rant, is remitted, at sixty days sight, to England. It is, on every reasonable calculation, at all events, a prolongation of the risk.

The contract at the Havana may be considered as one to be performed immediately. It does not appear, that any time was given for the shipment of the coffee; and the whole transaction has the appearance that the bills were to be drawn as soon as the coffee was shipped. The last bill on New York was drawn on the 21st of May, and notice of the bill on *London was given on the 26th of that month. It may be considered, [*640 then, as a transaction to be completed as soon as the nature of the business would permit. It might be reasonably supposed, that it would be completed before the condition of the parties would be essentially changed. Had the bill which was drawn on London been drawn at the same time on New York, there is reason to believe that it would have been paid. The change in the mode of payment, by substituting a bill on London, at long sight, necessarily prolonged the time at which payment should be made, and prolonged the risk of Edmondston. This they had no right to prolong, without his consent.

It is admitted, that Drake & Mitchel could not change the mode of payment, without the consent of the Robsons. Then, it is a part of the contract; of that contract, for which alone Edmondston became responsible.

It has been said, that the engagement respecting the place of payment was contingent, dependent on the facility of negotiations, and subject to any future arrangement to be made between the parties. We do not so understand the agreement. Its terms are positive, dependent upon no contingency. "The facility of negotiations" was the motive for the stipulation. No hint of a reserved power to change it, is given, either in the letter of T. Robson to Drake & Mitchel, or in theirs to Edmondston. It was not a contingent but an absolute arrangement, as absolute as any other part of the contract.

We think, the court erred in not giving the second, third, fourth and fifth instructions to the jury, and the judgment ought to be reversed, and the cause remanded with directions to award a *venire facias de novo.*

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 South Carolina, and was argued by counsel: 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 that this cause be and the same is hereby remanded to the said circuit court, with instructions to award a *venire facias de novo.*

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*United States *v.* Robertson. [*641

Construction of bond.

Construction of a bond executed by the president and directors of the Bank of Somerset to the United States, for the performance of an agreement made by them with the United States, for the payment of a debt due to the United States, arising from deposits made in the bank, for account of the United States.

This case came before the court on a certificate of division from the judges of the Circuit Court for the district of Maryland. The facts, including those stated in the opinion of the court, were the following:

In the circuit court, at January term 1828, the United States instituted an action of debt, on a bond, executed on the 15th of July 1820, by Thomas Robertson, Levin Ballard, Arnold E. Jones, Mathias Deshiell, Charles Jones, Marcey Maddux, William Done, George W. Jackson and John H. Bell, of Somerset county, in the state of Maryland, in the penal sum of $100,000. The bond and the condition are stated in the opinion of the court.

The plaintiffs gave in evidence a statement of the condition of the Bank of Somerset, on the 11th of May 1820; by which it appeared, that the assets of the bank consisted of notes discounted, $106,995; real estate, $5000; debts due by the Bank of Columbia, and the Merchants' Bank of Alexandria, $1607; and that its debts were, capital unredeemed, $4250; notes in circulation, $15,000; deposits, including the United States, without interest, $115,426; making a deficit of $20,074. The plaintiffs also proved, that from the 15th of July 1820, to the 15th of July 1825, the president and directors of the Bank of Somerset received in good current money from the debtors of the bank, and from sales of their real estate, a large sum of money. That they received in payment of debts due to the bank, and as the proceeds of the real estate of their debtors, a large sum of money in
*642] the bank-notes of *the corporation, and in certificates of deposits of bank-notes of the same. A certificate of those receipts was exhibited and admitted in evidence; by which it appeared, that the receipts, in the period stated, were $11,000 in good money, in payment of debts due the bank, and for the proceeds of real estate; $15,500 in bank-notes of the corporation, in payment of debts due to the bank, or the proceeds of the real estate of the debtors to the bank; $15,000 in certificates of deposits of such notes: that the payments were, $10,000 for extinguishing prior liens on an estate conveyed to the bank by C. D. Teackle, a debtor to the bank; $1000, for clerk and sheriff's fees, in suits brought by the bank; $1000, attorney's fees and commissions; $1000 paid to William Done, as agent for the bank; $500 for taxes on real estate and small charges. This statement contained an allegation by the corporation, that the losses, by insolvencies of its debtors, amounted to $60,000.

It was further given in evidence by the plaintiffs, that Charles Jones, one of the obligors in the bond, was sheriff of Somerset county, from October 1821, to October 1824; and as such, received, under executions placed in his hands, in favor of the bank, $8255.77, in notes and certificates of the bank, and in good money; no part of which was proved to have been paid by him to the bank.

It was admitted, that before the 15th of July 1820, the notes of the Somerset Bank had largely depreciated, and were not current as paper, as a circulating medium; that they had continued to depreciate, and were then worth nothing. No part of the debt due to the United States had been paid.

The defendants gave evidence of the payments made by the bank for the extinguishment of the liens on the estate of L. D. Teackle; for clerk's and sheriff's fees on suits brought by the bank against the debtors to the bank; for attorney's fees and commissions, which were asserted to have been actually due and lawfully chargeable; for the lawful and reasonable commissions to William Done, as the agent of the bank; and for taxes on real estate; and for small charges. All these payments were in good money, and were paid between the 15th of July 1820, and the 15th of July 1825.

*The evidence given by the defendants, as to the taxes on the real estate of the debtors to the bank, and the lawfulness of the fees, costs and commissions, was opposed by evidence on the part of the United States. Evidence was also given which was intended to deny that the taxes, fees, &c., were due, or that they were reasonable.

The plaintiffs also gave in evidence, that attachment suits were issued against the same debtors of the Bank of Somerset, in the district court of the United States, in the years 1818 and 1819, against whom suits were instituted and prosecuted by the president and directors, in the county court of Somerset; some of which suits were instituted prior, and some subsequent, to the instituting of the attachment suits in the district court of the United States; all of which suits were actually proceeded in, after the attachment suits, and in the prosecution of which Somerset county suits, the principal fees, commissions and costs were incurred.

The defendant further offered evidence, that some time after the execution of the bond, upon which this suit was instituted, a contest arose between the Bank of Somerset and several of its debtors, in consequence of the bank having refused to receive its certificates of deposit, which the debtors tendered in payment of debts due by them to the bank; and that the right of a debtor to use such certificates in payment of a debt due by him to the bank was judicially brought before the Somerset county court, in an action instituted therein by the bank, for the recovery of a claim which the debtor had refused to pay, except in said certificates; that the county court, at its November term, in the year 1821, decided, that the tender of the certificates of deposit by the said debtors to the bank, in payment of the debt due by them to the bank, was a satisfaction of the claim; and that the bank-notes and certificates of the Bank of Somerset were a legal tender to the bank, and should be received in payments of judgments obtained in that court in favor of the bank, from the date of the act of assembly of the session of 1818, ch. 177; and that in conformity with the opinion, a verdict was entered for the debtor, with a judgment for his costs. And the defendant also proved, that the bank-notes and certificates, received by the president and directors of the said bank as stated, were received by them subsequently to the said decision.

*The defendant also gave in evidence, that among the judgments in favor of the bank were several against Littleton D. Teackle, upon [*644 whose property there were prior liens; and that all the money paid away by the corporation for liens, was in discharge of such liens; and that the bank, under their own executions, bought the property of said Teackle, subject to such liens, and that the property so taken was and is worth more than such liens; and that the property was delivered by the bank to the United States, and had been and was then in the hands and possession of the United States, or its authorized agents.

The plaintiffs then gave in evidence, that the property last referred to was never otherwise in the hands or possession of the United States, than as taken in execution under a writ of *fieri facias*, issued against the property of the bank, since the 15th July 1825; and further, that the property was not worth so much as the amount of the said prior liens.

The defendant offered, at the trial, to deliver to the plaintiffs the notes and

certificates of the bank, received in payment of debts due to the bank and for real estate, but the plaintiffs declined to receive them.

The defendant further offered in evidence, that the president and directors of the Bank of Somerset, during the five years from the 15th of July 1820, to the 15th July 1825, used due and reasonable diligence in recovering and securing the property and estate of the said bank, for the benefit of the United States; and that they, on the 15th July 1825, offered to deliver over to the United States all the property and estate which had been received by them (except what had been paid for liens, commissions, fees, cost and taxes, as therein-before set forth), which the United States refused to accept; and that the president and directors had continued to hold, and still held the same for the benefit of the United States, and always had been, and still were, ready to deliver the same to the United States.

The plaintiffs then offered in evidence, that the president and directors did not, during the five years, from the 15th July 1820, to the 15th July 1825, use due and reasonable diligence in recovering and securing the property and estate of the bank, for the benefit of the United States; and that they did not on the 15th July 1825, or at any time since, offer to deliver up any property or estate whatsoever; and that they did *not
*645] hold any part of such property or estate, by them received, for the benefit of the United States; and that they had theretofore neglected and refused to deliver up any property or proceeds of property of the bank to the United States.

The defendant further offered evidence, that the bank, from the 15th July 1820, to the 15th July 1825, sustained losses to the amount of $60,000 by insolvencies of its debtors, for which the said corporation was not responsible. And thereupon, the plaintiffs offered evidence, that the said supposed insolvencies, or the principal part thereof, happened by the negligence and misconduct of the said president and directors.

Certain proceedings of the corporation, relative to the management and transactions of its business, were given in evidence. At a meeting of the board of directors of the bank, on the 16th June 1818—Ordered, that all persons indebted to this bank may discharge the same, by transfers of its stock, at the rate of ninety *per centum*, for the amount of capital actually paid in.

By a resolution of the president and directors of the bank, passed June 13th, 1820, William Done, one of the directors, "is hereby appointed agent for the Bank of Somerset, to adjust and settle the claim of the United States, and he is requested immediately to repair to the seat of government, and there submit to the proper officer the propositions made by the former committee on the United States claim; and endeavor to procure the acceptance of either of them by the government in substance as the same now stands. And whereas, this board has been informed, that it has been represented at the seat of the general government, that the last election for directors was illegally conducted, and would be contested; the cashier is requested to furnish the said William Done with such extracts and statements from the proceedings of the board of directors of April 12th last, as he may think necessary and sufficient to satisfy the officers of government that the said election was conducted and closed according to all antecedent

usage in this bank; and, so far as we know, in every other similar institution."

*At a meeting of the president and directors of the bank, on the 15th of July 1820, the agent, appointed at the former meeting of the board to proceed to the seat of government for the purpose of effecting a compromise with the treasury department relative to the claim of the United States against the bank, reported, that he had waited accordingly on the secretary and comptroller of the treasury; and that he had entered into a compromise, upon the basis of the second proposition made by the committee on the United States claim, with a modification made by the treasury, as follows, viz., the directors will pledge to the government the whole estate of the corporation, as a security for the payment of the original principal of the claim, on or before the expiration of the term of five years from the date of the compromise; and for the fulfilment of this engagement, they will bind themselves individually to the United States, in a sum equal to the amount of the debt. The board then resolved, that the board accept the said proposition, as thus modified, provided the United States will agree to assign to those individuals who shall enter into the bond, the whole claim as it now stands, and all interest which have or shall accrue on the same. And for the better security of those who shall enter into said bond, and as an indemnification for any loss they might sustain, and a compensation for their extraordinary trouble and responsibility, it is hereby distinctly declared and understood by this board, that all advantages and privileges now held by the United States, shall be transferred to said individuals; and that they shall be entitled to all interest, profit and costs, which have or shall accumulate on the said claim, until the same shall be finally settled. [*646

On the 26th of June 1821, the board of directors ordered, "That William Done proceed, as soon as convenient, to the seat of government, for the purpose of finally settling the arrangement entered into with the treasury department; and he is also requested to ascertain the state of the suit or suits brought by the United States against the bank and its garnishees, in the district court of Maryland." "That Charles Jones shall attend all sales of property under execution, shall receive all moneys offered to him in payment of any execution or judgment, and shall pay over the same, at the expiration of each month, to the chairman." *Evidence was given that Charles Jones was solvent during the whole period of his shrievalty, and that he had since died, leaving his estate insolvent. [*647

And further testimony was given, that the stockholders, generally, availed themselves of the provision of the resolution of the 16th June 1818; that where the stockholders were debtors, the transfer of their stock was made to cancel their debts *pro tanto;* and other debtors purchased from other stockholders stock for the like purpose; that some of the persons who were directors on the 16th June 1818, and who acted under the said resolution, were obligors in the bond in question; and that other obligors therein subsequently availed themselves of the same resolution.

Upon the statements, admissions and evidence, the plaintiffs, by their counsel, prayed the court for their opinion and direction, as is stated in the opinion of this court. The defendant also submitted certain prayers to the court, which are also stated in the opinion of this court.

The case was argued by *Berrien*, Attorney-General, for the United States; and by *Martin*, for the defendant.

Marshall, Ch. J., delivered the opinion of the court.—This suit was brought in the court of the United States for the fourth circuit and district of Maryland, on the following bond:

Know all men by these presents, that we, Thomas Robertson, Levin Ballard, Arnold E. Jones, Mathias Dashiell, Charles Jones, Marcey Maddux, William Done, George W. Jackson and John H. Bell, all of Somerest county and state of Maryland, are held and firmly bound unto the United States of America, in the sum of one hundred thousand dollars, current money of the United States, to be paid to the said United States, their certain attorney or attorneys; to the which payment well and truly to be made and done, we hereby bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents, as witness our hands and seals this 15th day of July, in the year 1820. Whereas, on the first day of August 1817,
*648] the Bank of *Somerset became indebted to the United States for the sum of $69,079.62 deposited in said bank, by George Brown, collector, and others, for the final payment of which sum, and the better security of the United States, an agreement has this day been entered into between the United States on the one part, and the president and directors of the said Bank of Somerset, on the other part, in the words following, viz.:

"The directors agree to pledge to the government of the United States, the entire estate of the corporation, as a security for the payment of the original principal of the claim, on or before the expiration of the term of five years, from the date of the compromise; and for the fulfilment of this engagement, they will bind themselves individually to the United States, in a sum equal to the amount of the debt; and in order that no misunderstanding may hereafter arise respecting the true intent and meaning of the phrase, 'the entire estate of the corporation," and the nature and extent of the individual obligation, it is hereby declared to be distinctly understood by both parties, that the entire estate of the corporation means not only all the real estate of the said Bank of Somerset, but also all the debts of every description which are now due and owing unto the said bank, or to which the said bank may have any legal or equitable right whatever; and it is also understood by both parties, that the bond of individuals is not intended as a contract for the absolute payment of the said sum of money from their private estates, but as a guarantee that the said president and directors and their successors will fulfil their agreement to preserve entire the estate of the corporation, until the United States are paid and satisfied the said original principal of their claim, and to give a preference to the United States over any other creditor of the bank. The United States agree, upon receiving the bond of individuals, to assign the direction and management of the suit which has been instituted in the district court of Maryland, against the bank, to the individuals who thus enter into bond; and at the expiration of the said term of five years, upon the payment of the sum of $69,079.62, on or before the day of payment, the United States will give a full and free acquittal to the said corporation for the whole claim."

*649] *Now, the condition of the foregoing obligation is such, that if the said president and directors, and their successors, shall on their

part well and faithfully perform the said contract, and shall, in preference to any other claim against the said bank, pay into the treasury of the United States the said sum of $69.079,62, on or before the 15th of July 1825, then the foregoing obligation to be void, otherwise to remain in full force and virtue in law. Signed and sealed by Thomas Robertson, Levin Ballard, Jun., Arnold E. Jones, Mathias Dashiell, Charles Jones, Marcey Maddux, William Done and George W. Jackson.—John H. Anderson, witness.

The issues joined on several special pleas filed by the defendant, were withdrawn by consent; and *nil debet* pleaded, under an agreement that the parties might give any matter in evidence which might have been given under any form of pleadings.

It will be perceived, from the condition of the bond, that the Bank of Somerset had become indebted to the United States in a large sum of money on account of deposits made by a collector, and that a suit had been instituted against the bank in the court of the United States for the district of Maryland. On the 15th of July 1820, an agreement was entered into between the United States and the president and directors of the Bank of Somerset, which is recited in the condition of the bond. The principal object of this agreement was, to secure the whole estate and property of the bank, of every description, for the payment of the principal debt, on or before the expiration of five years from the date of the agreement. For the performance of this engagement, the directors agree to bind themselves individually, in a sum equal to the amount of the debt; but this bond of individuals is not to be understood as a contract for the absolute payment of the said sum of money, but as a guarantee that the president and directors, and their successors, will fulfil their agreement to preserve the entire estate of the corporation, until the United States are satisfied with the principal, and to give a preference to the United States over any other creditor of the bank. The United States on *their part agree, on receiving this bond to assign the direction and management of the suit to the obligors. [*650

The construction of this bond has been discussed at the bar, as a preliminary question to the several points made in the cause. The United States contend, that the agreement recited in the condition of the bond, is made by the then president and directors of the Bank of Somerset, in their individual as well as corporate character, and that the defendant is bound individually, not merely to the extent of the obligation created by the bond, but also so far as he would have been bound had he signed the agreement in his private character. The defendant contends, that the agreement was made by the president and directors for the bank, as its legitimate agents, and is to be treated as an engagement made in their corporate character; and that the bond is an undertaking by the obligors, in pursuance of that agreement, by which they become sureties for the bank, that the president, directors and their successors will perform their engagements with good faith.

In pursuing this inquiry, the form of the instrument and the nature of the transaction must be considered. The agreement between the United States and the bank is not spread on the record, otherwise than as it is recited in the condition of the bond. It does not appear to have been signed by the president and directors individually. This could not have been omitted,

had they intended to bind themselves individually by that agreement. As an official act, it was sufficient, that it be entered on their journals; as an undertaking of individuals, it ought to be signed by them. It is referred to in the recital of the condition, in these words: "and whereas, an agreement has this day been entered into between the United States on the one part, and the president and directors of the said Bank of Somerset of the other part, in these words," &c. This language indicates, we think, an agreement by the president and directors, in the corporate character in which they are mentioned, rather than in their individual characters in which they are not mentioned. If the president and directors are bound in their private character, is every member of the board bound, whether he was present and assented to the agreement or not? The incorporating act declares, that the affairs of the bank shall be managed by a president and ten *directors. Are they all bound by this argeement? If not, who of them are? The paper itself, as recited, does not inform us. If we look out of the condition of the bond, to the journals of the corporation, for instruction, we are informed, that at a meeting of the board on the 15th of July 1820, the president and six directors attended. If it be contended, that this record fixes the members present, one of them, George Jones, who was a party to the agreement, did not sign the bond. Is he bound? If we are permitted to travel out of the bond, and search the journals of the bank for information on this subject, the same record informs us, that this whole business was transacted by the board, in their corporate character, as acting for the bank.

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The great object of the agreement was, to pledge the estate of the bank, to secure, so far as it would secure, the payment of the debt due to the United States. None could give this pledge, but those whose official duty it was to manage that property; and they could only give it in the character in which they were intrusted with its management. They alone, in their political character, and their successors, could redeem this pledge; for only those who retained the management of the affairs of the bank, during the five years given for the payment of the debt, could keep the estate together, and apply it exclusively to the use of the United States.

To what purpose should the United States require, that the directors should bind themselves individually, if they were already bound individually by the agreement itself? This stipulation, being for the benefit of the United States, must be considered as introduced at their instance; and if we may look at the proceedings of the board on the 15th of July 1820, we are informed, that the agent of the board, who carried propositions to the secretary of the treasury, reported, that he had made a compromise on the basis of the second proposition, with this modification made by the treasury. But without going out of the bond, this stipulation must be considered as being made on the part of the United States. For what purpose, we repeat, was it made? If the individual members of the board were bound by the agreement, why require a bond from the same persons, as sureties for themselves? They could be sued upon the original agreement as well as upon the bond. *Why this complex proceeding? Upon the hypothesis of individual obligation, under the agreement, it is inexplicable. Upon the hypothesis, that the original agreement was a mere corporate act, the whole transaction is accounted for. The agreement being

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a corporate act, could not affect the members of the board in their private characters; it was a mere pledge of the faith of the corporation, for the violation of which, the corporate funds would alone be responsible, and would add nothing to the security of the government; because the liability of those funds was already as complete as any corporate act could make it. The obligation of individuals, therefore, was required, who should be sureties that the corporate body would faithfully observe its contract. This is expressly declared to be the effect of the bond, and the purpose for which it was given. The words are, "and it is also understood by both parties, that the bond of individuals is not intended as a contract for the absolute payment of the said sum of money from their private estates, but as a guarantee that the said president and directors, and their successors (not their heirs and executors) will fulfil their agreement to preserve entire the estate of the corporation," &c.

The words which follow this recital of the condition, serve still further to show the understanding of the parties. They are, "now, the condition of the foregoing obligation is such, that if the said president and directors, and their successors, shall on their part well and faithfully perform the said contract," &c., then the foregoing obligation to be void, &c.; obviously referring to a contract made by the corporate body, and to be performed by the corporate body.

An argument against this construction of the instrument has been founded on the following clause: "The United States agree, upon receiving the bond of individuals, to assign the direction and management of the suit which has been instituted in the district court of Maryland to the individuals who thus enter into bond; and at the expiration of the said term of five years, upon the payment of the sum of $69,079.62, on or before the day of payment, the United states will give a full and free acquittal to the said corporation for the whole claim." The court does not allow to this clause that influence over *the agreement for which the counsel for the United States contends. Being a stipulation to assign the management of the suit, not the judgment which should be obtained, the power might have been conferred on the president and directors and their successors, without releasing the debt. If, as we suppose, it was intended as an inducement to incur personal responsibility, by affording security to those who should incur it, the clause rather furnishes an argument in favor of that construction for which the defendant contends. [*653

We are of opinion, that the agreement recited in the condition of the bond on which this suit is instituted, is, in fact, made, and was understood by the parties to be made, by the United States, with the Bank of Somerset, acting by its lawful agents, the president and directors of that bank; and that the obligors bound themselvers, as sureties, that the bank would faithfully perform its engagements.

At the trial of the cause, the following points were made at the bar by the counsel for the United States, and the opinion of the court was asked upon them.

1. That, by the bond on which this suit is brought, the defendant has undertaken that the estate of the bank, including its debts, shall be applied, in the first instance, to extinguish the debt due to the United States, in five years, if that estate was sufficient to extinguish it; and if the jury shall be

of the opinion, that the estate, at the date of the bond, was sufficient, and might, by the use of proper means on the part of the defendant and his co-obligors, have been rendered available to that purpose, within the time limited by the bond, the defendant is answerable for any portion of the debt ascertained upon the face of the bond, which remained due to the United States, at the expiration of the five years given by that bond, and which still remains due.

2. That it being admitted the statement of the condition of the bank, on the 11th May 1820, which has been offered in evidence, proceeded from the obligors in the bond, and has been furnished by them, it is an admission on their part, that the estate of the bank was, at that time, sufficient to have paid the debt due to the United States, and throws the burden of proof on the defendant, to show how it afterwards became insufficient; and in the absence of satisfactory proof on this *point, the estate of the bank is
*654] to be held sufficient to have paid the debt due to the United States, within the five years given by the bond, and the defendant is answerable for any portion of that debt which remains unpaid to the United States.

3. That, among the duties imposed on the defendant by the bond, was that of calling in the debts due to the bank, in the most expeditious and effectual manner; and if the jury shall believe, that a resort to attachment against the bank debtors, in the name of the United States, on the judgment which had been obtained by the United States against the bank, was the most expeditious and effectual manner, and that the obligors in the bond have not resorted to this mode of proceeding, they have been guilty of a breach of their undertaking in the bond, and are answerable for the full value of any debt which might have been secured by that mode of proceeding.

4. That by the bond, on which this suit is brought, the obligors were bound to use diligence in enforcing the collection of the outstanding debts due to the Bank of Somerset, at the date of the bond; and that if they have failed to employ the best means which the law placed in their power, to enforce such collection, they are responsible for all losses proceeding from their neglect to use those means, &c.

5. That having been authorized to proceed against the debtors of the bank, on the judgment which had been obtained by the United States against the Bank of Somerset, and to enforce the proceedings against those debtors, as garnishees, which had already been instituted in that suit, as well as to take out new attachments against other debtors, in the name of the United States, the plaintiffs in that judgment; if, instead of resorting to these proceedings, they brought new actions against their debtors, in the state courts, and by the adoption of this latter course, debts have been lost which might have been saved by resorting to the process of attachment against those debtors, under the judgment before mentioned, the defendants are liable for all such losses.

6. That if the jury shall be satisfied, that the statement of the condition of the bank, on the 11th May 1820, was its true condition at that time, and that no proof has been offered by the defendants to show that this condition was variant at the date of the bond, the defendants can repel the inference of the *solvency of the bank, in no other way, than by showing to the
*655] satisfaction of the jury, that the debtors, whose debts compose the

aggregate of $106,995 presented on the statement, were wholly or partially insolvent; and that the defendant was unable to collect the debts, either by reason of such insolvency, or by some legal impediment which they could not control; and that, in the absence of such proof, the legal presumption will be, that such debtors were solvent, and that those debts might have been collected, by the use of due diligence; and if they have not been collected and paid over to the United States, that the defendant is liable for the amount of the debt acknowledged in the bond to be due to the United States, or for whatever balance of that amount remains unpaid to the United States.

7. That attachments, at the suit of the United States, which had been laid in the hands of the debtors to the Bank of Somerset, prior to the date of the bond, fixed the debts in the hands of such debtors; and that such debts could be discharged only by the payment of good and lawful money, equal in value to the amount of such debts; and that if the obligors in the bond on which this suit is brought, did afterwards receive such debts from the debtors, in depreciated notes of the Bank of Somerset, or any other depreciated paper, the defendant is liable to the United States, in good and lawful money, for the amount of debts so received in depreciated paper, if there be no proof that such debtors were in circumstances so insolvent, as that they could not have paid their debts in good and lawful money.

8. That by virtue of the agreement recited in the bond, on which this suit is brought, and of the bond itself, the debts due to the bank were so pledged to the United States, that the obligors in the bond had no right to receive these debts in the depreciated notes of the Bank of Somerset; and that if, after the date of the bond, they did so receive them, they are liable to the United States, in good and lawful money, for the amount so received, if there be no proof that the debtors from whom they were so received were in circumstances so insolvent, that they could not have paid these debts in good and lawful money.

9. That by virtue of the bond and the agreement therein *recited, [*656
the defendant was bound to see that the estate of the bank, as described in the agreement and bond, should be applied, in the first instance, to the payment of the debt due to the United States, before any payment made to any other creditor; and that if any portion of that estate has been paid to the holders of certificates of deposit, which were outstanding at the date of the bond, or if these certificates have been received in payment of debts due by the holders to the bank, the defendant is liable for all sums so paid to the holders of such certificates, and for the amount of all debts for which such certificates have been received in payment, if there be no proof that the debtors from whom they were so received were in circumstances so insolvent, that they could not have paid those debts in good and lawful money.

10. That in all cases where, after the date of the bond, moneys have been shown to have been paid under executions, at the suit of the bank, placed in the hands of Charles Jones, the sheriff of the county, who is admitted to have been one of the obligors in the bond, the defendant is liable for all such amounts so received by the said Charles Jones.

11. That the defendant had no authority to pay away any part of the estate of the bank, as described in the bond, to the purpose of relieving liens

on the estates of the debtors to the bank; but their duty was to have collected the debts due to the bank, out of the estate of such debtors, which they will be presumed to have been capable of doing, until the contrary is proved; and in the absence of such proof, they are liable to all sums paid away for such liens.

12. That it was in the power of the obligors to have proceeded by attachment against the debtors of the bank, under the judgment which had been obtained in the district court of the United States, the institution of new suits against such debtors in the county court of Somerset was unnecessary, until it shall be proved that they could not have so proceeded; and that the costs and expenses attending these suits were incurred by the obligors, in their own wrong, and must fall upon them; and the defendant is entitled to no credit on account of such costs and expenses, but must answer for the value of these debts, clear of any other costs and expenses, than would have arisen from his proceeding by attachment in the courts of the United States.

*657] *13. That the defendant was not authorized to diminish the amount of the estate of the bank, by the payment of a commission for collection, to William Done, one of the obligors.

14. That if the resolution of the board of directors, of date the 16th June 1818, authorizing the stockholders to assign their stock at ninety dollars, in discharge of their debts, was made for the purpose of shielding the stockholders from the judgment of the United States, and the process of attachment against the debtors of the bank which the United States were authorized to sue out against these debtors, such transfers of stock were fraudulent and void; and it was the duty of the obligors to have re-asserted these debts, as they stood prior to such transfer of stock, and to have proceeded to recover them by the legal process of attachment, in the name of the United States; and that if they failed to do so, such failure was a breach of their duty under the said bond and contract; and if such debts might have been so recovered, by the use of due diligence, the defendant is liable for the amount.

15. That if process of attachment, at the suit of the United States, had been served on these stockholders, prior to such transfer in payment of their debts, such debts became fixed thereby to the United States; and the subsequent transfer of stock in extinguishment of them was a void act, and these debts constituted a part of the estate of the bank, which the defendant was bound to apply to the payment of the debt of the United States; and not having done so, he is liable for those amounts.

And the counsel for the defendants made the following points:

1. That by the true construction of the bond, the obligors undertook for the acts of the corporation only, and not for their own conduct as individuals, or the conduct of any other individuals, not being the agents of the corporation.

2. That payment made to the sheriff, is no payment made to the bank, and that the defendant is not liable for any money received by the aforesaid Charles Jones, as sheriff, unless the same was paid over to the bank, or to the agents of the bank lawfully authorized to receive the same.

*658] 3. That the bank is not liable for any depreciation in the *money,

which the bank was compelled to receive by the judgment of the Maryland courts.

4. That the corporation had not the right to use the attachments which had issued from the district or circuit court; nor to order any process connected with the suit or judgment of the United States against the Bank of Somerset, and cannot, therefore, have been guilty of negligence or misconduct, by reason of not attempting to use the said attachments, or to issue process on said judgment.

5. That the defendant is not liable for any depreciation in the money, which the bank was compelled to receive by the judgment of the Maryland courts, unless the jury find that the bank was guilty of culpable negligence or misconduct, in prosecuting their claims in the courts of Maryland, instead of using the attachments issued from the district or circuit court of the United States.

6. That if the jury believe, that the property, from which the liens were removed, by payments of the Bank of Somerset, as stated in the evidence, has come to the hands and possession of the plaintiffs, and is worth more than such liens, and that the payment of such liens was made with an honest intention and view, for the benefit of the United States, then, the plaintiffs are not entitled to recover the amount so paid for such liens, as stated in the evidence.

7. That if the jury find from the evidence, that the taxes, officers' fees, counsel fees and commissions, paid by the bank, were actually due, and that the said taxes were lawfully chargeable on the said property, when in the hands of the bank, as the agent of the United States, and that the said officers' fees, and counsel fees and commissions, became due on account of suits instituted by the bank, as the agent of the United States, under the contract upon which this suit is brought, and that the said fees and commissions were lawful and reasonable; that then the plaintiffs are not entitled to recover the amount so paid by the banks, of taxes, officers' fees, counsel fees and commissions, unless the jury find that, in instituting the said suits, the said bank from negligence and misconduct violated its duty to the United States.

Upon these points too, the instructions of the court to the jury were requested. *The record states that the judges being opposed in opinion on each of these questions, ordered them, on motion of the counsel for the plaintiffs, to be certified to this court for its decision; and discharged the jury. [*659

Some general propositions have been stated in argument, which bear upon all the points; and which will be considered, before we proceed to apply them to the several specific questions which have been certified by the circuit court. The counsel for the United States insists, that by the act of 1818, the United States were empowered to enforce payment of the judgment they might obtain against the bank, in specie, by summoning the debtors of the corporation as garnishees, and obtaining judgments against them. The act provides, that in any suit thereafter instituted by the United States against any corporate body, for the recovery of money upon any bill, note or other security, it shall be lawful to summon as garnishees, the debtors of such corporation, who are required to state on oath the amount in which they stand indebted, at the time of serving the summons, for which amount judgment shall be entered in favor of the United States, in the same

manner as if it had been due and owing to the United States. This act operates a transfer from the bank to the United States of those debts which might be due from the persons who should be summoned as garnishees. They become, by the service of the summons, the debtors of the United States, and cease to be the debtors of the bank. But they owe to the United States precisely what they owed to the bank, and no more. On the 9th of February 1819, the legislature of Maryland passed an act declaring that in payment of any debt due to, or judgment obtained by, any bank within that state, the note of such bank should be received. This act, so far as respects debts on which judgments have not been obtained, embodies the general and just principles respecting off-sets which are of common application. Every debtor may pay his creditor with the notes of that creditor; they are an equitable and legal tender. So far as these notes were in possession of the debtor, at the time he was summoned as a garnishee, they form a counter-claim, which diminishes the debt due to the bank, to the extent of that counter-claim. But the residue becomes a *debt to the United States, for which judgment is to be rendered. May this judgment be discharged by the paper of the bank?

*660]

On this question, the court are divided. Three judges are of opinion, that by the nature of the contract, and by the operation of the act of Maryland upon it, an original right existed to discharge the debt in the notes of the bank; which original right remains in full force against the United States, who come in as assignees in law, not in fact; and who must therefore stand in the place of the bank. Three other judges are of opinion, that the right to pay the debt in the notes of the bank does not enter into the contract. A note given to pay money generally, is a note to pay in legal currency, and the right to discharge it with a particular paper, is an extrinsic circumstance depending on its being due to the person or body corporate responsible for that paper, which right is terminated by a transfer of the debt.

The counsel for the United States also contend, that the obligors are responsible in this suit for the act of any individual who has signed the bond, by which any portion of the estate of the bank may have been lost; and for the omission of the obligors to perform any act within their power, which might have enabled the corporate body to collect its debts in money of more value than its own notes. We do not think so. Whatever obligations a sense of right might have imposed upon them, as members of the corporation, the obligation imposed by the bond itself is measured by its terms. They do not undertake for their general conduct as individuals. They do not undertake for each other, as to any matter not expressed in the bond. They undertake that the bank shall perform the contract recited in the condition, and for nothing more. The bond does not stipulate that the obligors will do anything which may facilitate the operations of the bank in collecting its debts and performing its contract with the United States.

It has been urged, that they might have used the power to direct and manage the suit, so as to compel the debtors to the bank, by summoning them as garnishees, to discharge their debts in specie.

The United States have not required them to make *any use of the power to manage and direct the suit. Nothing is specified, nor is anything either demanded or undertaken on this subject. Were this court

*661]

to insert it, we should add a new term to the bond, and create an obligation which the parties have not imposed upon themselves. We should do something more than construe and enforce the contract.

In the state in which the record now appears, this question does not regularly arise. If the obligors were bound to use their power to direct and manage the suit, in the manner most advantageous to the United States; if we could suppose, that the power was given, not for the benefit of the obligors who obtained it, but for the benefit of the United States, who agreed to surrender it unconditionally, for something else stipulated in the bond; still this obligation, so to use the power, could not commence until the power was given. This we think is not shown by the record. The bond was executed to the United States, and this action is a proof that it was accepted. So far as respects the liability of the obligors, as sureties for the bank, the acceptance has relation to the date; but so far as respects the liability to be created by a subsequent act of the obligee, this relation cannot be sustained. The actual time of acceptance becomes a subject of inquiry.

The record furnishes reason for the opinion, that the bond was not accepted at its date, on the 15th of July 1830. The acceptance being a fact *in pais*, we may look out of the bond for proof of it. The directors agree to bind themselves individually for the performance of the contract recited in the condition. This was required by the treasury department, in terms implying that all the directors should so bind themselves. The act incorporating the Bank of Somerset makes the board to consist of a president and ten directors; the bond is executed by the president and seven directors. It remained some time for the signature of others, and was incomplete at its date. It might, without the slightest breach of faith, have been rejected by the secretary of the treasury; and, as it did not conform to its original proposition, remained as an escrow, until approved by him. The record furnishes some evidence that is was not immediately approved. On the 26th of June 1821, the board of directors ordered, * "that William Done proceed, as soon as convenient, to the seat of government, for the [*662 purpose of finally settling the arrangement entered into with the treasury department; and he is also requested to ascertain the state of the suit or suits brought by the United States against the bank and its garnishees, in the district court of Maryland."

If then the power claimed for the obligees, to direct and manage the suit of the United States, was conferred by the mere operation of the bond; it could not be conferred, until the bond was actually accepted, and the time of acceptance ought, for this particular purpose, to be shown. But this power is not conferred by the mere operation of the bond; it requires a distinct and independent act on the part of the government. "The United States agree, upon receiving the bond of individuals, to assign the direction and management of the suit which has been instituted in the district court of Maryland against the bank, to the individuals who thus enter into bond." Till this authority was actually given, the attorney for the United States would have disregarded, and ought to have disregarded, any orders received from the obligors in the bond.

Suits were instituted by the bank against its debtors in the courts of the state; by whose judgment the bank was compelled to receive not only its own notes, but the certificates of deposit held by its debtors. The counsel

for the United States insists, that the bank is responsible for the sums so received, in violation of its agreement to give a preference to the United States over other creditors. So far as this act was voluntary on the part of the bank, it is a violation of the contract, for which its sureties are liable. But how far was it voluntary? The bank possessed no other means of collecting its debts than through the medium of the state courts. It might, therefore, be necessary to resort to those courts, in order to avoid a total loss. The act of limitations, independent of those casual insolvencies which might occur, would have formed a serious deduction from that estate; which it was their duty to preserve entire for the United States. The bank, perhaps, might have made, and sound morality required that they should have endeavored to make, new arrangements with the United States. It is
*663] not certain, that any arrangements which would remove *difficulties with which the whole transaction was embarrassed, were practicable. But, be this as it may, we perceive no other course which was prescribed by duty and by contract, with respect to their debts generally, than to sue in the state courts. With respect to those debts which were attached by the United States, the same division of opinion exists, as with respect to their payment in the notes of the bank.

We will now apply these principles to the particular points on which the judges of the circuit court were divided.

On the first question propounded by the counsel for the United States, and also on the first question propounded by the counsel for the defendant, this court is of opinion, that the obligors undertook for the faithful performance, by the president and directors, of the contract recited in the condition of the bond, on which the suit is instituted; and not for their own conduct as individuals; and that they are responsible for any failure on the part of the bank to perform that engagement.

On the second and sixth questions propounded by the plaintiffs, this court is of opinion, that the statement of the condition of the bank of the 11th of May 1820, which appears in the record, is evidence to be submitted to the jury, who are the judges, on the whole testimony, how far the estate of the bank was, at that time, sufficient to pay the debt due to the United States; and if any part of that estate has been wasted or misapplied by the corporate body, or their agents, or has been appropriated unnecessarily to any purpose other than towards the debt of the United States, or is otherwise unaccounted for; the defendant is responsible for such misapplication or waste, and for any sum not accounted for.

On the third and fourth questions propounded by the plaintiffs, this court is of opinion, that the obligors did not undertake by their bond, to call in the debts due to the bank. That duty was to be performed by the president and directors of the bank; for whose faithful performance of it, the obligors are responsible.

The court does not perceive the application of the fifth question on the part of the plaintiffs to the cause, unless the president and directors of the bank be considered as the obligors, which idea is negatived in the answer
*664] to the first question. *The obligors had no power to bring actions against the debtors of the bank, in the state courts.

On the seventh question propounded by the plaintiffs, this court is of opinion, that the attachments at the suit of the United States which had

been laid in the hands of the debtors to the Bank of Somerset, prior to the date of the bond, fixed the debts in the hands of such debtors, as to the sum remaining due, after deducting the legal off-sets against the bank, then in the hands of such debtors. This court gives no opinion as to the money or paper in which the sum so remaining due was demandable.

The eighth instruction required by the plaintiffs ought not to be given as asked. The ninth question is answered in the opinions given by this court on the preceding inquiries.

On the tenth question propounded by the plaintiffs, and the second propounded by the defendant, this court is of opinion, that the bank is liable for the money received by Charles Jones, as their collector; and the defendant is liable therefor, as their surety; but that the bank is not liable for the money which came to his hands, as sheriff, unless the president and directors were guilty of negligence in using the appropriate means to draw it out of his hands in reasonable time.

On the eleventh question propounded by the plaintiffs, and the sixth propounded by the defendant, this court is of opinion, that it was the duty of the president and directors, to collect the debts due to the bank. In the performance of this duty, it might be necessary to purchase property pledged to the bank, which was subject to prior liens, and to relieve such property from its prior incumbrances, in order to avoid a total loss of the debt. This may have been advantageous, or may have been disadvantageous, to the United States. We think the transaction, with all its circumstances, ought to be submitted to the jury; and that the liability of the defendant can, in no event, exceed the actual loss sustained by the United States, in consequence of the bank having taken the property, by discharging the prior incumbrances, instead of suing the debtor in the state court.

On the twelfth question propounded by the plaintiffs, and *the seventh propounded by the defendant, this court is of opinion, that [*665 the president and directors of the Bank of Somerset had no power over the judgment of the United States. They could, therefore, proceed only in the state courts; and were entitled to credit for such necessary expenses, as were incurred in such suits as it was prudent to bring.

On the thirteenth question propounded by the plaintiffs, this court is of opinion, that the propriety of allowing the commissions paid to William Done depends upon their reasonableness.

On the fourteenth and fifteenth questions, propounded by the counsel for the plaintiffs, this court is of opinion, that the instructions ought to have been given as asked; except so much of the fourteenth, as states it to have been the duty of the obligors, instead of the president and directors, to re-assert these debts; and so much as supposes a power to proceed by the legal process of attachment in the name of the United States; and except so much of the fifteenth as supposes a power in the defendant to apply the funds of the bank.

The court is of opinion, that the third, fourth, and fifth instructions moved by the counsel for the defendants, ought to be given as asked; except so much of the fifth as submits to the jury the question on the power of the bank to use the attachments issued from the district court of the United States.

All which is to be certified to the circuit court for the fourth circuit and district of Maryland.

BALDWIN, Justice. (*Dissenting.*)—I consider the directors of a bank, as its chartered agents; and the bank as bound by their acts, when they are within the powers, and are exercised on the subjects, and in the manner authorized by the charter. 12 Wheat. 52, 53, 58, 83, 87. *Shankland* v. *Corporation of Washington*, decided at this term. If a corporation is authorized to raise money by a lottery, their agents cannot sell it (12 Wheat. 55); if to raise a specific sum, they cannot raise a quarter. *Lee* v. *Manchester Canal*, 11 East 645, 654. Every act of fraud, departure from their duty, of any other illegal act, committed by the directors of a bank, or the cashier, by their connivance and permission, however *sanctioned by the uniform usage of the *666] board, is an excess of power and void from illegality. 1 Pet. 71, 72. The directors are liable individually; but the bank cannot be bound by their doing that which they had no lawful power to do, or which was a violation of some duty enjoined by the charter, or resulting from the nature and objects of the incorporation; for the directors are not then their agents. A corporation is strictly limited to the exercise of those powers which are specifically conferred on it. 4 Pet. 168; 2 Dow P. C. 521, &c. The directors own none of the property or funds of the bank. They are trustees for the stockholders and creditors. Their control over the effects is entirely fiduciary and confidential; deriving their power over them by the act of incorporation, they must execute it according to its provisions and directions; which are in their nature creative, and not merely restrictive, inherent powers. If the act of incorporation is their only authority, they must act within its precise terms. 2 Dow P. C. 253. By section 13th of the charter, they may manage the funds, in the common course of banking, for the use and benefit of the stockholders; but for any fraud, are liable to an indictment, a suit by the bank for the damages sustained, or forfeiture of their stock. If they manage them in any other way, they do it on their own individual responsibility, not on that of the bank, as its authorized agents; if misapplied funds of the corporation come to the hands of innocent third persons, they cannot be recovered back. But if the directors make a contract which contains stipulations exceeding their authority, it cannot be enforced against the bank, by the party contracting with them. By the act of contracting with the agents and trustees of a corporation, the party is presumed and bound to know the nature, extent and the legitimate objects of their authority, according to the terms of the charter; and necessarily contract subject to them.

The 12th section of the law of Maryland, ch. 32, December 1813, chartering the Bank of Somerset, enacts that, "no member of said company shall be answerable in his personal or individual property, for any contract or engagement of said bank, or for any losses, deficiencies or failures thereof, or the capital stock thereof; but all the capital stock, together *with *667] all its property, rights and credits of the said institution shall at all times be answerable for demands against said bank."

At, or as near the date of the bond as could be ascertained, according to the statement given in evidence by the plaintiffs, the bank owed the creditors $130,000; whereof there was due to the holders of notes, $15,000; to individual

depositors, $46,000 ; and to the United States, $69,000. The whole property and effects of the bank amounted to $113,000 ; of which $60,000 appear to be lost by insolvencies. The state of the bank, in May 1820, shows on its face, a deficit of $21,000, short of the debts. With this law and statement of the bank before them, the plaintiffs and the directors entered into the agreement of the 15th of July 1820 ; by which the entire estate of the corporation was pledged to the United States, for the payment of their debt of $69,000 ; and they were to have a preference over every other creditor of the bank. They were entitled to no such preference by law ; and unless the agreement of the directors gave it to them, under their authority as agents of the bank, they cannot enforce it. The power and right of an individual to prefer one creditor to another, is undoubted ; not because any law confers that right upon him, but being the owner, and having full power of disposing of it as he pleases among his creditors, or to sell it for money, the distribution or payment of it, at his pleasure, among them, results from his ownership ; and no law has prohibited or restrained him. But, to my mind, an agent or trustee of a banking corporation is in a different situation ; he has no rights of individual ownership ; his control over the effects is solely derived from the law ; regulated and controlled by it, in any application he may make of it. The moment he exceeds his chartered powers, or violates his duty as prescribed by law, all privity between him and the bank ceases ; he is no longer their agent ; and his acts are no longer theirs. Conceding the rule to be, that in a contest between creditors, at the counter of a bank, the note or check first presented, may be first paid by the cashier ; it cannot, in my opinion, apply to real estate, or unavailable effects ; which require time and legal process for their collection ; and which *the charter declares, [*668
shall be at all times answerable for demands against the bank. Directors have no inherent right in the property, or control over it, resulting from ownership, which gives them the power of individual debtors to give creditors a preference. The charter gives them none. Their authority must then be implied, either from the general scope and objects of the incorporation, or be incident to the agents and trustees of all moneyed and other corporations, in a case of known and ascertained deficiency to pay its corporate debts. If there is in the statute or common law of Maryland, or of any state in this Union, such a principle, it is wholly unknown to me. If, instead of delaring a pre-existing rule, a new one is adopted, from reasons of supposed analogy, justice or inconvenience, I cannot withhold my dissent to its adoption ; for I can perceive no reason which permits preferences by individuals, which do not, instead of authorizing, forbid the application of the rule to the trustees of the corporation ; nor can I perceive the justice of preferring one noteholder or one depositor to another. It would seem to me a justice unknown to the common law, to apply all the effects of an insolvent corporation to the debt of the government, and strip individuals. In such a case, the rule that equality is equity, would seem a very appropriate one. An equal distribution of all the effects among all the creditors, would certainly not operate unjustly. I can apply no other rule to this case, in the absence of any provision in the charter, or common-law authority, to the contrary.

An agreement like the present, made by an executor or trustee, under a deed or will, by an administrator or guardian, would be an excess or abuse of power. Creditors excluded by the agreement, would have their remedy

on the fund. Yet, in all these cases, the trustee has an interest in and control over the property intrusted to him, at least equal to that of the bank directors, in and over the effects of the corporation. If the giving a preference to one, and excluding all other creditors, would not be deemed a fair execution of the powers of the former classes of trustees, it is difficult to assign the reasons, which, on settled principles of law, would confer on the trustees of a corporation, an extent of authority unknown to any private
*669] trustees. A power given by will, deed or assignment, *to a trustee, to sell property to pay the debts of the party executing it, would not be well executed by such an agreement and bond as this; nor can it be a compliance with the clear direction of the twelfth section of the charter; the express words of it import a different meaning. The whole capital stock, property, rights and credits of the bank are answerable for demands upon it. They are thus pledged alike to all. While the demand is unsatisfied, the pledge is unredeemed, and directly violated, if the whole fund is appropriated to the demand of a favorite. It cannot be pretended, that the appropriation of the whole fund to the United States exonerates the bank from their obligation to pay the $60,000 due to individuals; their demands are not extinguished thereby, but remain in full force, after all the corporate effects are disposed of. And this becomes the situation of the parties: the private creditors have just and legal demands against the bank, arising from a deposit of their money; the United States have a demand of the same kind; the bank is bound to pay both, if its property and effects are sufficient; but its effective means fall short of either debt. The 13th section expressly releases the members of the company, exempts their persons and property from all liability for the contracts and engagements of the bank, or losses, deficiencies and failure of the capital stock; thus making the capital stock the only fund for payment. Two creditors, then, having debts contracted in the same way, have by law a pledge of the whole estate and effects for their security. The trustees of the fund apply the whole to one creditor; the other receives nothing. All the losses are thrown on him; he has a right to a judgment against the bank, as his debtor; but can take neither their property nor effects, and the law prohibits him from resorting to any individual member of the company. I cannot consider this as anything short of a palpable perversion of the corporate powers of the directors, by depriving innocent individuals of every possible remedy for the clearest possible right.

If it is said, that the directors are answerable individually to the injured creditors; that could only be on the legal result of the acts done by them; for, if they act within their chartered authority, they are mere agents of the bank; and as such, expressly exempted from all personal responsibility. It
*670] is only *by an excess or abuse of their authority, that they cease to be agents, and act at their individual peril; and it follows, necessarily, that in so doing, their acts are void as to the bank, and cannot operate as a corporate transfer of corporate property, to one who is a party to an unauthorized transaction.

If the charter gives power to apply the corporate effects to one creditor only, when it is unable to pay all, the directors have the same power to prefer one stockholder, after the debts are paid; and in either case, might prefer themselves. Stockholders, debtors to the bank, might apply their

notes to the reimbursement of their capital paid in; throw all the losses on those stockholders who had borrowed no money, and on whose funds the operations of the bank had been carried on. The directors themselves, and the preferred debtors of the corporation, would thus receive back their whole stock, while the creditor stockholders lose all theirs.

When the debts of a bank, due to the holders of their paper, or their customers, are paid; stockholders, being creditors, are entitled to payment of their demands. The 13th section directs the directors to manage the funds, "for the use and benefit of the stockholders;" and the 12th pledges them for all demands upon the bank. After the out-of-doors debts are paid, the claims of stockholders are as sacred as those of depositors were before payment; and any acts of the directors, not strictly authorized by these sections of the charter, are inoperative and void, as well against the bank as against those who are creditors by holding their notes, or depositors or stockholders.

The charter of any corporation is the only source of its powers, and the only authority by which any can be exercised; it is opposed to all sound rules of construction, to consider that which confers, as merely restraining and controlling powers, incident to the incorporation; and therefore, to be constructed strictly as a limitation or exception to powers which pre-existed, or necessarily resulted from it; as is the power to make by-laws, to sue and be sued, &c. The power to manage, control and dispose of the corporate property, is a special authority given by the charter. None can be exercised which is not explicitly granted; and it can only be exercised on the precise subjects over which it is given, and within the *limits definitively assigned. No charter ever gave a right of preference of one creditor [*671 of the corporation to the exclusion of all others; none ever authorized a transfer of all its property, as this assignment does; and those who claim a right under it are bound to show, affirmatively, the authority of the directors to do so, by the terms of the charter. The injured creditors are not bound to show a negative of the power, by any restrictions or prohibitions. It is an universal principle, that he who claims under a special authority must show its existence and lawful exercise; to throw the burden of proof on the party whose rights will be destroyed by its abuse, would be the utter reversal of every rule which governs the execution of powers. The charter expressly pledges the whole property of the bank to the payment of the demands upon it. The creditor who claims the whole, by the act of the directors, the agents of the bank, and the trustees for all creditors and stockholders, must, especially when plaintiff, clearly make out their power to give him the preference. The absence of a restriction is no evidence of the grant of the power. The general pledge for all demands can only be dispensed with, by express power to transfer that pledge to the satisfaction of one, by withdrawing it from all others. This rule clearly results from the cases before cited, and is clearly established in those which follow. An act of parliament authorized the directors of an incorporated company, in order to raise money by loan, and secure its repayment, to give a mortgage of their tolls: it was held, not to empower them to mortgage their toll houses; and they are not estopped by their deed from denying their power, 2 T. R. 171. Where a mortgage was given, pursuant to a similar act of parliament, in order to secure their loans to one creditor of the company.

contrary to the provisions of the act prohibiting a preference, it was declared, that he was a bailee for all others who loaned their money under the authority of the act, that they should receive their due proportion. *Banks* v. *Booth*, 2 Bos. & Pul. 222. Where tolls were granted to a company, to reimburse them for money subscribed to a canal, they cannot diminish their rate, or make their rate unequal, by giving a preference to one person, using
*672] it for transportation, over *another (*Lees* v. *Manchester Canal*, 11 East 656); or reduce tolls at one gate and not at all. *King* v. *Bury*, 4 Barn. & Cres. 361.

The principle of these cases applies to this; the second is much stronger. The thing mortgaged was only the profits; the property from which they were to accrue remained in fee to the company, subject to the payment of the loan. The preference given by a mortgage to one lender, was only as to the time of payment; and did not diminish the security of the lenders. Both cases show the great strictness in which the powers of a corporation must be exercised. The case of canal tolls seems conclusive, so far as any decision of the court of king's bench can be, to show that an agreement to give a customer a preference in a reduced rate of toll is void, as an excess of the corporate powers of the directors. An agreement to transfer the whole property of the corporation to one creditor, or stockholder, would not have been enforced in Westminster Hall.

"No argument drawn from convenience can enlarge the powers of a corporation." 4 Pet. 169. "A general authority in the charter, that the directors shall have power to do whatever shall appear to them necessary and proper to be done, for the well-ordering of the interest of the proprietors, not contrary to the laws of the state;" was not intended to give unlimited power; but the exercise of a discretion within the scope of the authority conferred. 4 Pet. 171. Such words are restricted by the other provisions of the charter. Ibid.

Construing the one to the Bank of Somerset, by rules so well settled, I cannot consider the agreement in question to be within the legitimate powers of the directors. In the case of *Slee* v. *Bloom*, 19 Johns. 456, 477, the court of errors decided, with only one senator dissenting, that a resolution of the board of directors of a manufacturing company, giving the stockholders the privilege of forfeiting their shares, on paying thirty per cent., "was utterly inoperative, against the fundamental principles of law and equity; legally fraudulent, and therefore, void and inoperative," because a debt due to an only creditor would have been only partially paid, by depriving him of his
*673] only means of satisfation by a resort to the stockholders *ratably until his debt was paid. The agreement in this case produced a worse effect, as it cut off a class of creditors to the amount of $60,000 from the hope of a dividend.

If the directors have this power of preference among the holders of their notes, depositors and stockholders, it must be as incidental, not only to all banking, but other insolvent corporations; if incidental to corporate trustees, it must be applied to those who act under individual authority, to hold the trust fund answerable for demands or debts due by the person giving the directions to manage and dispose of it, for his use and benefit. I must dissent from the adoption of these principles, which my judgment tells me forms no part of the common law.

If this were the case of a bank, solvent but embarrassed, requiring only time to wind up its concerns, and the preference given to the United States were only as to time, the question would assume but little importance; but in this case, the insolvency was apparent on the statement of the general account of the bank. There could have been no possible hope of retrieving its affairs, with debts to the amount of $130,000, with not one dollar in their vaults, and an admitted deficit of $21,000. It is evident, that the continuance of their corporate functions, after May 1820, was not to carry on banking operations, for they had no means whatever to do it. The only possible object was to collect from the wreck what could be saved. The preference, therefore, given to the United States, could operate in no other manner than as a final extinction of all hope to the private depositors and note-holders, by throwing on them alone the loss arising from the deficiency of the funds. This, I think, was wholly unauthorized by the charter, and directly opposed to its spirit and meaning; that it was an abuse of their trust, which a court of law would not enforce, and equity would restrain. Whenever a court of chancery interferes in cases of trusts, they make no discrimination between individuals and a corporation; "a corporation being a trustee, is in this court the same as an individual." 2 Ves. jr. 46–7; 14 Ves. 252–3. If they misapply trust revenues, and by misbehavior are unable to pay moneys due by them, chancery will take the estate out of their hands. *Coventry Case*, 7 Bro. P. C. *235. So, if they mis-spend or misapply trust money, [*674
2 T. R. 200, 204; or as trustees, having the management of a productive fund, abuse their trust, 14 Ves. jr. 252–3; pledge corporate property for purposes not corporate, 1 Ves. & B. 242; deprive, by a by-law, one member of the company of his share of the profits, 1 Ves. jr. 316, 322 (where the chancellor examines fully the jurisdiction of the court over corporate trusts); or if the twelve jurymen of a manor court should make a by-law, that the next year's profits should be divided among themselves exclusively, 17 Ves. 321.

Thus believing that where property is devised or assigned to trustees to pay debts, the law of all courts is perfectly well settled, that the trustee has no power to pay one, in exclusion of another creditor, where the fund is not sufficient to pay all; finding that by the best-established principles of courts of chancery, corporate trusts are within their jurisdiction, and to be exercised by the same rules which control the execution of individual trusts; seing no authority in the charter for the directors of this bank to make the agreement which is the subject of this suit; and utterly unable to discriminate between the powers and duties of a private or corporate trustee; I must, though standing alone, record my decided dissent from the doctrine settled by the decision of the court in this case.

Though this point has not been made by counsel, nor noticed in the opinion of the court, it necessarily arises on the record; it enters into the very vitals of the cause; its merits cannot be settled, without a direct decision upon it; and thinking that the affirmance of the agreement to appropriate the whole effects of the bank exclusively to the United States, establishes, by the high authority of this court, a general principle, applicable to all corporations, all trustees, private or corporate; extending to creditors and stockholders, equally novel and alarming; it is my duty to notice and examine the question with the deliberation and research peculiarly necessary

from its intrinsic importance, and the circumstances under which it arose and was considered; it is equally my duty, to express the results of my judgment.

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*675] *James Sheppard and others, Appellants, *v.* Lemuel Taylor and others, Appellees.

Seamen's wages.

The ship Warren, owned in Baltimore, sailed from that port, in 1806, the officers and seamen having shipped to perform a voyage to the north-west coast of America, thence to Canton, and thence to the United States; the ship proceeded, under the instructions of the owners, to Conception Bay, on the coast of Chili, by the orders of the supercargo, he having full authority for that purpose; the cargo had, in fact, been put on board for an illicit trade against the laws of Spain, on that coast. After the arrival of the Warren, she was seized by the Spanish authorities, the vessel and cargo condemned, and the proceeds ordered to be deposited in the royal chest; the officers and seamen were imprisoned, and returned to the United States; some after eighteen months, and others not until four years from the term of their departure; the king of Spain subsequently ordered the proceeds of the Warren and cargo to be repaid to the owners, but this was not done; afterwards, the owners having become insolvent, assigned their claims for the restoration of the proceeds, and for indemnity from Spain, to their separate creditors; and the commissioners under the Florida treaty awarded to be paid to the assignees a sum of money, part for the cargo, part for the freight, and part for the ship Warren. The officers and seamen having proceeded against the owners of the ship, by libel for their wages, claiming them by reason of the change of voyage, from the time of her departure until their return to the United States, respectively, and having afterwards claimed payment out of the money paid to the assignees of the owners, under the treaty, it was held, that they were entitled, towards the satisfaction of the same, to the sum awarded by the commissioners for the loss of the ship and her freight, with certain deductions for the expenses of prosecuting the claim before the commissioners; with interest on the amount, from the period when a claim for the same from the assignees was made by a petition.

If the ship had been specifically restored, the seamen might have proceeded against her in the admiralty, in a suit *in rem*, for the whole compensation due to them; they have by the maritime laws an indisputable lien to this extent. There is no difference between the case of a restitution in specie of the ship itself, and a restoration in value; the lien re-attaches to the thing, and to whatever is substituted for it; this is no peculiar principle of the admiralty; it is found incorporated into the doctrines of courts of common law.

Freight, being the earnings of the ship, in the course of the voyage, is the natural fund out of which the wages are contemplated to be paid; for although the ship is bound by the lien of the wages, the freight is relied on as the fund to discharge it, and is also relied on by the master to discharge his personal responsibilities for disbursements and wages.

Over the subject of seamen's wages, the admiralty has an undisputed jurisdiction *in rem*, as well as *in personam*;[1] and wherever the lien for the wages exists, and attaches upon the proceeds, it is the familiar practice of that court, to exert its jurisdiction over them, by way of monition to the parties holding the proceeds. This is familiarly known in the cases of prize, and bottomry,
*676] and *salvage; and is equally applicable to the case of wages: the lien will follow the ship, and its proceeds, into whose hands soever they may come, by title or purchase from the owner.[2]

Appeal from the Circuit Court of Maryland. In December 1810, a libel was filed by James Sheppard and others, officers and seamen of the merchant ship Warren, against Lemuel Taylor, Samuel Smith, James A. Buchanan, John Hollins and Michael McBlair, owners of the merchant ship Warren,

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[1] The James and Catharine, Bald. 544. L'Arina *v.* Manwaring, Bee 199.

[2] Brown *v.* Lull, 2 Sumn. 444; Pitman *v.* Hooper, 3 Id. 50; Vandever *v.* Tilghman, Crabbe 66.