state the plaintiff's readiness and offer, and his request, on the first day of January, generally, and not at the last convenient hour of that day; and if an averment of a personal demand be made, it need not have been on the land ..... *Id.*
4. The strict doctrines relative to averments in pleading, have been applied to special pleas in bar, of tender, and some others of a peculiar character, and depending upon their own particular reasons ..... *Id.*
5. Declarations containing general averments readiness and request have been held ufficient, especially, after verdict, unless in very peculiar cases ..... *Id.*
6. The law requires every issue to be founded upon some certain point, that the parties may come prepared with their evidence, and not be taken, by surprise, and the jury may not be misled by the introduction of various matters. *Minor* v. *Mechanics' Bank of Alexandria* *46
7. What defects in pleading are, and are not, cured by verdict ..... *Id.*
8. On a joint and several bond, the plaintiff may sue one of all of the obligors; but, in strictness of law, he cannot sue an intermediate number; he must sue all or one; but if such error be not taken advantage of by plea in abatement, it is waived, by pleading to the merits ..... *Id.*
9. Where it was omitted to allege in the declaration on a promissory note, a demand of payment on the person of the maker, but it averred a demand at the bank, "where the note was negotiable," such averment in the declaration, could not be true, unless there was an agreement between the parties, that the demand should be made there; and the averment must have been proved at the trial, or the plaintiff could not have obtained a verdict and judgment; and after a verdict, the judgment will be sustained. *Brent's Executors* v. *Bank of the Metropolis*.... *89
10. After the filing of a new count to a declaration, the defendant, who to the former counts has pleaded the general issue, or any particular plea, may withdraw the same, and plead anew, either the general issue, or any further or other pleas, which his case may require; but he may, if he pleases, abide by his plea already pleaded, and waive his right of pleading *de novo*. The failure to plead, and going to trial without objection, are held to be a waiver of his right to plead, and an election to abide by his plea; and if it, in terms, purport to go to the whole action, it is deemed sufficient to cover the whole declaration; and puts the plaintiff to the proof of his case, on the new, as well as on the old old counts. *Wright* v. *Lessee of Hollingsworth* *165
11. Where, upon a submission by one partner of all matters in controversy between the partnership and the person entering into the agreement of reference, an award was made, directing the payment of money; in an action on the bond to abide by the award, the breach assigned was, that the partner who agreed to the reference did not pay, &c.; this is a sufficient assignment of a breach, as he only who agreed to the reference was bound to pay. *Karthaus* v. *Ferrer* *222
12. The principle is, that a contract made by copartners is several as well as joint, and the *assumpsit* is made by all and by each; it is obligatory on all, and on each of the partners. If, therefore, the defendant fail to avail himself of the variance in abatement, when the form of his plea obliges him to give the plaintiff a proper action; the policy of the law does not permit him to avail himself of it, at the time of trial. *Barry* v. *Foyles*. *311
13. The declaration in an action against one partner only, never gives notice of the claim being on a partnership transaction; the proceeding is always as if the party sued was the sole contracting party; if the declaration were to show a partnership contract, the judgment against the single partner could not be sustained ..... *Id.*
14. A question of the citizenship of a party to a cause, cannot constitute a part of the issue on the merits; it must be brought forward by a proper plea in abatement, in an earlier

stage of the cause, than the trial on the merits. *De Wolf* v. *Rabaud*..... *476

15. The plaintiff, as administrator of W., had brought a suit in the district court of the United States for the western district of Pennsylvania, and recovered a judgment; and upon this judgment, he instituted a suit in the district court of the United States, of the state of Mississippi, against the defendant in the original suit; the defendant pleaded, that, by the orphans' court of Adams county, in the state of Mississippi, where the defendant resided, he had been appointed the administrator of W., and had continued to act in that capacity: *Held*, that the debt due upon the judgment obtained in Pennsylvania, by the plaintiff, as administrator of W., was due to him in his personal capacity, and it was immaterial, whether the defendant was or was not administrator of W., in the state of Mississippi; that would not, in any manner, affect the rights of the plaintiff; the plea tenders an immaterial issue, and is bad on demurrer. *Biddle* v. *Wilkins*.....*686

16. Where the court in which judgment is rendered, has not jurisdiction over the subject-matter of the suit, or where the judgment upon which suit is brought, is absolutely void, this may be pleaded in bar; or may, in some cases, be given in evidence, under the general issue, in an action brought upon the judgment ..... *Id.*

17. The general rule is, that there can be no averment in pleading against the validity of a record, though there may be against its operation; and it is upon this ground, that no matter of defense can be pleaded in such case, to a suit on a judgment, which existed anterior to the judgment.. ..... *Id.*

18. It has become a settled practice, in declaring in an action upon a judgment, not, as formerly, to set out in the declaration, the whole of the proceedings in the original suit, but only to allege generally, that the plaintiff, by the consideration and judgment of that court, recovered the sum mentioned therein, the original cause of action having passed *in rem judicatam*..... *Id.*

19. In an action upon a judgment recovered in favor of an administrator, the plaintiff is not bound to make a *profert* of the letters of administration; that is not necessary in actions upon such judgments, that the plaintiff name himself as administrator, follows, from his not being bound to make *profert* of the letters of administration; and when he does so name himself, it may be rejected as surplusage .... *Id.*

See ATTACHMENT, 1: NOLLE PROSEQUI, 1–3.

POST-OFFICE DEPARTMENT.

1. The act of congress, for regulating the post-office department, does not, in terms, discharge the obligors, in the official bond of a deputy postmaster, from the direct claim of the United States upon them, on the failure of the postmaster-general to commence a suit against the defaulting postmaster, within the time prescribed by law; their liability, therefore, continues; they remain the debtors of the United States; the responsibility of the postmaster-general is superadded to, not substituted for, that of the obligors. *Dox* v. *Postmaster-General* *318

PRACTICE.

1. In a trial of an action of ejectment, in which, according to the provision of the laws of Tennessee, the defendant was held to bail, the declaration stated two demises, one by H. & K., citizens of Pennsylvania; and the other, the demise of B. & G., citizens of Massachusetts; the cause coming on for trial before a jury, the plaintiffs suffered a nonsuit, which was set aside; and the court, on the motion of the plaintiffs, permitted the declaration to be amended, by adding a count on the demise of S., a citizen of Missouri; the parties went to trial without any other pleadings, and the jury found for the plaintiff, upon the third or new count, and a judgment was rendered in his favor: *Held*, to be valid. *Wright* v. *Lessee of Hollingsworth*.... .....*165

2. The allowance and refusal of amendments in the pleadings; the granting and refusing new trials; and most of the other incidental orders, made in the progress of a cause, before trial; are matters so peculiarly addressed to the sound discretion of the courts of original jurisdiction, as to be fit for their decision only, under their own rules and modes of practice; this court has always declined interfering in such cases..... .....*Id.*

3. On a trial upon the merits, it is too late to take exception to the capacity of the plaintiff to sue, this should be done by a plea in abatement, before the trial; and the omission to do so is a waiver of the objection. *Conard* v. *Atlantic Insurance Co*..... *386

4. Where the state of the record does not show a judgment of nonsuit to have been entered, although the bill of exceptions states the fact, the plaintiff may apply for a *certiorari* to bring up a perfect record, or dismiss the writ of error, and proceed *de novo*. *Elmore* v. *Grymes*.....*469

5. The state of Ohio, not having been admitted into the Union until 1802, the act of congress,

passed May 8th, 1792, which is expressly confined in its operations to the day of its passage, in adopting the practice of the state courts into the courts of the United States, could have no operation in that state; but the district court of the United States, established in that state, in 1803, was vested with all the powers and jurisdiction of the district court of Kentucky, which exercised full circuit court jurisdiction, with power to create a practice for its own government. The district court of Ohio did not create a system for itself, but finding one established in the state, in the true spirit of the policy pursued by the United States, proceeded to administer justice according to the practice of the state courts, and by a single rule, adopted the state system of practice. When, in 1807, the seventh circuit was established, the judge assigned to that circuit, found the practice of the state adopted, in fact, into the circuit court of the United States, and the same has since, so far as it was found practicable and convenient, by a uniform understanding, been pursued, without any positive rule upon the subject. *Fullerton* v. *Bank of the United States*.....*604

6. The act of 18th February 1820, relative to proceedings against parties to promissory notes, was a very wise and benevolent law, and its salutary effects produced its immediate adoption into the practice of the courts of the United States, and suits have in many instances been prosecuted under it.....*Id.*
7. It will not be contended, that the practice of a court can only by sustained by written rules, nor that a party pursuing a form or mode of proceeding, sanctioned by the most solemn acts of the court, through a course of years, is to be surprised and turned out of court upon a ground which has no bearing upon the merits. Written rules are unquestionably to be preferred, because of their certainty; but there can be no want of certainty, where long acquiescence has established it to be the law of the court, that the state practice shall be their practice, so far as they have the means of carrying it into effect, or until deviated from by positive rules of their own making.....*Id.*
8. Although the act of legislature of Ohio, regulating the mode of proceeding in actions on promissory notes, was passed after the making of the note upon which the action was brought, yet the circuit court of the United States for the district of Ohio, having incorporated the action under that statute, with all its incidents, into his course of practice, and having full power by law to adopt it, there does not appear any legal objection to its doing so, in the prosecution of the system under which it has always acted.....*Id.*
9. Where the record from the court below contained the whole proceedings in the case, and exhibited all the matters either party required for a final disposition of the case, and the counsel for both the appellant and the appellees were willing to submit, upon argument, the whole case to the final decision of the court, but it appeared, that the circuit court of Ohio had not decided any question, but that which had been raised upon the jurisdiction of the court; the counsel were directed by this court to argue the point of jurisdiction only. *McDonald* v. *Smalley*.*620

See CHANCERY PRACTICE.

PRESIDENT OF THE UNITED STATES.

See ARMY OF THE UNITED STATES, 2, 3.

PRINCIPAL AND AGENT.

1. The officers of a bank are held out to the public, as having authority to act according to the general usage, practice and course of their business; and their acts, within the scope of such usage, practice and course of business, would, in general, bind the bank in favor of third persons, possessing no other knowledge. *Minor* v. *Mechanics' Bank of Alexandria*.....*46

PRIORITY OF THE UNITED STATES.

1. What is the nature and effect of the priority of the United States, under the statute of 1799, ch. 128, § 65. *Conard* v. *Atlantic Insurance Co*.....*386
2. It is obvious, that the latter clause of the 65th section of the act of 1799, is merely an explanation of the term "insolvency" used in the first clause, and embraces three classes of cases, all of which relate to living debtors; the case of deceased debtors, stands wholly upon the alternative, in the former part of the enactment.....*Id.*
3. Insolvency, in the sense of the statute, relates to such a general divestment of property, as would, in fact, be equivalent to insolvency in its technical sense; it supposes, that all the debtor's property has passed from him. This was the language of the decision in the case of the United States *v.* Hooe, 3 Cranch 73; and it was consequently held, that an assignment of part of the debtor's property, did not fall within the provision of the statute.....*Id.*
4. Mere inability of the debtor to pay all his debts, is not an insolvency, within the statute; but it must be manifested in one of the three

modes pointed out in the explanatory clause of the section..... *Id.*
5. The priority, as limited and established in favor of the United States, is not a right which supersedes and overrules the assignment of the debtor, as to any property which the United States may afterward elect to take in execution, so as to prevent its passing, by virtue of such assignment, to the assignees; but it is a mere right of prior payment out of the general funds of the debtor, in the hands of the assignees; and the assignees are rendered personally liable, if they omit to discharge the debt due to the United States..... *Id.*
6. It is true, that in discussions in courts of equity, a mortgage is sometimes called a lien for a debt; and so it certainly is, and something more; it is a transfer of the property itself, as security for the debt; this must be admitted to be true at law, and it is equally true in equity; for in this respect equity follows the law; the estate is considered as a trust, and according to the intention of the parties, as a qualified estate and security; when the debt is discharged, there is a resulting trust for the mortgagor. It is, therefore, only in a loose and general sense, that it is sometimes called a lien; and then only by way of contrast, to an estate absolute and indefeasible..... *Id.*
7. It has yet never been decided by this court, that the priorty of the United States will divest a specific lien, attached to anything, whether it be accompanied by possession or not..... *Id.*
8. The case of Thelusson *v.* Smith, 2 Wheat. 396, turned upon its own particular circumstances, and did not establish any principles different from those which are recognised in this case; and it establishes no such proposition, as that a specific and perfected lien can be displaced by the mere priority of the United States..... *Id.*
9. It is not understood, that a general lien, by judgment, on lands, constitutes *per se* a property or right in the land itself; it only confers a right to levy on the same, to the exclusion of other adverse interests, subsequent to the judgment; and when the levy is actually made on the same, the title of the creditor relates back to the time of the judgment, so as to cut out intermediate incumbrances; but subject to this, the debtor has full power to sell or or otherwise dispose of the land..... *Id.*

PROMISSORY NOTE.

1. In an action against the indorser of a promissory note, made "negotiable in the Bank of the Metropolis," the declaration averred a demand of the same, at that bank; no other notice of non-payment of the note, was sent to the indorser, but that left for him at the Bank of the Metropolis; and it was proved, that there was an agreement, by parol, with the indorser, as to other notes discounted previously, by the bank, for his accommodation, that payment, and demand of payment, should be made at the bank, the indorser residing a considerable distance from the bank: *Held*, to be sufficient. *Brent's Executors* v. *Bank of the Metropolis*..... .....*89
2. The indorser of such a note is himself bound by the contract made by the maker, and by the established and known usage of the bank..... *Id.*
3. A promissory note was made at Georgetown, payable at the Bank of Columbia, in that town; the defendant, the indorser of the note, living in the county of Alexandria within the district of Columbia, and having what was alleged to be a place of business in the city of Washington; and the notice of the non-payment of the note, inclosed in a letter and subscribed with his name, was put into the post-office at Georgetown, addressed to him at that place: *Held*, that this notice was sufficient. *Bank of Columbia* v. *Lawrence*..... .....*578
4. In cases where the party entitled to notice resides in the country, unless notice sent by the mail be sufficient, a special messenger may be employed, for the purpose of sending it, but this case is not one which required such a duty..... *Id.*
5. If the defendant had a place of business in the city of Washington, and the notice served there would be good, yet it by no means follows, that service at his place of residence in another place, would not be equally good; parties may be, and frequently are, so situated that notice may well be given at either of several places..... *Id.*
6. That is not properly a place of business, in the commercial understanding of the term, which has no public notoriety as such, no open or public business carried on at it by the party, but only occasional employment by him there, two or three times a week, in a house occupied by another person, the party only engaged in settling up his old business..... *Id.*
7. The general rule is, that the party whose duty it is to give notice of the dishonor of a bill or note, is bound to use due diligence in communicating the same; but it is not required of him to see that the notice is brought home to the party; he may employ the usual and ordinary modes of conveyance; and whether the notice reaches the party or

not, the holder has done all that the law requires of him..... *Id.*
8. It seems to be well settled, that when the facts are ascertained and undisputed, what shall constitute due diligence is a question of law..... *Id.*
9. The rules relative to diligence ought to be reasonable, and founded in general convenience, and with a view to clog, as little as possible, consistently with the safety of the parties, the circulation of paper of this description..... *Id.*
10. When a person has a dwelling-house and a counting-room in the same city or town, a notice sent to either place is sufficient; if parties live in different post-towns, notice through the post-office is sufficient. Notice to a party living at another place than the holder, sent by mail to the nearest post-office, is good, under common circumstances, and in such cases, where notice is sent by mail, it is distance alone, or the usual course of receiving letters, which must determine the sufficiency of the notice..... *Id.*
11. Some countenance has lately been given in England, to the practice of sending a notice by a special messenger, in extraordinary cases, by allowing the holder to recover of the indorser the expenses of serving the notice in this manner; the holder is not bound to use the mail for the purpose of sending the notice; he *may* employ a special messenger, if he pleases, but it has not been decided that he *must;* to compel the holder to the expense of a special messenger would be unreasonable..... *Id.*
12. Modern decisions go to establish, that if a note be at the place where it is payable, on the day it falls due, the *onus* of proving payment falls upon the parties who are liable to pay it; and the instructions in the circuit court, in this case, were more favorable to the parties to the note, where the court said, upon the sufficiency of the demand, that on an article or a note made payable at a particular bank, it is sufficient to show that the note had been discounted, and become the property of the bank, and that it was in the bank, and not paid when at maturity. *Fullerton* v. *Bank of the United States*..*604

RECORDING OF DEEDS.

1. The registry act of Ohio directs that all deeds made within the state, shall be recorded within six months from the time of the actual execution thereof, and declares, that if any such deed shall not be recorded in the county where the land lies, within the limits allowed by the law, "the same shall be deemed fraudulent and void, against any subsequent purchaser, for a valuable consideration, without notice of such deed." *Steele's Lessee* v. *Spencer*..... .....*552
2. In the construction of the registry act of Ohio, the term "purchasers," is usually taken in its limited legal sense; it means a complete purchaser; or, in other words, a purchaser clothed with a legal title..... *Id.*
3. It is not necessary, that a deed made to a subsequent *bonâ fide* purchaser, without notice, shall be recorded, to give it operation against a prior unrecorded deed, as by the provisions of the registry acts, the prior deed is declared, in itself, absolutely void, as against such purchaser..... *Id.*
4. A decree of the supreme court of Ohio ordered that the patentee of a certain tract of land, should, within six months, make a deed &c., with covenants of warranty, conveying a portion of the land held under a patent, to the complainants in that suit, and on the failure of A. to make the said deed, &c., "that then and in that case, the complainant shall hold, possess and enjoy the said portion of land, in as full and ample a manner, as if the same had been conveyed to him:" The decree of the supreme court of Ohio, by which a conveyance of land is directed to be made, the decree being according to the laws of Ohio, vested in those to whom the deed was ordered to be made, such a legal title to the land to have been conveyed by the deed, as would have been vested by a deed of equal date; and the registry act of Ohio applies as well to a title under such a decree, as it would do, if the party held under a *bonâ fide* deed of the same date with the patent of the land; and the decree gives a legal title as ample as a deed..... *Id.*
5. The provisions of the laws of Kentucky, relative to the acknowledgment of deeds for the purpose of recording the same. *Elliott* v. *Piersol*..... ..*328

See DEEDS, 2, 5–9.

RELEASE.

1. At common law, the release of a debtor whose person is in execution, is a release of the judgment itself; the law will not permit proceedings by a creditor, at the same time, against the person and estate of his debtor, and where an election has been made to take the person, it presumes satisfaction, if the person be voluntarily released. *United States* v. *Stansbury*..... ..*573

RESPONDENTIA.

1. It is not necessary, that a *respondentia* loan should be made, before the departure of the

ship on the voyage; nor that the money loaned should be employed in the outfit of a vessel, or invested in the goods on which the risk is run. *Conard* v. *Atlantic Insurance Co.**386

2. It matters not at what time the loan is made nor upon what goods the risk is taken; if the risk of the voyage be substantially and really taken, if the transaction be not a device to cover usury, gaming or fraud; if the advance be in good faith, for a maritime premium; it is no objection to it, that it was made after the voyage was commenced, nor that the money was appropriated to purposes wholly unconnected with the voyage..... *Id.*
3. The lender on *respondentia* is not presumed to lend on the faith of any particular appropriation of the money; and if it were otherwise, his security could not be avoided by any misapplication of the fund, where the risk was *bonâ fide* run, upon other goods, and it was not a mere contract of wager and hazard .... *Id.*
4. It seems, that the common and usual form of a *respondentia* bond is that which was used in this case..... *Id.*

SPECIFIC PERFORMANCE.

See CHANCERY PRACTICE, 11: BARRY *v.* COOMBE, 640.

STATE LAWS.

1. Under the law of Virginia, a confession of judgment by the defendant, is a release of errors. *Mandeville* v. *Holey*.....*136
2. The act of the legislature of Maryland, passed 19th December 1791, entitled "an act concerning the territory of Columbia and the city of Washington," which by the 6th section, provides for the holding of lands by "foreigners," is an enabling act, and applies to those only who could not take lands without the provisions of that law; it enables a "foreigner" take in the same manner as if he were a citizen. *Spratt* v. *Spratt*....*343
3. A foreigner who becomes a citizen, is no longer a foreigner, within the view of the act; thus, after-purchased lands vest in him as a citizen, not by virtue of the act of the legislature of Maryland, but because of his acquiring the rights of citizenship.....*Id.*
4. Lands in the county of Washington, and district of Columbia, purchased by a foreigner, before naturalization, were held by him under the laws of Maryland, and might be transmitted to the relations of the purchaser, who were foreigners; the capacity so to transmit those lands, is given absolutely, by this act, and is not affected by his becoming a citizen; but they pass to his heirs and relations, precisely as if he had remained a foreigner .....*Id.*
5. The nature of limitations, in Kentucky, is substantially the same with the statute of 21 James II., c. 16, with the exception, that it substitutes the term of five years instead of six; the English decisions have, therefore, been resorted to, in this case, in the construction of the statute of Kentucky, and are entitled to great consideration; they cannot be considered as conclusive, upon the construction of a statute passed by a state, upon a like subject; for this belongs to the local state tribunals, whose rules of interpretation must be presumed to be founded upon a more just and accurate view of their own jurisprudence. *Bell* v. *Morrison* *351
6. If the doctrines of the Kentucky courts, in the construction of a statute of that state, are irreconcilable with the English decisions, upon a statute in similar terms, this court, in conformity with its general practice, will follow the local law, and administer the same justice which the state court would administer between the same parties .....*Id.*
7. The decisions in the courts of New York on the construction of its own statute of frauds, and the extent of the rules deduced from it, present to this court a guide in its decisions upon the construction of their statute. *De Wolf* v. *Rabaud*.....*476
8. In an action of ejectment, to recover land in Kentucky, the law of real estate in Kentucky is the law of this court, in deciding the rights of the parties. *Davis* v. *Mason* *503
9. Under the law of the state of Kentucky, and the decisions of their courts upon it, a will with two witnesses is sufficient to pass real estate; and the copy of such a will, duly proved and recorded in another state, is good evidence of the execution of the will.....*Id.*
10. It is a settled rule in Kentucky, that although more than one witness is required to subscribe a will disposing of lands, the evidence of one may be sufficient to prove it .....*Id.*
11. The orphans' court, by the testamentary laws of Maryland, has a general power to administer justice in all matters relative to the affairs of deceased persons, according to law. The commission to be allowed to an executor or administrator, is submitted to the discretion of the court, and is to be not under five per cent., nor exceeding ten per cent. on the amount of the inventory. *Nicholls* v. *Hodges*. *562
12. Under the laws of Virginia, relative to the estates of deceased persons, lands are never appraised. *Archer* v. *Deneale*.....*585
13. Under the law of Virginia, which directs the sheriff holding an execution against the

goods and effects of defendants, to take forthcoming bonds for the property levied upon by the execution, and authorizes execution to issue for the amount of the debt due upon the original execution, after ten days' notice to the obligors in the bond, of the motion for execution, the property levied on not having been re-delivered, according to the condition of the bonds; if the notice given to the obligees, of the plaintiff's intention to proceed, be sufficiently explicit to render mistake impossible, it will be sustained, although the whole of the defendants in the original execution may not be named in the notice. Nice and technical objections to the notice, where every purpose of substantial justice is effected, ought not to be favored. *Alexander* v. *Brown*.....*683

See COURTS OF THE SEVERAL STATES, 1–5: PRACTICE, 5–8.

STATUTE OF FRAUDS.

1. The statute of frauds of New York, is a transcript, on this subject, of the statute 29 Charles II., c. 3; it declares, that no action shall be brought to charge a defendant, on a special promise for the debt, default or miscarriage of another, unless the agreement, or some memorandum or note thereof, be in the writing, and signed by the party, or by some one by him authorized; the words "collateral" or "original" promise, do not occur in the statute; and have been introduced by courts to explain its objects, and expound its true interpretation. *De Wolf* v. *Rabaud*.*476
2. Whether, by the true intent of the statute of frauds, it was to extend to cases where the collateral promise (so called) was a part of the original agreement, and founded on the same consideration, moving at the same time, between the parties; or whether it was confined to cases where there was already a subsisting debt or demand, and the promise was merely founded upon a subsequent and distinct understanding, might, if the point were entirely new, deserve very grave deliberation; but it has been closed within very narrow limits, by the course of the authorities, and seems scarcely open for general examination; at least, in those states where the English authorities have been fully recognised and adopted in practice..... *Id.*
3. If A. agree to advance B. a sum of money, for which B. is to be answerable, but at the same time, it is expressly upon the understanding, that C. will do some act for the security of A., and enter into an agreement with A. for that purpose, it would scarcely seem a case of mere collateral undertaking, but rather a trilateral contract; the contract of B. to repay the money, is not coincident with, nor the same contract with C. to do the act; each is an original promise; though the one may be deemed subsidiary or secondary to the other. The original consideration flows from A., not solely upon the promise of either B. or C., but upon the promise of both, *diverso intuitu*, and each becomes liable to A., not upon a joint, but a several original undertaking; each is a direct original promise, founded upon the same consideration..... *Id.*
4. The case of Wain *v.* Warlters, 5 East 10, was the first case which settled the point, that it was necessary, in order to escape from the statute of frauds, that the agreement should contain the consideration for the promise as well as the promise itself; if it contain it, it has since been determined, that it is wholly immaterial, whether the consideration be stated in express terms, or by necessary implication. That case had been adopted, to a limited extent, by the courts of New York, into its jurisprudence, as a sound construction of the statute..... ....*Id.*
5. The statute of frauds in Maryland requires written evidence of the contract, or a court cannot decree performance; the words of the statute are, "unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized." *Barry* v. *Coombe*.....*640
6. A note or memorandum in writing of the agreement between parties, is sufficient, under the statute of frauds of Maryland; and in order to obtain specific performance in equity, the note in writing must be sufficient to sustain an action at law; the form is not required, nor the place of signature, provided it be in the handwriting of the party, or his agent, and furnish evidence of a complete and practicable agreement. A court of equity will supply no more than the ordinary incidents to such an agreement, such as the ingredients of a complete transfer, usual covenants, &c..... *Id.*
7. An examination of the cases will show, that courts of equity are not particular, with regard to the direct and immediate purpose for which the written evidence of the contract was created; it is written evidence which the statute requires; and a note or letter, and even, in one case, a letter, the object of which was to annul the contract, on a ground really not unreasonable, was held to bring a case within the provisions of the statute..... *Id.*
8. Where, in an account stated by the parties, in

the handwriting of the defendant, his name being written by him at the head of the account, a balance was acknowledged to be due by him to the complainant in the bill for a specific performance, there was the following credit, "By my purchase of your ½, E. B. wharf and premises, this day agreed upon between us, $7578.63;" it was *held*, to be a sufficient memorandum in writing, under the statute of frauds of Maryland, upon which the court could decree a specific performance of the sale of the estate referred to; other matters appearing in evidence, and by the admissions of the defendant in his answer, to show the particular property designated by "your ½ E. B. wharf and premises."....*Id.*

STATUTE OF LIMITATIONS.

1. The statute of limitations, instead of being viewed in an unfavorable light as an unjust and discreditable defence, should have received such support from courts of justice, as would have made it, what it was intended, emphatically, to be, a statute of repose. It is a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt, from lapse of time; but to afford security against stale demands, after the true state of the transaction may have been forgotten, or be incapable of explanation, by reason of the death or removal of witnesses. *Bell* v. *Morrison*.....*351
2. An exposition of the statute of limitations, which is consistent with its true object and import, is that expressed by this court, in the case of Wetzell *v.* Bussard, 11 Wheat. 309, "an acknowledgment which will revive the original cause of action, must be unqualified and unconditional, it must show, positively, that the debt is due, in whole or in part; if it be connected with the circumstances which in any manner affect the claim, or if it be conditional, it may amount to a new *assumpsit*, for which the old debt is a sufficient consideration; or if it be construed to revive the original debt, that revival is conditional, and the performance of the condition, or a readiness to perform it, must be shown ..... *Id.*
3. If the bar of the statute is sought to be removed, by the proof of a new promise, that promise, as a new cause of action, ought to be proved in a clear and explicit manner, and be, in its terms, unequivocal and determinate; and if any conditions are annexed, they ought to be shown to have been performed .....*Id.*
4. The admission of a party of the existence of an unliquidated account, on which something is due to the plaintiff, but no specific balance is admitted, and no document produced at the time, from which it can be ascertained, what the parties understood the balance to be, would not, by the courts of Kentucky, be held sufficient to take the case out of the statute, and let in the plaintiff to prove *aliunde*, any balance, however large it may be; it is indispensable for the party to prove, by independent evidence, the extend of the balance due to him, before there can arise any promise to pay it as a subsisting debt ..... *Id.*
5. The acknowledgment of a debt by one partner, after a dissolution of the co-partnership, is not sufficient to take the case out of the statute, as to the other partners .....*Id.*
6. A dissolution of partnership puts an end to the authority of one partner to bind the other; it operates as a revocation of all power to create new contracts, and the right of partners as such, can extend no further than to settle the partnership concerns already existing, and distribute the remaining funds; and this right may be restrained, by the delegation of this authority to one partner. .....*Id.*
7. After a dissolution of a partnership, no partner can create a cause of action against the other partners, except by a new authority communicated to him for the purpose.....*Id.*
8. When the statute of limitations has once run against a debt, the cause of action against the partnership is gone .....*Id.*

SURETIES.

1. The claim of the United States upon an official bond, and upon all the parties to it, is not released by the *laches* of the officer to whom the assertion of this claim is intrusted; such *laches* has no effect whatsoever on the right of the United States, as well against the sureties, as the principal in the bond. *Dox* v. *Postmaster-General*... .....*318
2. The discharge by the secretary of the treasury, of the principal in a bond to the United States, who is imprisoned under a *ca. sa.* issued against him, and who has assigned all his property for the use of the United States, does not impair or affect the rights of the United States to proceed against sureties for tor the amount due upon the judgment, and unpaid. *United States* v. *Stansbury*...*573

TENANCY BY THE CURTESY.

1. It seems, that the rigid rules of the common law do not require that the husband shall have had actual seisin of the lands of his wife, to entitle himself to a tenancy by cur-

tesy, in waste, or what is sometimes styled "wild lands." *Davis* v. *Mason*.....*503
2. If a right of entry on lands exists, it ought to be sufficient to sustain the tenure acquired by the husband, where no adverse possession exists ..... *Id.*
3. At present, it is fully settled in equity, that the husband shall have curtesy of trust, as well as of legal estates, of an equity of redemption, of a contingent use, or money to be laid out in lands..... *Id.*

TERRITORIES.

1. The constitution of the United States confers absolutely on the government of the Union, the power of making war, and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty. *American Insurance Co.* v. *Canter*..... ...*511
2. The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace; if it be ceded by treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty of cession, or such as its new master shall impose. On such transfer of territory, it has never been held, that the relations of the inhabitants with each other undergo any change; their relations with their former sovereign are dissolved, and new relations are created between them and the government which has acquired their territory; the same act which transfers their country transfers the allegiance of those who remain in it, and the law, which may be denominated political, is necessarily changed; although that which regulates the intercourse and general conduct of individuals, remains in force, until altered by the newly-created power of the state..... *Id.*

See Florida: Jurisdiction.

TRUSTS AND TRUSTEES.

1. Where, by the terms of a deed conveying real estate in trust, to be sold for the benefit of the creditors of the grantor, the trustee is directed to sell the property conveyed, by public auction, the trustee was bound to conform to this mode of sale; this was the test of value, which the grantor thought proper to require; and it was not competent to the trustee to establish any other; although by doing so, he might, in reality, promote the interests of those for whom he acted. *Greenleaf* v. *Queen*.....*138
2. Full notice of a trust draws after it all the consequences of a full declaration of the trust, as to all persons chargeable with such notice. *Mechanics' Bank of Alexandria* v. *Seton*.....*299
3. It is well settled in equity, that all persons coming into possession of trust property, with notice of the trust, shall be considered as trustees; and bound, with respect to that special property, to the execution of the trust..... *Id.*

See Agreement, 2: Chancery Practice, 1–3.

UNITED STATES.

Lien of the United States for priority of payment. See Lien: Priority of Payment.

USAGE.

See Bills of Exchange, 4, 5: Promissory Notes, 1.

USURY.

1. C. & Co. discounted their notes with the F. and M. Bank of Georgetown, at thirty days; and in lieu of money, they stipulated to take the post-notes of the bank, payable at a future day, without interest, while the post-notes were at a discount of one and a half per cent. in the market, at the time of the transaction; such a contract is usurious. The indorsement of a promissory note of a stranger to the transaction, which was passed to the bank as a collateral security for the usurious loan, although the note itself is not tainted with the usury, yet the indorsement is void, and passes no property to the bank, in the note; and the subsequent payment of the original note, for which the security was given, and the repayment of the sum received as usury, will not give legality to the transaction. *Gaither* v. *Farmers' and Mechanics' Bank of Georgetown*.....*37
2. If a note be free from usury in its origin, no subsequent usurious transactions respecting it can affect it with the taint of usury, although an indorser of the note, whose property in it was acquired through a usurious transaction, may not be able to maintain a suit upon it..... *Id.*
3. The act of assembly of Maryland declares "all bonds, contracts and assurances whatever, taken on an usurious contract, to be utterly void;" and the indorsement of a promissory note, for a usurious consideration, is a contract within the statute, and void ..... *Id.*

VENDOR AND VENDEE.

1. In contracts for the sale of land, by which one agrees to purchase, and the other to convey, the undertakings of the respective parties are always dependent, unless a contrary intimation clearly appears. *Bank of Columbia* v. *Hagner*..... *455
2. Although many nice distinctions are to be found in the books, upon the question, whether the covenants or promises of the respective parties to a contract, are to be considered independent or dependent; yet it is evident, the inclinations of courts have strongly favored the latter construction, as being obviously the most just..... *Id.*
3. In such cases, if either vendor or vendee wish to compel the other to fulfil his contract, he must make his part of the agreement precedent, and cannot proceed against the other, without actual performance of the agreement on his part, or a tender and refusal..... *Id.*
4. An averment of performance is always made in the declaration, upon contracts containing dependent undertakings, and that averment must be supported by proof..... *Id.*
5. The time fixed for the performance of a contract is, at law, deemed the essence of the contract, and if the seller be not ready and able to perform his part of the agreement on that day, the purchaser may elect to consider the contract at an end; but equity, which, from its peculiar jurisdiction, is enabled to examine into the cause of delay in completing a purchase, and to ascertain how far the day named was deemed material by the parties, will, in certain cases, carry the agreement into execution, although the time appointed has elapsed..... *Id.*
6. It may be laid down as a rule, that, at law, to entitle the vendor to recover the purchase-money, he must aver in his declaration performance of the contract on his part, or an offer to perform, at the day specified for the performance; and this averment must be sustained by proof; unless the tender has been waived by the purchaser..... *Id.*
7. If, before the period fixed for the delivery of a deed for lands, the vendee has declared he would not receive it, and that he intended to abandon the contract, it may render a tender of the deed, before the institution of a suit, unnecessary; but this rule can never apply, except in cases where the act which is constructed into a waiver, occurs previously to the time for performance..... *Id.*
8. The taking possession of property by the vendee, before conveyance, is a circumstance from which is to be inferred, that he considered the contract closed, but would not deprive him of the right to relinquish the property, if the vendor could not make a title, or neglected to do so. After a relinquishment for such causes, the vendee could sustain an action to recover back the purchase-money, had it been paid..... *Id.*
9. Where the legal title cannot be conveyed to the vendee by the vendor, and the vendee must resort to a court of equity to establish his title, nothwithstanding a conveyance of all the right of a vendor to him, the court will not compel him to pay the purchase-money; it would be compelling him to take a law-suit, instead of the land..... *Id.*

WILLS AND TESTAMENTS.

1. Under the law of the state of Kentucky, and the decisions of their courts upon it, a will with two witnesses is sufficient to pass real estate; and the copy of such a will, duly proved and recorded in another state, is good evidence of the execution of the will. *Davis* v. *Mason*..... *503
2. It is a settled rule, in Kentucky, that although more than one witness is required to subscribe a will disposing of lands, the evidence of one may be sufficient to prove it..... *Id.*
3. Where a legacy, for which suit is instituted, is given jointly to several persons, in different families, and the legatees take equally, the number in neither family being ascertained by the will, all the claimants ought to be brought before the court; the right of each individual depends on the number who are entitled, and this number is a fact which must be inquired into, before the amount to which any one is entitled can be fixed; if this fact were to be examined in every case, it would subject the executors to be harassed by a multiplicity of suits, and if it were to be fixed by the first decree, would not bind persons who were not parties. *Pray* v. *Belt*..... *670
4. Testator in his will said, "whereas, my will is lengthy, and it is possible I may have committed some error or errors, I, therefore, authorize and empower, as fully as I could do myself, if living, a majority of my acting executors, my wife to have a voice as executrix, to decide, in all cases, in case of any dispute or contention; whatever they determine is my intention, shall be final and conclusive, without any resort to a court of justice:" Clauses of this description have always received such judicial construction, as would comport with the reasonable intention of the testator..... *Id.*
5. Even where the forfeiture of a legacy has

been declared to be the penalty of not conforming to the injunction of a will, courts of justice have considered it, if the legacy be not given over, rather as an effort to effect a desired object, by intimidation, than as concluding the rights of the parties. If an unreasonable use be made of such a power, so given in a will; one not foreseen, and which could not be intended by the testator; it has been considered as a case, in which the general power of courts of justice to decide on the rights of parties, ought to be exercised..... *Id.*

6. There cannot be such a construction given to such a clause in a testator's will, as will prevent a party who conceives himself injured by the construction, from submitting his case to a court of justice; a court must decide whether the construction of the will adopted by those who are named is the right construction, or the grossest injustice might be done..... *Id.*