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hereby remanded to the said district court for further proceedings to be had therein, according to law and justice, and in conformity to the opinion and decree of this court.<sup>1</sup>

\*ELISHA WINN and others, Plaintiffs in error, v. WILLIAM PAT- [\*663  
TERSON.

*Secondary evidence.—Certified copies.—Fraud to avoid a grant of land.*

Ejectment for a tract of land in Franklin county, Georgia, held under a grant to Basil Jones, and conveyed by the attorney of Basil Jones to the defendant in error. (See 11 Wheat. 380; 5 Pet. 233.) A copy of the grant was produced in evidence; and a copy of a power of attorney, dated 6th of August 1793, to Thomas Smith, authorizing him to sell the land, executed in the presence of Abram Jones, J. P. and Thomas Harwood; this copy was certified from the records of Richmond county, Georgia, and recorded 11th of July 1795; the original power of attorney was lost, and evidence of the loss, to introduce the copy, was given.

What evidence is sufficient to introduce secondary proof. The deputy-clerk of the Richmond county court, who, as such, had recorded the original power of attorney, testified, that he was well acquainted with Abram Jones, Esquire, and his handwriting, during the year 1793, &c., that the record of the power of attorney from B. Jones to T. Smith, made by himself, while clerk of the court, was a copy of an original power of attorney, which he believed to have been genuine, for that the official signature of Abram Jones must have induced him to commit the same to record; and that the copy of that said power of attorney, the one offered in evidence, had been compared with the record of the original made by himself, and was a true copy. Upon this evidence, the plaintiff offered the copy in evidence, and it was admitted by the circuit court: *Held*, that there was no error in admitting this evidence.

At the time of the admission of this evidence, it was forty years old; Abram Jones, the subscribing witness to the original, was long since dead, and did not appear that the other witness was alive; the original power did not exist, so that no evidence of the handwriting of the other witness could be given. After the lapse of thirty years from the execution of a deed, the witnesses are presumed to be dead; and this is the common ground for dispensing with the production of them, without any search for them, or proof of their death, when the original deed is before the court for proof; this rule applies not only to grants of land, but to all other deeds, where the instrument comes from the custody of the proper party claiming under it, or entitled to its custody. *Patterson v. Winn*, 5 Pet. 233, 244, cited.

The rule is admitted, that a copy of a copy is not evidence; this rule properly applies to cases where the copy is taken from a copy, the original being still in existence; and capable of being compared with it, for then it is a second remove from the original; or when it is a copy of a copy of a record, the record being in existence, and deemed by law as high evidence as the original; for then it is also a second remove from the original. But it is a quite different question, whether it applies to cases of secondary evidence, where the original is lost, and the record of it is not deemed in law as high as the original, or when the copy of a copy is the highest proof in existence (in this case, the power of attorney was recorded in Richmond \*county, [\*664 and the land in controversy was in Franklin county): *Held*, that this is not the case of a mere copy of a copy, verified as such; but it is the case of a second copy, verified as a true copy of the original.

If a certified copy of a duly-recorded deed is evidence, it is not necessary to produce the original book in which the same was recorded.<sup>2</sup>

There are cases where grants and securities made contrary to the prohibitions of a statute, in part, are, upon the true construction of the intent of the statute, void *in toto*; but it is very different, in cases standing merely on the common law; and, therefore, at the common law, in order to

<sup>1</sup> For further proceedings in this case, see 11 Pet. 351; 12 Id. 339; and 13 Id. 359.

<sup>2</sup> A certified copy of an instrument is not evidence, if the law do not authorize it to be recorded. *James v. Gordon*, 1 W. C. C. 333;

*Barger v. Miller*, 4 Id. 280; *New York Dry-Dock v. Hicks*, 5 McLean 111; *Ormsby v. Tin-gey*, 2 Cr. C. C. 128; *Lemon v. Bacon*, 4 Id. 466; *Kerns v. Swope*, 2 Watts 75.

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make a grant void, *in toto*, for fraud or covin, the fraud or covin must infect the whole transaction, or be so mixed up in it, as not to be capable of a distinct and separate consideration. A grant may be good for part of the land granted, and bad as to other parts of the same. *Patterson v. Jenks*, 2 Pet. 216, 235, cited.

ERROR to the Circuit Court of Georgia. In February 1820, an action of ejectment was instituted in the circuit court, by the lessee of William Patterson against Elisha Winn and others, to recover a tract of land in the county of Franklin, in the state of Georgia. The case had been twice before this court on writ of error. (11 Wheat. 380, and 5 Pet. 233.) Many of the material facts in the case will be found in the reports referred to.

At November term 1833, of the circuit court, in pursuance of the mandate of this court, a new trial of the case took place; and the plaintiff gave in evidence a grant from the state of Georgia to Basil Jones, for 7300 acres of land, including the lands in controversy in this suit, dated 24th May 1787, with a plat of the survey of the said land annexed; a copy of a power of attorney from Basil Jones to Thomas Smyth, jr., purporting to be dated the 6th of August 1793, authorizing Smyth, *inter alia*, to sell and convey the tract of 7300 acres; which power purported to be signed and sealed in the presence of Abram Jones, J. P., and Thomas Harwood, jr.; and the copy was certified to be a true copy from the records of Richmond county, Georgia, and recorded there on the 11th July 1795; and to account for the loss of the original power of attorney, of which the copy was offered, and of the use of due diligence and search for the same, the plaintiff read the depositions of William Patterson and others, the particulars of which, and all the evidence in the case, are stated in the bill of exceptions.

The defendant objected to the evidence, and \*the court overruled \*665] the objection, and allowed the paper to be read to the jury. To this decision of the court, the defendant excepted, and the court sealed a bill of exceptions. In the further progress of the case, further evidence was offered, and certain instructions thereon asked of the court, which were refused; and the refusal of the court to give such instructions was the subject of another exception. The jury, under the charge of the court, found a verdict for the plaintiff, upon which judgment was entered; and the defendants prosecuted this writ of error.

The bills of exception were as follows: The plaintiff, to maintain the issue on his part, gave in evidence a copy of a grant from the state of Georgia to Basil Jones, for 7300 acres, bearing date on the 24th day of May 1787, together with a plat of survey of the said land thereto annexed (a copy of which plat and grant was in the record); and further offered to give in evidence to the jury, a paper writing, purporting to be a copy of a power of attorney from Basil Jones to Thomas Smyth, Junior, executed on the 6th day of August 1793, by Basil Jones, in the presence of Abram Jones, J. P., and Thomas Harwood, on which copy there was a certificate under the official seal of John H. Mann, clerk of the superior court of Richmond county, stating that it was a true copy from the record in his office, entered on book, &c., on the 11th July 1795. A certificate from John H. Montgomery, one of the judges of the superior court, was annexed, stating that the officer who certified the copy, was the clerk of the superior court, that his signature was entitled to full faith and credit, and that the

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attestation was in due form. The power of attorney authorized Thomas Smyth, Junior, to sell and dispose of 7300 acres of land granted to Basil Jones, part of which is the land for which this ejectment was brought. To account for the loss of the original power of attorney, the plaintiff below produced his affidavit, stating his belief that the said original grant to Basil Jones had been lost or destroyed. This affidavit was made on the 23d of July 1833; also the deposition of Andrew Fleming, stating numerous and particular acts which he had performed to discover the said \*originals. This deposition set forth diligent examinations for the lost papers, in various places, and by inquiries of all such persons [\*666 where and with whom the said papers might probably have been found, if they had not been altogether lost or destroyed. Also the answers to interrogatories of Anna Maria Smyth, the widow of Thomas Smyth, relative to the lost papers, and stating that she had not been able to find them among the papers of her deceased husband, nor had she ever seen them, although she had the custody of all the papers left by her deceased husband.

And further to account for the loss of the said original power, Richard H. Wilde, Esq., was examined, on interrogatories propounded to him, who stated, that he had made diligent search for the said power of attorney, with the assistance of the clerk, in the clerk's office of the superior court of Richmond county, without success. That he had applied to the widow of Basil Jones for the paper and for the original grant, who was unable to find the same; and had advertised for the same for some months, in two newspapers in Georgia; he had inquired for the same, at the office of the secretary of state of Milledgeville, and had searched the the clerk's office at Columbia, where Basil Jones formerly resided; and also had made numerous other searches and inquiries. A copy of the advertisement for the lost papers was inserted in the examination. The testimony of John H. Wilde, Esq., was also introduced, who proved, that, by reputation, Abram Jones was dead long since; that he compared the copy of the power of attorney offered in evidence with the record in the clerk's office of Richmond superior court, and it is a true copy. William Patterson, the plaintiff in the circuit court, he believed, had never been in Georgia.

William Robertson deposed, that he was deputy-clerk, and acted as such of Richmond county, in the year 1794, and clerk of the said court in 1795, and continued in that office till 1808 or 1809; that he was well acquainted with Abram Jones, Esq., and his handwriting, during the years 1793, 1794 and 1795, and before and afterwards. The deponent further states, that the record of a power of attorney from B. Jones to Thomas Smyth, Junior, made by himself, while clerk \*of that court, is a copy of an original power of attorney, which he believes to have been genuine, for that [\*667 the official signature of Abram Jones must have induced him to commit the same to record; and that the copy of said power of attorney transmitted with deponent's depositions has been compared by himself with the record of the original made by himself in Richmond county, and is a true copy.

The plaintiff then offered the paper purporting to be a copy of the power of attorney in evidence; which was opposed by the counsel for the defendants, as not admissible evidence.

The counsel for the lessor of the plaintiff, further to prove the original

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power of attorney was made and executed, gave in evidence a deed executed by Thomas Smyth, Junior, alleging himself to be the attorney in fact of Basil Jones, dated 18th November 1793, which conveyed to William Patterson, the lessor of the plaintiff, 7300 acres of land in Franklin county, originally granted to Basil Jones, May 24th, 1787; which deed also conveyed, or purported to convey, four other tracts of land, situate in Franklin county, and contained the following recital: "Whereas, the said Basil Jones, by a certain writing or letter of attorney, dated the sixth day of August last past, did empower and authorize the said attorney (Thomas Smith, Junior), in his, the said Basil Jones's name, to sell or dispose of five certain tracts or parcels of land hereinafter mentioned, situate in Franklin county, in the state of Georgia aforesaid." And the plaintiff offered in evidence proof that Abram Jones, who signed the original power of attorney, was, at the time he signed the same, a justice of the peace of the county of Richmond; which was admitted by the defendant's counsel.

The plaintiff's counsel then insisted, that the copy of the power of attorney was admissible in evidence, and should go to the jury, which was opposed by the defendants' counsel; but the court admitted the same, and the counsel for the defendants excepted to the said admission.

The plaintiff also offered three witnesses before the jury, to prove the identity of the land in dispute, with a plat of the same, given in evidence, and that the defendants were in possession of the part for which this suit was brought, and also the location of the land; which witnesses also proved, \*668] that part of the said land, which lay on the south and west of the said Appalachee river, was not, at the time of issuing the said grant, situate in the county of Franklin, as the grant purported it to be, but was without the then county of Franklin, and beyond the then temporary boundary line of the state of Georgia. Whereupon, the attorney for the said defendants prayed the said justices to instruct the said jury, that if the jury believed, that Basil Jones, the deputy-surveyor and grantee, under whom the lessor of the plaintiff claims, by designating the stream marked in the original plat, as "the branch of the south fork of the Oconee river, instead of the south fork of the Oconee river, and by stating that the land was situate in the county of Franklin, when a large part of it lay without the county of Franklin, and without the temporary boundary line of the state of Georgia, practised a deception upon the governor of the state, and thereby induced him to issue the grant; that such grant is fraudulent and void, and cannot entitle the plaintiff to recover;" which instruction the said justices refused to give to the said jurors. And the said attorney further prayed the said court to instruct the said jurors, that a grant of land is an entirety, and that a grant void in part is void for the whole; which instruction the said justices also refused to give the said jurors. And they further prayed the said court to instruct the said jurors, that a concealment or misrepresentation of material facts, calculated to deceive the governor issuing the grant, renders the grant null and void in law; which instruction the said justices also refused to give to the said jurors, and the jurors gave their verdict against the said defendants, upon the issue aforesaid.

The case was argued by *Seaborn Jones*, for the plaintiff; and by *Wilde and Berrien*, for the defendant.

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*Jones* contended, that the circuit court erred:—1. In permitting the defendant in error to read in evidence to the jury a paper purporting to be a copy of a power of attorney from Basil Jones to Thomas Smyth, Junior, for want of sufficient legal proof of the genuineness, existence and execution of the original, or of the correctness of said paper, offered as a copy. \*2. In permitting the defendant in error to read in evidence to the jury, a copy of a grant to Basil Jones, which grant, and the survey on which it was founded, were contrary to the laws of Georgia, and therefore, null and void. 3. In refusing to instruct the jury, that the said grant and the survey on which it was founded, were contrary to the laws of Georgia, and were, therefore, null and void.

To show that the writing was not admissible in evidence, until the absence of all the witnesses was accounted for, he cited, 1 Stark. Evid. 340, 342, 345; 5 Cranch 13; 18 Johns. 60; 2 Serg. & Rawle 44; 1 Overton 187; 1 Dall. 123; Peake's Evid. 146, 152. There had been no possession to warrant the admission of the copy of the power of attorney, as an ancient deed. The rule requires thirty years' possession under the deed. No actual possession of the land has been shown, and constructive possession will not do. No possession can be based upon a presumption. Possession or constructive possession cannot be presumed, and then from that, the execution of the deed be presumed. The actual accompanying possession is what gives credit to the presumption of the execution of a deed. Cited, 3 Johns. 295; 10 Ibid. 475; 9 Ibid. 169; Bull. N. P. 254. But the rule which admits ancient deeds, does not apply to a copy. Peake's Evid. 162, 141, 167. There must be proof of the due execution of the original. 1 Stark. Evid. 154; 1 Johns. Cas. 402, 409.

The record of the recording an instrument, is no evidence, unless the deed was recorded by due authority. 1 Atk. 264; 6 Binn. 274; 1 Marsh. 205. The deed was not recorded in the proper county, as no part of the land lay in the county where the deed was recorded. There is no law of Georgia which authorizes the recording of powers of attorney; but the courts have considered powers of attorney as standing on the same footing as deeds.

The enrolment of a deed is no evidence of the contents of a deed, unless made by the authority of law. Cited, 1 Stark. Evid. 365, note; Bull. N. P. 255; 1 Har. & Johns. 527; 1 Taylor 25; 2 Wash. 280; 1 Pet. 98.

The evidence offered, was but a copy of a copy. As to copies \*of records being evidence: cited, 1 Philips's Evid. 291, 309, 292; 3 Day records being evidence: cited, 1 Philips's Evid. 291, 309, 292; 3 Day 399; Peake's Evid. 58; 3 Dall. 65; 4 Munf. 310. There was no evidence whatever of the absence of the witnesses to the power of attorney. Cited, 5 Pet. 242.

The grant to Basil Jones was absolutely void, having been obtained by practising a fraud on the government of Georgia. The evidence of the fraud should have been admitted. Cited, 1 Wheat. 115, 155; Indian Treaty of 1783, and Act of the legislature of Georgia of 1784; Act of 1780; *Patterson v. Winn*, 11 Wheat. 380. There has been a legislative construction of the treaty of 1784, showing what the boundary line was. This is referred to, for the purpose of showing that the grant was void in part, the part of the land being within the Indian lines; and was, therefore, void altogether. To show that all grants of land within the Indian boundary were absolutely void, and that the surveys under such grants were void: cited,

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Prince's Dig. of the Laws of Georgia 268, 275, 278, 304, 363; Walker's Dig. 363; *Polk's Lessee v. Wendall*, 9 Cranch 99.

It is not intended to say, that the legislature could declare a patent for lands void, if granted for lands within the state, and which were subject to grants. The law declares, the patent for land so situated shall not be given in evidence. The legislature have declared all grants within the Indian boundary void. Prince's Dig. 268, 276. Basil Jones was but a deputy-surveyor, and had no authority to make the survey. The evidence shows he acted fraudulently, as he well knew the actual boundary of the Indian territory, and knowingly violated the laws of Georgia, forbidding surveys of lands not subject to grant. He acted in violation of his official oath.

A deed which is void in part, is altogether void. 14 Johns. 458. This point was not decided by the court, in the case of *Patterson v. Jenks*; nor was the question of the admissibility of the power of attorney decided in that case.

Mr. Jones laid before the court certificates from the judges of the courts of Georgia, and opinions of the judges of those courts as to the construction \*671] of the registry acts of that state; \*which certificates, he contended, sustained the views he had presented of those laws.

*Wilde* and *Berrien*, for the defendant in error, argued, that there was but one point in this case, open for argument, as all the other questions had been decided by the court in the former cases. The defendants in the court below are shown by the record to have all resided within the limits of the county of Franklin, and all the lands in controversy in this suit are within that county. The only point in the case is, therefore, that which relates to the admissibility of the power of attorney to support the deed from Basil Jones. Did the court err in allowing this evidence to go to the jury?

The rules of law on this question relate either: 1. To the proof of the execution of the original instrument. 2. To the proof necessary to dispense with the production of an original. 3. To the degree of secondary proof which is necessary, when the production of the original is dispensed with. As the evidence in this case was not the original power, the question is, whether evidence sufficient to authorize the introduction of the copy was given. It is contended, that this proof was given in the evidence of the clerk who recorded the power, and which is set forth at large in the bill of exceptions. A copy may be verified by an officer duly authorized for that purpose, or by the oath of an individual who has compared it with the record authorized by law; and therefore, as the evidence of a private individual, not an officer, the testimony of the person who made the copy was sufficient.

It is not a copy of a copy. The witness was in possession of the original, and from that made the copy in the record, and he swears that the copy is a genuine copy of the original. The evidence is, that the copy on the record, and the copy offered in evidence, were both genuine copies of the original.

The counsel then went into a particular examination of the evidence, and contended, that it fully sustained the right of the plaintiff below, on every principle of law, to give the copy of the power of attorney in evidence. The strictest rules of law were complied with. 1 Stark. Evid. 341, 343.

\*672] \*The handwriting of the other witness to the power of attorney could not have been proved, as the original was lost.

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Thirty years had elapsed since the execution of the power and of the deed made under it, and this authorizes the presumption of the due execution of the instrument. Possession must accompany the deed, but an actual *pedis possessio* is not required; and this rule is not applicable to a power of attorney. In this case, the possession was in accordance with the deed, and there was no evidence given, to show that the defendants were other than mere intruders. Cited, 8 Cranch 229; 4 Wheat. 222; 5 Pet. 489. Evidence of loss of papers, and secondary proof of their contents is addressed to the court. 6 Johns. 195. In Georgia, if proof of loss of an original paper is given, by the death of the party, a copy will be admitted or proof of its contents. Cited, 5 Pet. 243; 2 Serg. & Rawle 44; 4 Bos. & Pul. 260; 2 Pet. 250; 3 Hayw. 96, 123.

If the original power of attorney were before this court, the acknowledgment of it before a justice of the peace, would, by the law of Georgia of 1785, make it, *per se*, evidence.

STORY, Justice, delivered the opinion of the court.—This is a writ of error to the circuit court of the district of Georgia. The cause, which is an ejectment, has been twice before this court, and the decisions then had, will be found reported in 11 Wheat. 380, and 5 Pet. 233; to which we may, therefore, refer, as containing a statement of many of the material facts.

At the new trial had in November term 1833, in pursuance of the mandate of this court, the plaintiff, to maintain the issue on his part, gave in evidence a copy of a grant from the state of Georgia to Basil Jones, for 7300 acres, including the lands in controversy, dated the 24th of May 1787, with a plat of survey thereto annexed. He then offered a copy of a power of attorney from Basil Jones to Thomas Smyth, Junior, purporting to be dated the 6th of August 1783, and to authorize Smyth, among other things, to sell and convey the tract of 7300 acres, so granted, which power purported to be signed and sealed in the \*presence of "Abram Jones, J. P., and Thomas Harwood, jr.;" and the copy was certified to be a [\*673 true copy from the records of Richmond county, Georgia, and recorded therein, on the 11th day of July 1795. And to account for the loss of the original power of attorney, of which the copy was offered, and of the use of due diligence and search to find the same, the plaintiff read the affidavit of William Patterson, the lessor of he plaintiff, which in substance stated, that he had not in his possession, power or custody, the original grant; and that he verily believed the original power of attorney and grant have been lost or destroyed. He also read, for the same purpose, the deposition of Andrew Fleming, which stated in substance, the searches made by him among Thomas Smyth's papers, and the information received by him, leading to the conclusion, that the same has been lost or destroyed. Also, the deposition of Mrs. Smyth, the widow of Thomas Smyth, for the same purpose. Also, the deposition of Richard H. Wilde, which stated several searches made by him for the original power, in the office of the clerk of Richmond county, and in other places, and an application to the wife of Basil Jones, and to the son of Thomas Smyth, for the like purpose; and an advertisement in two Georgia newspapers, for information respecting the same, all of which proved ineffectual. The same witness also stated, that Abram Jones, the supposed subscribing witness, was, by public reputation,

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long since dead. It was admitted, that Abram Jones was, at the time of the supposed execution of the power, a justice of the peace.

The plaintiff also read in evidence the deposition of William Robertson, who stated, that he was deputy-clerk of Richmond county, in 1794, and clerk in 1795, and continued in office until 1808 or 1809; that he was well acquainted with Abram Jones, and his handwriting, during the years 1793, 1794 and 1795, and before and afterwards; that the record of the power of attorney from B. Jones to Thomas Smyth, jr., made by himself, while clerk of the court, is a copy of an original power of attorney, which he believes to have been genuine, for that the official signature of Abram Jones must have induced him to commit the same to record; and that the copy of the said power of attorney, transmitted with the deponent's depositions (the \*674] copy before the court), \*had been compared with the record of the original made by himself in Richmond county, and is a true copy.

The plaintiff also gave in evidence a deed executed by Thomas Smyth, jr., as attorney in fact of Basil Jones, dated on the 18th of November 1793, conveying, as such attorney, to William Patterson, the lessor of the plaintiff, certain tracts of land, and among others, the tract of 7300 acres; which deed contained a recital, that Basil Jones, by his certain writing or letter of attorney, dated the 6th of August 1793, did empower and authorize his said attorney in his, Basil Jones's, name, to sell and dispose of the tracts mentioned in the deed; which deed was recorded in the records of Franklin county, on the 25th of July 1795.

Upon this evidence the plaintiff offered the copy as evidence in the cause. It was objected to by the defendants, and the objection was overruled by the court; and the copy was admitted in evidence to the jury. And this ruling of the court constitutes the first ground in the bill of exceptions, upon which the defendants now rely for a reversal of the judgment of the circuit court, which was in favor of the plaintiff.

In the consideration of the admissibility of the copy, two questions are involved. In the first place, whether there was sufficient evidence of the genuineness and due execution of the original power of attorney. In the next place, if its genuineness and due execution are established, whether the copy was, by the principles of law, under all the circumstances, admissible proof.

In regard to the first question, we are to consider, that the original instrument (supposing it to be genuine) is of an ancient date, having been executed in the year 1793, and recorded in the public records, as a genuine instrument, in 1795; so that at the time of the trial, it was forty years of age. Abram Jones, one of the subscribing witnesses, was long since dead; and it does not appear that Thomas Harwood, the other subscribing witness, was alive, or that the plaintiff had any means of identifying him or tracing out his residence. The original power did not exist, so that the plaintiff could not, by an inspection of his handwriting, ascertain, who he was, or where he lived. After the lapse of thirty years from the time of the execution of a \*675] deed, the witnesses are presumed to be dead; and this is \*the common ground, in such cases, for dispensing with the production of them, without any search for them, or proof of their death, when the original deed is before the court for proof. It is a rule adopted for common convenience, and founded upon the great difficulty of proving the due execution of a

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deed, after an interval of many years. And the rule applies not only to grants of land, but to all other deeds, where the instrument comes from the custody of the proper party, claiming under it, or entitled to its custody. 1 Phillips Evid. ch. 8, § 2, p. 406, and cases there cited; 1 Stark. Evid. part 2, § 143-5, and cases there cited. If, therefore, the original power were now produced from the custody of the plaintiff, it would not be necessary to establish its due execution, by the production of the subscribing witnesses. It would be sufficient to establish it by other proofs. This view of the matter disposes of that part of the argument, which denies that the proof of the original instrument can be made, without the production of the subscribing witness, Harwood, or accounting for his non-production.

Then, what is the proof of the genuineness and due execution of the original power of attorney? Mr. Robertson swears, that he was acquainted with the handwriting of Abram Jones (one of the subscribing witnesses), at the time of its date, as well as before, and afterwards; that he recorded it in the county records; that the record is a copy of an original power of attorney, which he believed to have been genuine, for that the official signature of Abram Jones must have induced him to commit the same to record. Now, what is to be understood by the "official signature" in the language of the witness? Clearly, his genuine handwriting, and the annexation of his official title, J. P., that is, Justice of the Peace, establishing that he verifies the instrument, not merely as an individual, but as a public officer. It is impossible, that it could be his official signature, unless it was also a genuine, and not forged, signature of his name. So that here we have from Mr. Robertson, direct proof of his belief of the genuineness of the signature of a subscribing witness, from his knowledge of his handwriting, his examination of the original instrument, and his having recorded it upon the faith of such belief. It seems to us perfectly clear, upon the received principles of the law of evidence, that this was sufficient *prima facie* proof of the genuineness and due execution of the original power, to be left [\*676 to the jury, for their consideration of its weight and effect.

The next question is, whether sufficient ground was laid in the evidence, to establish the loss or destruction of the original power, so as to let in secondary proof of its contents. We think there was, considering the lapse of time since the original transaction, the diligence which had been used, the searches which had been made, and the other attendant circumstances stated in the depositions, to fortify the presumption of such loss or destruction. This was the view of this point taken by this court in the former decision, in 5 Pet. 233, 242, though it was not then so directly before us; and having heard the new argument addressed to us on the present occasion, we see no reason for departing from our former opinion.

The remaining question, then, is, whether the copy now produced was proper secondary proof, entitled by law to be admitted in evidence. The argument is, that it is a copy of a copy, and so not admissible; and that the original record might have been produced in evidence. By the laws of Georgia (act of 1785), deeds of bargain and sale of lands are required to be recorded in the county where the lands lie. (Prince's Dig. 112.) Powers of attorney to convey lands, are not required by law to be recorded in the same county, though there seems to be a common practice so to do. The act of 1785 provides, that all bonds, specialties, letters of attorney, and

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powers in writing, the execution whereof shall be proved by one or more of the witnesses thereto, before certain magistrates of either of the United States, where the same were executed, and duly certified in the manner stated in the act, shall be sufficient evidence to the court and jury of the due execution thereof. (Prince's Dig. 113.) The present power was not recorded in the county of Franklin, where the lands lie, but in Richmond county; and therefore, a copy from the record is not strictly admissible in evidence, as it would have been, if powers of attorney were by law to be recorded in the county where the lands lie, and the present power had been so duly recorded. It is certainly a common practice, to produce, in the custody of the clerk, under a *subpoena duces tecum*, the original records \*677] of deeds, duly recorded. But in point of law, a copy from such record is admissible in evidence, upon the ground stated in *Lynch v. Clark*, 3 Salk. 154, that where an original document of a public nature would be evidence, if produced, an immediate sworn copy thereof is admissible in evidence; for, as all persons have a right to the evidence, which documents of a public nature afford, they might otherwise be required to be exhibited at different places at the same time. See Mr. Leach's note to 11 Mod. 134; *Birt v. Barlow*, 1 Doug. 171; 1 Stark. Evid. § 36-7. If, therefore, the record itself would be evidence of a recorded deed, a duly attested copy thereof would also be evidence. The present copy does not, however (as is admitted), fall within the reach of this rule. But the question does arise, whether the defendant can insist upon the production of the record-books of the county of Richmond, in court, in this case, as higher and more authentic evidence of the power of attorney, not properly recorded there, to the exclusion of any other copy, duly established in proof. We think he cannot. It is not required by any rule of evidence with which we are acquainted.

We admit, that the rule, that a copy of a copy is not admissible evidence, is correct in itself, when properly understood and limited to its true sense. The rule properly applies to cases, where the copy is taken from a copy, the original being still in existence and capable of being compared with it; for then it is a second remove from the original; or where it is a copy of a copy of a record, the record being in existence, by law deemed as high evidence as the original; for then it is also a second remove from the record. But it is quite a different question, whether it applies to cases of secondary evidence, where the original is lost, or the record of it is not in law deemed as high evidence as the original; or, where the copy of a copy is the highest proof in existence. On these points, we give no opinion, because this is not, in our judgment, the case of a mere copy of a copy, verified as such; but it is the case of a second copy, verified as a true copy of the original. Mr. Robertson expressly asserts, that the record was a copy of the original power made by himself, and that the present copy is a true copy, which has \*678] been compared by himself with the record. In effect, therefore, he swears, that both are true copies of the original power. In point of evidence, then, the case stands precisely in the same predicament, as if the witness had made two copies, at the same time, of the original, and had then compared one of them with the original, and the other with the first copy, which he had found correct. The mode by which he had arrived at the result, that the second is a true copy of the original, may be more circuitous than that by which he has ascertained the first to be correct; but that only

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furnishes matter of observation as to the strength of the proof, and not as to its dignity or degree. In each case, his testimony amounts to the same result, as a matter of personal knowledge, that each is a true copy of the original. We are, therefore, of opinion, that there was no error in the court in admitting the copy in evidence, under these circumstances.

In the further progress of the trial, additional evidence was offered; and thereupon the defendants prayed the court to instruct the jury: 1. That if the jury believed, that Basil Jones, the deputy-surveyor and grantee under whom the lessor of the plaintiff claimed—by designating the stream marked on the original plat as the branch of the south fork of the Oconee, instead of the south fork of the Oconee river, and by stating that the land was situate in the county of Franklin, when a large part of it lay without the county of Franklin, and without a temporary boundary line of the state of Georgia—practised a deception upon the governor of Georgia, and thereby induced him to issue the grant, that such grant is fraudulent and void, and cannot entitle the plaintiff to recover. 2. That a grant of land is an entirety, and that a grant void in part is void for the whole. 3. That a concealment or misrepresentation of material facts, calculated to deceive the governor issuing the grant, renders the grant null and void in law. The court refused to give either of these instructions; and the question now is, whether all or either of them ought to have been given.

The first instruction is couched in language not wholly unobjectionable or free from ambiguity. It assumes certain facts to be established in the case, without referring them to the decision of the jury, and on them founds the instruction, which is certainly not a correct practice. It also uses the words \*‘‘practised a deception,’’ without adding any qualifying words, whether the deception was knowingly and wilfully practised, [\*679 for the purposes of fraud, or whether it was by mistake of law or fact, or by misplaced confidence in the representations of other persons. And it is certainly the duty of a party, asking an instruction, to use language of such a definite and legal interpretation, as may not mislead either the court or jury in regard to the precise nature of the application. But, waiving this consideration, the instruction asked makes no distinction between the case of a *bona fide* purchaser from such grantee, without notice; a distinction most important in itself, and in many cases decisive in favor of the purchaser, whatever may have been the fraud of the original grantee.

It is unnecessary, however, to rely on this circumstance; for, stripping the instruction of its technical form, it comes to this, that if any part of the land included in the grant lay within the Indian boundary, and the governor was deceived as to that fact, the grant is void for the whole land; not only for that within the Indian boundary, but for all that lying within the limits of the state. This proposition is attempted to be maintained by the doctrine, that a grant void in part is void as to the whole. And certain authorities at the common law have been cited at the bar, in support of the doctrine. We have examined those authorities, and are of opinion, that they do not apply to cases like the present. There are doubtless cases, where grants and securities, made contrary to the prohibitions of a statute, in part, are, upon the true construction of the intent of the statute, void *in toto*. But Lord HOBART informs us, that it is very different in cases standing merely upon the common law. For (to use his quaint but expressive

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language), "the statute is like a tyrant; where he comes, he makes all void: but the common law is like a nursing father, and makes void only that part, where the fault is, and preserves the rest." See also *Norton v. Simmes*, Hob. 14; *Maleverer v. Redshaw*, 1 Mod. 35; *Collins v. Blantern*, 2 Wils. 351. And therefore, at the common law, in order to make a grant void *in toto*, for fraud or covin, the fraud or covin must infect the whole transaction, or be so mixed up in it as not to be capable of a distinct and separate consideration. \*The case of *Hyslop v. Clarke*, 14 Johns. 458, was a \*680] case of fraud, where both the grantors and grantees and assignees were privy to a meditated fraud against creditors, and therefore, it was held void *in toto*. The case of *Butler v. Dorant*, 3 Taunt. 229, which is very shortly reported, seems to have proceeded upon the ground, that the statute avoided the security *in toto*. If it did not, it seems questionable in its doctrine. In the present case, there is no statute of Georgia, which declares all grants of land lying partly within, and partly without, the Indian boundaries, to be void *in toto*. And the policy of the legislature of Georgia, on this subject, is sufficiently vindicated, by holding such grants void as to the part within the Indian boundary, leaving the grant good as to the residue. This very point was, in fact, decided by this court in *Patterson v. Jenks*, 2 Pet. 216, 235. One question there was, whether the whole grant (a similar grant) was a nullity, because it contains some land not grantable. In answer to the question, Mr. Chief Justice MARSHALL, in delivering the opinion of the court, said, "In the nature of the thing, we perceive no reason, why the grant should not be good for land which it might lawfully pass, and void as to that part of the tract, for the granting of which the office had not been opened. It is every day's practice, to make grants for lands, which have, in fact, been granted to others. It has never been suggested, that the whole grant is void, because a part of the land was not grantable." We are entirely satisfied with this doctrine, as equally founded in law and reason. The land in controversy in the present suit is within the acknowledged boundary of Georgia, and without the Indian boundary; and admitting the grant to be void as to the part within the Indian boundary, it is, in our judgment, valid as to the residue, notwithstanding the supposed deception stated in the instruction; for that deception did not affect with fraud any part of the transaction, except as to the land within the Indian boundary. The instruction, therefore, was rightly refused by the court.

The second instruction may be disposed of in a few words. It contains a proposition absolutely universal in its terms, that a grant of lands is an entirety, and that a grant void in part, is void for the whole. If this proposition were true, then a grant \*of 10,000 acres, which was void for \*681] any cause whatever, as a conveyance of one acre, although it might be for want of title in the grantor, would be void for the remaining 9999 acres. It is sufficient to say, that the instruction, so generally framed, ought not to have been given.

The third instruction admits of a similar answer. It is universal in its terms; and states, "that a concealment or misrepresentation of material facts" (not stating whether innocently or designedly and fraudulently made), "calculated to deceive the governor issuing the grant" (not stating whether he actually deceived or not), "renders the grant null and void in law," as to all persons whatever (not stating whether the party is the orig-

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inal grantee, or a *bonâ fide* purchaser under him, without notice). For the reasons already stated, such an instruction, so generally stated, ought not to have been given.

Upon the whole, we are all of opinion, that the judgment of the circuit court ought to be affirmed, with costs.

Judgment affirmed.

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UNITED STATES, Appellant, *v.* The Brig BURDETT.

*Evidence.—Letters.—Declarations of agent.—Penal actions.—Presumption of innocence.*

An information was filed in the district court of the United States, on the 1st of October 1832, against the Brig Burdett, alleging her to have been forfeited to the United States, for a violation of the registry acts, she being owned in whole or in part by a foreigner, a subject of the king of Spain. The vessel was purchased by an agent of George S. Steever, a native citizen of the United States, and was sent to the Havana; from the time of her arrival at Havana, she was placed under the direction of J. J. Carrera, a merchant of that place, and all her voyages directed by him, professing to act as the agent of Mr. Steever; part of the cost of the brig was paid in cash by Mr. Steever to his agent, on his return to the United States, and the balance charged by the agent and settled for in account with Mr. Carrera. The counsel for the United States offered in evidence certain letters written by Mr. Carrera to Captain Nabb, the master of the Burdett, during her several voyages, which had been directed by him, and which letters related to the business and employment of the Burdett; the letters were objected to as evidence, and were admitted in the district and circuit court, to which latter court the case was taken on an appeal by the claimant of the vessel: *Held*, that the letters were not legal evidence.

The confessions of an agent are not evidence to bind his principal, nor is his subsequent account of a transaction to his principal, evidence; but his acts, within the scope of his powers, are obligatory upon his principal, and those acts may be proved in the same manner as if done by the principal; the agent, acting within his authority, is substituted for the principal in every respect, and his statements, which form a part of the *res gestæ*, may be proved.

The object of this prosecution was to enforce a forfeiture of the vessel and all that pertains to her, for a violation of a revenue law; the prosecution was a highly penal one, and the penalty should not be inflicted, unless the infraction of the law were established beyond reasonable doubt.

That frauds are often practised under the revenue law, cannot be doubted, and that individuals who practise these frauds are exceedingly ingenious in resorting to various subterfuges to avoid detection, is equally notorious; but such acts cannot alter the established rules of evidence, which have been adopted as well with reference to the protection of the innocent, as the punishment of the guilty.

If a fair construction of the acts and declarations of an individual do not convict him of an offence, if the facts may be admitted as proved, and the accused be innocent, should he be held guilty of an act which subjects him to the forfeiture of his property, on a mere presumption? He may be guilty, but he may be innocent. If the scale of evidence does not preponderate against him—if it hang upon a balance, the penalty cannot be enforced; no individual should be punished for a violation of law, which inflicts a forfeiture of property, unless the offence shall be established beyond reasonable doubt. This is a rule which governs a jury in all criminal \*prosecutions; and the rule is no less proper for the government of the court, when exercising a maritime jurisdiction.<sup>1</sup> [\*683

<sup>1</sup> If the scale of evidence hangs in doubt, the verdict should be in favor of the claimant; the jurors ought to be clearly satisfied that the allegations of the informations are true; but if they are so satisfied, they may render a ver-

dict for the government, even though the proof falls short of what is required in a criminal case prosecuted by indictment. *Lillenthal's Tobacco v. United States*, 97 U. S. 272.