*Doe *ex dem.* William Patterson, Plaintiff in error, *v.* Elisha Winn and others, Defendants in error.[1]

Evidence.—Exemplification of grant.

An exemplification of a grant of land, under the great seal of the state of Georgia, is, *per se*, evidence, without producing or accounting for the non-production of the original; it is record proof, of as high a nature as the original; it is a recognition, in the most solemn form, by the government itself, of the validity of its own grant, under its own common seal; and imports absolute verity, as a matter of record.[2]

The common law is the law of Georgia, and the rules of evidence belonging to it are in force there, unless so far as they have been modified by statute, or controlled by a settled course of judicial decisions and usage. Upon the present question, it does not appear, that Georgia has ever established any rules at variance with the common law; though it is not improbable, that there may have been, from the peculiar organization of her judicial department, some diversity in the application of them, in the different circuits of that state; acting, as they do, independent of each other, and without any common appellate court to supervise their decisions.

There was, in former times, a technical distinction existing on this subject; as evidence, such exemplifications of letters-patent seem to have been generally deemed admissible; but where in pleading, a *profert* was made of the letters-patent, there, upon the principles of pleading, the original, under the great seal, was required to be produced; for a *profert* could not be of any copy or exemplification; it was to cure this difficulty, that the statutes of 3 Edw. VI., c. 4, and 13 Eliz., c. 6, were passed; so too, the statute of 10 Ann., c. 18, makes copies of enrolled deeds of bargain and sale, offered by *profert* in pleading, evidence.

These statutes being passed before the emigration of our ancestors, and being applicable to our situation, and in amendment of the law, constitute a part of our common law.

By the laws of Georgia, all public grants are required to be recorded in the proper state department.

What should be considered proof of the loss of a deed, or other instrument, to authorize the introduction of secondary evidence?

However convenient a rule established by a circuit court, relative to the introduction of secondary proof, might be, to regulate the general practice of the court, it could not control the rights of parties, in matters of evidence admissible by the general principles of law.

Error to the Circuit Court of Georgia. This was an action of ejectment, brought to May term 1820, of the circuit court of the United States for the
*234] district of Georgia, to recover a tract of land, containing *7300 acres, lying in that part of the county of Gwinnett, which was formerly a portion of Franklin county.

On the trial, at Milledgeville, at November term 1829, the plaintiff offered in evidence, the copy of a grant or patent from the state of Georgia, to Basil Jones, for the land in question, duly certified from the original record or register of grants, in the secretary of state's office, and attested under the great seal of the state. To the admissibility of this evidence, the defendants, by their counsel, objected, on the ground, that the said exemplification could not be received, until the original grant or patent was proved to be lost or destroyed, or the non-production thereof otherwise legally explained or accounted for, according to a rule of the court. This objection the circuit court sustained, and rejected the evidence; to which decision, the plaintiff excepted.

The plaintiff then offered: 1. A notice to the defendants, requiring them to produce the original grant or patent for the land. 2. The affidavit of the lessor of the plaintiff, William Patterson, sworn before Theodoric Bland,

---

[1] For a former decision in this case, see 11 Wheat. 380.

[2] S. P. United States *v.* Sutter, 21 How. 175; United States *v.* Vallejo, 1 Black 554–5.

district judge of the United States for the district of Maryland, on the 9th of October 1821, deposing, in substance, that he had not in his possession, power or custody, the said original grant, describing it; and that he knew not where it was; and that he had made diligent search for the same among his papers, and it could not be found. 3. The deposition of Andrew Fleming, stating at length the inquiries he had made for the papers of Thomas Smyth, jr., by whom, as attorney in fact for Basil Jones, this land had been conveyed to William Patterson, and the information he had received of the destruction of these payers. 4. The deposition of Mrs. Anna M. Smyth, stating the pursuits of her late husband, Thomas Smyth, and the facts and circumstances leading to the conclusion that his papers had been destroyed. 5. The plaintiff then called a witness who proved that he had compared the exemplification of the grant or patent aforesaid, with the register of grants in the office of the secretary of state of the state of Georgia, and the book or register of surveys, in the office of the surveyor-general of the said state; and that *the exemplification offered was a true copy from the said register of grants and plats in the said offices respectively. [*235

He further proved, that he had made search for the original grant or patent, in the said offices; and that the same was not there to be found. That he had made application to Mrs. Ann Farrar, the relict of Basil Jones, the grantee, who had since intermarried with Francis Farrar, for the said original grant or patent, if among the papers of her late husband, Basil Jones; and was assured by the said Ann and Francis, that there were no such papers in their possession. That the said witness had made application to Gresham Smyth, the reputed son of Thomas Smyth, jr., for the said original grant, if in his possession; and received for answer, that his father had died, while he was yet young, and that he had no papers of his father's in his possession. The said witness also proved, that he had made diligent search among the papers of George Walker, now and long since deceased, who, it appeared, had once had some of the muniments of title of the lessor of the plaintiff in his possession, or been consulted as counsel; but the said original grant or patent could not there be found. That the witness himself, assisted by the clerk of Richmond superior court, where the power of attorney from Basil Jones to Thomas Smyth, jr., was recorded, searched diligently through all the papers in the office for the said original grant or patent, without success. That the said witness, as agent of William Patterson, caused advertisements to be published, for two months, in two of the gazettes of the state of Georgia, for said grant or patent, as lost, offering a reward for its production, if required, which advertisements were exhibited to the court, and were inserted in the record, at full length. And the said witness further proved, that no information whatever had been received, in answer to the said advertisements, nor any discoveries made in relation to said original grant or patent. He also proved, that he had searched the executive office of Georgia for the said original grant, and had examined the list of grants or patents to which the great seal of the state had *been refused to be annexed; but the said original grant to Basil Jones was not found noted upon the said list, as one of that description. [*236

And thereupon, the said counsel for the plaintiff moved the court to admit the said exemplification of the said patent or grant in evidence, the

loss or destruction of the original having been sufficiently proved; which the said court refused: to which decision, the plaintiff excepted.

The case was argued by *Wilde*, for the plaintiff in error; no counsel appeared for the defendants.

Wilde, for the plaintiff in error, contended: 1. That the exemplification of the patent or grant, under the seal of the state, was, by itself, admissible evidence. 2. That even were it not admissible alone, the proof made created a sufficient presumption of the loss or destruction of the original, to authorize the introduction of the copy.

The law of evidence in Georgia is the common law, except in so far as it is altered by acts of assembly. On this subject, there is no act; nor is there any settled course of judicial decision. From the organization of the judicial department in that state, there can be none. Seven distinct tribunals, each deciding for itself, in the last resort, without any common umpire, in case of disagreement, cannot be expected to exhibit a uniform interpretation of any code, however simple. With respect to rules of court, they are mere regulations for the convenient and orderly transaction of business. They can neither make law, nor repeal it. If the rule is in opposition to the law, it is a nullity, of course. The common-law doctrine is perfectly well settled; the *constat* or *inspeximus* of the king's letters-patent, is as high evidence as the original itself. 1 Phil. Evid. 410; Peake's Evid. 21; *Page's Case*, 5 Co. 53; 1 Saund. 189, in notes; 1 Hardr. 119; *Roberts* v. *Arthur*, 2 Salk. 497; *Hoe* v. *Nelthrope*, 1 Ld. Raym. 154; 3 Salk. 154; 1 Dall. 2, 64; 2 Wash. 280–1; 2 Mass. 358; 12 Vin. Abr. tit. Evidence, Constat, A, b, 125; Ibid. tit. Evidence, Exemplification, 114, A, b, 33, § 1, 5, 8, 16–18.

*237] In Georgia, the original warrant and survey are returned to *the surveyor-general's office, where they are filed, and the survey recorded. The acts of that state prescribed the form of grants. A record of them is ordered to be kept in the secretary of state's office, where the great seal is attached to them; and no grant is allowed to issue, until it is recorded. No distinction exists, in reason or authority, between the patents of the state and the patents of the king. They are of equal dignity, and to be verified in the same manner. It will not be pretended, there is one rule of evidence for grants issued before the revolution, and a different rule for those emanating since.

The most distinguished counsel of that bar, one who was among the profoundest jurists of his country, the greatest ornament of his profession, and most eloquent man of his age, had been consulted, in his lifetime, on this subject. Before the action was brought, his opinion on the point in contest had been obtained. This is its purport: "There can be no doubt, that an exemplification or sworn copy of the registry of the grant, is good evidence, without proving the loss of the original. See 12 Vin. Abr. 97, especially § 8, 39, and page 114, § 2, 5, 16, &c. The distinction always was between *profert* and evidence. When a grant was pleaded, *profert* must have been made of the original; and hence, the statutes mentioned in Vin. Abr. *supra*, but the exemplification or sworn copy from the roll or registry was always evidence at the common law. The statutes, however, were all passed before the colonization of Georgia. In that state, the grant is enrolled, or a *con-*

stat of it preserved, in some public office or offices, as in Maryland ; and what question can it be, whether the book itself, or a copy from it, is evidence ; whether the original be producible, or not ? In Maryland, the office-copy is constantly given in evidence, and always has been, although we have no act of assembly for that purpose, and it was never otherwise in England. The enrollment can answer no sensible purpose, if it does not answer this. The practice of enrolling grants, &c., can have no other object but to furnish sure constant evidence of the titles of the citizen to his lands, or rather of the source of his titles." Opinion of William Pinkney, Esq.

Thus the matter stands upon authority. How is it on the *score of reason ? This is the transcript of a public record, and imports [*238 absolute verity. That which remains in the office, is the true original ; the grant, which goes out into hands of interested parties, may be subject to alteration for fraudulent purposes ; from this, the official record is secure The emanation of the grant is a public and official act. In relation to any such act of the legislature or judicial department, the original document authenticating it, is not produced, but a copy. Nay, in relation to any other official act of the executive authority, the citizen who claims a right under it is not held to produce the original instrument. Why should it be otherwise, in the case of a grant ? If the patent which goes out is to be considered the original, and that which remains in the office, only a copy, then the exemplication is merely the copy of a copy ; and the individual whose grant is destroyed by accident, can obtain from the public achives only the weakest kind of evidence, to aid him in establishing his rights. Again, what is the fact which the patent is introduced to prove ? That the state has divested itself of part of the public domain, in favor of a particular citizen. And will not the solemn acknowledgment of the state, extracted from its own records, and authenticated by its own seal, be deemed sufficient evidence of that fact ?

As to the second point. The exemplication was rejected, not on account of any inherent defect, but because the affidavit of the lessor of the plaintiff was alleged not to be a compliance with the rule of court. Rules of court are made to advance justice ; they are always to be interpreted and applied in subservience to that object. They have not the inflexibility of the law : made by the court, they may be changed by the court ; the judge can relax or enforce them as justice may require. The forms of the shrine are not to be converted into snares for the suitors who approach it. The rule requires of the party seeking to introduce a copy, an affidavit of his belief that the original is lost or destroyed ; but this, evidently, is applicable only to the case where such belief exists. Suppose, he does not believe it to be lost or destroyed ? Suppose, he believes it to be in the hands of the opposite party ? Must he perjure himself, or, *lose his rights ? May [*239 he not give notice to the opposite party to produce the original ; show diligent inquiries after it ; prove circumstances presumptive of its destruction ; and by his own oath, declare that he has it not, that it is not in his custody or power, and that he knows not where it is ? All of which has been done in this case. What room is there to imagine the voluntary suppression of the original, after such an affidavit ? Could he say, it was not in his power, if he had given it to another, or directed that other to give it to a third ? Could he say, he knew not where it was ?

Moreover, this action was commenced in 1820, the affidavit was made in

1821, and the rule was not established until 1823. Before the adoption of the rule, the evidence in this case, independent of the plaintiff's oath, would have been deemed sufficient to admit the secondary proof. The oath is, virtually, in every important particular, a compliance with the *ex post facto* rule. According to the recollection of counsel, it was once so held by the circuit court itself, and in these very cases. The rule of the circuit court is said to be borrowed from those of the state courts. If the rule is borrowed, the interpretation is original. Nothing is hazarded, in saying, that upon the affidavit and evidence offered in this cause, and set forth in the record, no court in the state of Georgia would have refused to admit this copy.

Story, Justice, delivered the opinion of the court.—This case comes before the court by a writ of error to the circuit court for the district of Georgia. The original action was an ejectment, brought by the plaintiff in error, against the defendants ; and at the trial in November term 1829, a bill of exceptions was taken, which raises the only questions which are now before us for consideration.

The bill of exceptions states, that the plaintiff offered in evidence, in support of his title, an exemplification, under the seal of the state of Georgia, of a grant or patent to Basil Jones, of a tract of 7300 acres of land, dated the 24th of May 1787, and registered the 5th of June, of the same year, in the registry of grants in the secretary of state's office. The defendants objected, that the exemplification could not be received, until the original *240] patent was *proved to be lost or destroyed, or the non-production thereof otherwise legally explained or accounted for ; which objection the court sustained, and rejected the evidence. The plaintiff then exhibited a notice, served on the opposite party, to produce the original grant, and also an original power of attorney from Basil Jones to Thomas Smith, jr., dated the 6th of August 1793, to sell and convey (among other tracts) the tract in question. And also offered an affidavit, duly sworn to by the plaintiff, in October 1821, that he had not in his possession, power or custody, the said original grant or power of attorney, and knew not where they were ; and that he had made diligent search among the papers for the said grant and power, and they could not be found. He further offered depositions to prove, that search had been made for the papers of Thomas Smyth, by whom, as attorney in fact of Jones, the land had been conveyed to Patterson, and that no papers could be found. He further proved, that he had made search for the original grant or patent in the office of the secretary of state, and the book or register of surveys in the office of the surveyor-general of Georgia, and that the same could not be there found. And he further proved, by a witness, that the exemplification was a true copy from the register of grants and plats in the said offices. He further proved, that search had been made among the papers of Basil Jones, in the possession of his widow ; and among the papers of George Walker, deceased, who, as counsel for the plaintiff, had once had the muniments of his, the plaintiff's, title in his possession ; and also in the office of the clerk of Richmond superior court, where the power of attorney was recorded ; but without success. He also proved, that he had, by public advertisement, in two gazettes of the state of Georgia, offered a reward for the production of

the said grant or patent, but no discovery had been made; and that he had searched the executive office of Georgia for the same, and had examined the lists of grants or patents, to which the great seal of the state had been refused to be annexed, but the grant to Jones was not found noted upon that list, as one of that description. And the plaintiff then moved the court to admit the said exemplification in evidence, the loss or destruction of the original having been sufficiently proved; which the court refused. The plaintiff excepted to the ruling of the court upon both points.

*The first exception presents the question, whether the exemplification, under the great seal of the state, was, *per se*, evidence, [*241 without producing or accounting for the non-production of the original; and we are of opinion, that it was. The common law is the law of Georgia; and the rules of evidence belonging to it are in force there, unless so far as they have been modified by statute, or controlled by a settled course of judicial decisions and usage. Upon the present question, it does not appear, that Georgia has ever established any rules at variance with the common law; though it is not improbable, that there may have been, from the peculiar organization of her judicial department, some diversity in the application of them, in the different circuits of that state, acting, as they do, independent of each other, and without any common appellate court to supervise their decisions. We think it clear, that by the common law, as held for a long period, an exemplification of a public grant, under the great seal, is admissible in evidence, as being record proof of as high a nature as the original. It is a recognition, in the most solemn form, by the government itself, of the validity of its own grant, under its own seal; and imports absolute verity, as matter of record.

The authorities cited at the bar fully sustain this doctrine. There was, in former times, a technical distinction existing on this subject, which deserves notice. As evidence, such exemplifications of letters-patent seem to have been generally deemed admissible. But where, in pleading, a *profert* was made of the letters-patent, there, upon the principles of pleading, the original, under the great seal, was required to be produced; for a *profert* could not be of any copy or exemplification. It was to cure this difficulty that the statutes of 3 Edw. VI., c. 4, and 13 Eliz., c. 6, were passed, by which, patentees, and all claiming under them, were enabled to make title in pleading, by showing forth an exemplification of the letters-patent, as if the original were pleaded and set forth. These statutes being passed, before the emigration of our ancestors, being applicable to our situation, and in amendment of the law, constitute a part of our common law. A similar effect was given by the statute of 10 Ann., c. 18, to copies of deeds of bargain and sale, enrolled under the statute of Hen. VIII., when offered *by way of *profert* in pleading; and since that period, a copy of the [*242 enrolment of a bargain and sale is held as good evidence as the original itself. 1 Phil. Evid., ch. 5, § 2, p. 208–302; ch. 8, § 2, p. 352–6; 408–11; Bac. Abr. title Evidence, F. p. 610, 644, 646; Com. Dig. Evidence, A, 2; 1 Stark. Evid. § 33, p. 152; 2 Saund. Plead. & Evid. 638; *Page's Case*, 5 Co. 53; 12 Vin. Abr. tit. Evidence, A, b, 25, p. 97; A, b, 33, p. 114; 1 Saund. 189, note 2. Such, then, being the rule of evidence of the common law, in respect to exemplifications, under the great seal, of public grants, the application of it to the case now at bar will be at once perceived;

since, by the laws of Georgia, all public grants are required to be recorded in the proper state department.

The question, presented by the other exception, is, whether under all the circumstances of the case (even supposing the exemplification of the grant had not been admissible in evidence, upon the principles already stated), there was not sufficient proof of the loss of the original, to let in the secondary evidence, by a copy of the grant. It is understood, that the court decided this point wholly upon the ground, that the affidavit of Patterson did not conform to a rule made by the court in December 1823. That rule is in the following words, "whenever a party wishes to introduce the copy of a deed or grant in evidence, the oath of the party, stating his belief of the loss or destruction of the original, and that it is not in his possession, power or custody, shall be indispensable, in aid of such evidence as he may adduce to prove the loss." Patterson's affidavit was made before the making of this rule (in 1821), and the defect in it is, that it does not contain any declaration of his belief as to the loss or destruction of the original.

It might not be important to decide this point, if it were not understood, that the same objection applied to the copy of the power of attorney in the case, as to the copy of the grant. We think, that the affidavit and other circumstances of the case were sufficient to let in the secondary evidence. The grant and power of attorney were of an ancient date; the former being more than forty years old, and the latter but a little short of that
*243] period since the execution. Some presumption *of loss might naturally arise, under such circumstances, from the mere lapse of time. There appeared also to have been a very diligent search in all the proper places, and among all the proper persons, connected with the transactions, to obtain information of the existence or loss of the papers. The affidavit of Patterson explicitly denied any knowledge, where they were, and declared, that they were not in his possession, power or custody. We think, that according to the rules of evidence at the common law, this preliminary proof afforded a sufficient presumption of the loss or destruction of the originals, to let in secondary proof; and that it was not competent for the court to exclude it, by its own rule. However convenient the rule might be to regulate the general practice of the courts, we think, that it could not control the rights of the parties in matters of evidence, admissible by the general principles of law.

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

Johnson, Justice. (*Dissenting.*)—I am very well content that the judgment in this court should be reversed, as it went off below, on grounds which had little to do with the merits of the case. But I regret that no other grounds have been found for reversal than such as I feel it my duty to enter my protest against.

The truth of the case is, that the plaintiff below was precluded from introducing evidence of a secondary nature, under a rule of practice of five or six years' standing in that circuit, the benefit of which was strenuously claimed by the opposite counsel. The court would have permitted the copy grant and copy power of attorney offered in evidence, to go to the jury, upon the proof of loss of the originals, which was introduced; but as all the

evidence which can be adduced in such cases will be found very generally to leave the case subject to the possibility that the deed (except in cases of positive destruction) may still be in the party's own hands, or of another for him; the experience of that court, as well as the practice of the state courts, and the received doctrine, that such proof is addressed to the legal discretion of the judge, *had caused that court to require, by rule, [*244
the expurgatory oath of the party, in a prescribed form, such as any man may take in an honest case. An affidavit of the plaintiff was tendered, but not in the form prescribed, and in a form which did not amount to a substantial compliance with the rule; since, the affidavit so tendered might have been made consistently with truth, and yet the deed may, by possibility, have been delivered into the keeping of the affiant's next-door neighbor; at least, so it appeared to that court. It is true, it was of old date, and even antecedent to this suit; but then the plaintiff was still in life, and at any hour within the six years since the rule was adopted, might have amended it.

It appears by the first bill of exceptions, that at the trial, the plaintiff's counsel first offered in evidence a certified copy of the grant, without offering, in any mode whatever, to account for the absence of the original; not even the defective expurgatory oath, already noticed; so that, *non constat*, but that the original was then on the table before him. The defendant's counsel objected, on the ground, "that such exemplification could not be received, until the original grant or patent was proved to be lost or detroyed, or the non-production thereof, otherwise legally explained or accounted for." This doctrine the court sustained; and this is now to be overruled, and the doctrine established, that "in the state of Georgia, a copy of a grant, certified by the secretary of state, is of the same dignity with the original grant, and *per se* evidence in ejectment."

Although I do not know that it would make any difference in the law of the case, yet it is necessary to examine this bill of exceptions carefully, to understand its true meaning. The copy tendered has been supposed to be authenticated under the seal of the state, and the printed brief states it to be under the great seal. The word great is not in the exception, and as the whole matter thus set out is made part of the bill of exceptions, by referring to it, it will be seen that the seal is only appended to the governor's certificate to the character of the officer who certifies it; and his certificate only goes to the fact, that the writings exhibited, are true copies from the record-book of surveys and the register of grants. It is not then *certified, [*245
that such a grant was made or issued, but only that the above is a "true copy from the register of grants:" which I propose to show is only a certified copy of a copy.

But the general principle involved in this decision is one of infinitely greater importance than a mere rule of evidence. It is no less than this; how far each state is to be permitted to fix its own rule of evidence, as applicable to its own real estate. The course of reasoning, I presume, on which this doctrine is to be fastened upon the jurisprudence of Georgia, is this: "such is the doctrine of the common law; and the common law being the law of Georgia, *ergo*, such must be the law of Georgia." But, until better advised, I must maintain, that neither the major nor minor proposition here can be sustained; that the one is incorrect in the general, the

other true only in a modified sense; and in that sense, will not support the doctrine of this bill of exceptions.

If it be the correct sense of the common law, that the exemplification of a patent is as good evidence as the patent itself, I am yet to be made acquainted with the authority that sustains the doctrine. I am sure, that *Page's Case*, 5 Co. 53, commonly cited as the leading case in its support, establishes no such principle. It relies expressly on the British statutes, for the sufficiency of the exemplification of the patent, and the right to use it in the *profert*, and the exemplification is introduced into the cause, in order to correct an alteration that had been made in the date of the original patent, the original being then also before the court.

But it would be a waste of time, to run over cases upon this question, when we know that the force or authenticity given to such exemplifications is derived from the statutes 3 & 4 Edw. VI., c. 4; and 13 Eliz., c. 6; and then only of patents since 27 Hen. VIII. Now, how is it possible, that such secondary evidence should have been good at common law, and yet need the aid of those statutes to sustain it? In the passage in the Institutes on this subject, the introduction of these exemplifications of patents is expressly treated as an exception to the general rule. Co. Litt. 225; Harg. Co. Litt. 314. That a patent is proved by its own seal, we find *laid
*246] down in many places, and has always been the law of Georgia.

On the other member of this syllogism, it is not to be questioned, that in Georgia, as well as in every other state in the Union, the common law has been modified by local views, and settled judicial practice. So that, were it generally true as laid down, that at common law, the copy of the grant was equal in dignity as evidence to the original, still, unless so recognised in Georgia, it is not the law of Georgia. Now, to say nothing of my own "*lucubrationes viginti annorum*," there is not a professional man in Georgia, who does not know, that such has never been the rule of judicial practice in that state. I may subjoin, in form of a note, the most ample proof on this subject, and there is a reason in the practice of their land-office for this principle, which is too well known to every man in that country, to leave a doubt of the correctness with which they have applied the rules of evidence to their actual practice in the trial of land causes. I make no doubt, that there are, at this moment, thousands of grants lying unclaimed in the land-office, every one of which has been copied into the register. The truth is, the grant is a separate thing from the true original; and the *fac-simile* of it (if it may be so called in the register) is nothing more than a copy; so that the paper here dignified with the epithet of an exemplification is nothing more than a copy of a copy, and therefore, always considered, in practice, as evidence of an inferior order.

The courts of that state have latterly relaxed in requiring evidence of loss; but even at this day, such evidence cannot be received in any of their courts, without an affidavit from the party presenting it, of his belief in the loss or destruction of the original. And there are other reasons in support of this practice: for instance, suppose, the copy on the register of grants should be found variant from the original, without imputation of fraud in the latter, it is unquestionable, that the original must prevail. So also, in case of interlineation, erasure or alteration of the original, why should the

party be permitted to escape the penalties of the law, by suppressing it, and producing a correct copy from the register?

The second bill of exceptions goes to the exclusion of the *copy deed, for want of a substantial compliance with the rule of court. If [*247 this court mean to express the opinion, that the rule was substantially complied with, it is one of those mere matters of opinion, which are not to be argued down. Certainly, the defect already mentioned is imputable to the affidavit that was tendered; and there was no want of time to have made it conform to the rule. But if it be insisted, that the court transcended its powers in making such a rule, then, may the practice of the state and United States courts from time immemorial, and the actual existing practice of the courts of the states at this day, as well as the reason of the thing, be urged in its vindication; and if it be objected, that the case was one in which the court below might have relaxed its rule; then it may be fairly asked, how is it possible for one mind to dictate to another on such a subject? It is an exercise of discretion, which can be limited and directed by no fixed rule.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Georgia, and was argued by counsel: On consideration whereof, it is considered and ordered by this court, that the circuit court erred in refusing to allow the exemplification of the grant to Basil Jones, mentioned in the record, to be read in evidence as in the exceptions of the plaintiff is mentioned. Whereupon, 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 this cause be and the same is hereby remanded to the said circuit court, with instructions to award a *venire facias de novo*.[1]

---

*Lessee of John Fisher, Plaintiff in error, *v.* William Cockerell, [*248
Defendant in error.

Constitutional law.—Error to state court.—Record.

After a judgment for the plaintiff in ejectment, in the Union county circuit court of the state of Kentucky, an *habere facias possessionem* was awarded, and on the succeeding day, on motion of the defendant, commissioners were appointed by the court, according to the provisions of the occupying claimants' law of Kentucky, to assess the damages and waste committed by the defendant, and the value of the improvements made on the land; the commissioners valued the improvements at $1350; F. did not appear on the return of the inquisition, and judgment was rendered against him for the sum so reported; afterwards, F. tendered a bill of exceptions stating that "he moved the court to quash the report of the commissioners appointed to value the improvements, assess the damages, &c., but the court refused to quash the same," to which opinion he excepted, and appealed to the court of appeals; a citation was issued by the clerk of the court of appeals, which was served; in that court, among others, F. assigned, as error, "the plaintiff deriving his title from Virginia, the act or acts of the state of Kentucky, on which the court has founded its opinion, is repugnant to the compact with Virginia, therefore, void as to the case before the court, being against the constitution of the United States."

To bring a case within the protection of the seventh article in the compact between Virginia and Kentucky, it must be shown, that the title to the land asserted is derived from the laws of Virginia, prior to the separation of the two states.

The clerk of the Union county circuit court certified, that certain documents were read in evidence,

---

[1] For a further decision, see 9 Pet. 663.