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REPORTS OF CASES

ARGUED AND ADJUDGED

IN THE

SUPREME COURT

OF THE

UNITED STATES,

JANUARY TERM 1835.

By RICHARD PETERS,

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

VOL. IX.

THIRD EDITION.

EDITED, WITH NOTES AND REFERENCES TO LATER DECISIONS,

BY

FREDERICK C. BRIGHTLY,

AUTHOR OF THE "FEDERAL DIGEST," ETC.

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MR. JUSTICE JOHNSON.

ORDER OF COURT.

Mr. Butler, the Attorney-General for the United States, having moved the court, in pursuance of the third resolve contained in the subjoined proceedings of the bar and officers of this court, to have said proceedings entered on the records of the court, Mr. Chief Justice Marshall remarked as follows: "The sentiments of respectful affection just expressed for our deceased brother, are most grateful to myself and to all my brethren. We too condole with you; and in ordering the resolutions to be recorded, we indulge our own feelings, not less than the feelings of those who make the application."

Whereupon, it is considered and ordered by the court, that the said proceedings of the bar and officers be entered upon the minutes, and which are as follows, to wit:

"At a meeting of the members of the bar of the Supreme Court of the United States, and of the officers of the court, held in the supreme court room, in the city of Washington, on Monday, January 12th, 1835,

"Benjamin F. Butler, Attorney-General of the United States, was appointed chairman, and Richard Peters, reporter of the court, was appointed secretary.

"On motion of Mr. Jones, the following resolutions were unanimously adopted:

"The Hon. William Johnson, senior associate justice of the supreme court of the United States, having departed this life during the late vacation of the court, and the members of this bar, and the officers of the court, entertaining the most grateful and lively remembrance of his eminent talents and learning, and of his many and shining virtues as a judge and a man, and lamenting his loss with a sincerity and depth of feeling corresponding with their esteem for the public and private character of the deceased, have—

"Resolved, that, as a token of their sentiments, they will wear the usual badge of mourning during the residue of the term.

"Resolved, that the chairman communicate to the bereaved family of the deceased, the esteem and consideration in which the virtues and talents of Mr. Justice Johnson were held by the bar and officers of this court, and assure them of their sincere sympathy in the loss which they, the court, and the country, have sustained in his death.

"On motion of Mr. Ogden:

"Resolved, that the Attorney-General, in behalf of the bar and officers of this court, do respectfully move the court, that the foregoing resolutions may be entered on the minutes of the court"

JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES,

DURING THE PERIOD OF THESE REPORTS.

Hon. JOHN MARSHALL, Chief Justice.

" JOSEPH STORY,
" SMITH THOMPSON,
" JOHN McLEAN,
" HENRY BALDWIN,
" JAMES M. WAYNE,

} Associate Justices.

BENJAMIN F. BUTLER, ESQ., Attorney-General.

The Hon. GABRIEL DUVALL resigned his office of Justice of the Supreme Court, early in January 1835.

Mr. Justice WAYNE was appointed on the 9th day of January 1835, in the place of Mr. Justice JOHNSON, deceased, and took his seat on the 14th day of January 1835.

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RULES AND ORDERS

OF THE

SUPREME COURT OF THE UNITED STATES.

RULE, No. 43.

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

2. No writ of error or appeal shall be docketed, on the record of the cause filed by the plaintiff in error or appellant, after the first six days of the term, except upon the terms that the cause shall stand for argument during the term, or be continued, at the option of the defendant in error or appellee. But in no case shall the plaintiff in error or appellant be entitled to docket the cause and file the record, after the same shall have been docketed and dismissed in the manner provided for in the preceding rule, unless by order of the court, or with the consent of the opposite party.

3. In all cases where the cause shall not be docketed, and the record filed with the clerk, by either party, until after thirty days from the commencement of the term, the cause shall stand continued until the next term.

There having been an appointment made of an associate justice of the the Supreme Court during the present term, it is ordered by the court, that the following allotment be made of the chief justice and the associate justices of the supreme court among the circuits, agreeable to the act of congress in such case made and provided; and that such allotment be entered of record, to wit:

For the first circuit, Hon. Joseph Story.
" second circuit, Hon. Smith Thompson.
" third circuit, Hon. Henry Baldwin.
" fourth circuit, none (there being a vacancy).
" fifth circuit, Hon. John Marshall, Chief Justice.
" sixth circuit, Hon. James M. Wayne.
" seventh circuit, Hon. John McLean.

CASES DETERMINED

IN THE

SUPREME COURT OF THE UNITED STATES.

JANUARY TERM, 1835.

ELIZA BROWN, Appellant, *v.* FRANCES SWANN, Administratrix of WILLIAM T. SWANN, deceased, and RICHARD B. ALEXANDER.

Final decree.

An appeal to the supreme court does not lie from a decree of the circuit court making an injunction perpetual, and leaving some matters of account open for further consideration, upon which the parties went on to take further proof; the decree perpetuating the injunction was not a final decree.

APPEAL from the Circuit Court of the District of Columbia, and county of Alexandria.

Lee, for the appellees, moved to dismiss the appeal, the same having been taken before a final decree in the case in the circuit court. The appellees filed their bill in the circuit court, on the 21st of November 1825. An injunction was directed, on the filing of the bill, which was afterwards in part dissolved. *Subsequently, the injunction was altogether dissolved, and further proceedings being had in the case, the court, on [*2
the 3d day of December 1832, made the following decree.

"And now, here, at this day, to wit, at a court continued and held for the district and county aforesaid, the 3d day of December 1832, came the parties aforesaid, by their solicitors, and this cause having been set for hearing and decree on the bills, answers, demurrer of defendant, exhibits and depositions, as heretofore stated in the proceedings herein, and now coming on to be heard, it is the opinion of the court, that the law on the demurrer is for the complainant. It is, therefore, by the court adjudged and decreed, that the demurrer be overruled. It is further the opinion of the court, that the complainant has fully sustained the charge of usury made by her, in her bill against the defendant, in relation to the loan therein stated; for a part of which loan the judgment at law, heretofore enjoined by the order of this

court in this cause, was obtained; and that under the provisions of the third section of the statute to amend the act entitled an act against usury, the defendant is entitled to receive no more than the principal sum by her lent, and is liable to the payment of the costs of this suit. And it appearing to the court, as well from the admissions of the defendant, as from the proof made by the complainant, that of the sum of $2300, loaned by the defendant, under the said usurious contract, the complainant and her intestate have paid the sum of $1350.30, leaving of the principal money loaned the sum of $949.70 unpaid; and the court not being satisfied as to the payment of the further sum of $50, for which the complainant claims credit, it is thereupon, by the court, adjudged and decreed, that the injunction heretofore awarded the complainant be perpetual, except as to the said sum of $949.70, of which sum the defendant is at liberty to proceed under her judgment, for the sum of $899.70; and on the complainant's motion, for reasons appearing to the court, this cause is continued for further consideration as to the said sum of $50, part of the credit claimed by the complainant. From which decree, the defendant prays an appeal to the supreme court of the United States, which is granted, on her giving bond and security to be approved by one of the judges of this court."

*3] *The parties, after this decree and appeal, went on to take depositions under the authority of the circuit court, which were filed in that court; and on the 18th of May 1813, the circuit court made the following decree.

"And afterwards, to wit, at a United States circuit court of the district of Columbia, continued and held for the county aforesaid, the 18th day of May 1833, the deposition of Richard B. Alexander and Alexander Moore, taken under a commission issued in this case, having been returned and filed, and this cause now coming on for final hearing as to the credit claimed by the complainant for the sum of $50, her right to which was reserved for consideration by the terms of the decree heretofore pronounced; and it being the opinion of the court, that the complainant is, under the proof offered, entitled to the said credit; it is now here by the court decreed, that the injunction heretofore awarded the complainant be perpetual, except as to the sum of $899.70, as to which the defendant is at liberty to proceed on her judgment at law; and it is further decreed, that the defendant do pay to the complainant her costs in this suit, to be taxed by the clerk."

Jones, contrà.

Marshall, Ch. J., delivered the opinion of the court, dismissing the appeal, with costs; because the appeal was granted before there was a final decree in the case.

On appeal from the circuit court of the United States for the district of Columbia, holden in and for the county of Alexandria: On consideration of the motion made in this cause yesterday, by Mr. Edmund J. Lee, of counsel for the appellees, to dismiss this cause, because the appeal was granted before there was a final decree rendered in the court below, and of the arguments of counsel thereupon, had as well for the appellant as for the appellees; it is now here ordered, adjudged and decreed by this court, that this appeal be and the same is hereby dismissed, with costs.

*The Lessee of Samuel Smith, Plaintiff in error, *v.* Robert Trabue's Heirs, by James Trabue, their next freind.

Final judgment.

The judiciary act authorizes the supreme court to issue writs of error to bring up any final judgment or decree in a civil action or suit in equity, depending in the circuit court &c.; but, a judgment awarding a writ of restitution, in an action of ejectment, where, in the execution of a writ of *habere facias possessionem*, the sheriff had improperly turned a person out of possession, is not a final judgment in a civil action; it is no more than the action of the court on its own process, which is submitted to its own discretion. This court takes no jurisdiction, in such a case.

Error to the Circuit Court of Kentucky. In the circuit court, the defendants in error filed a petition, in May 1830, setting forth that, on the demise of Richard Smith, an action of ejectment was instituted in the circuit court, against Richard Finn, with notice to Hiram Bryant and William Bryant and others; that the Bryants were tenants to the petitioners and to Robert Trabue, who appeared to the ejectment, had his tenants entered as defendants; and a judgment was rendered at May term 1828, against them. No writ of *habere facias possessionem* was issued on this judgment; and at November term 1818, a judgment was rendered against other tenants, and on that judgment, a writ of *habere facias possessionem* was issued, and the marshal of the district of Kentucky, under this last judgment and writ, turned out of possession, John Evans, who was a tenant of the petitioners, resident on the same place occupied by the Bryants, when the suit was first brought and judgment rendered, and then possessed by the petitioners. The record showed that this writ of *habere facias possessionem* issued on the 17th November 1829.

At May term of the court, in 1830, a motion was made in behalf of the petitioners, and a rule awarded on Smith, the plaintiff in error and defendant in the petition, to show cause why a writ of restitution should not be awarded to them, to restore the possession of the tenements held by their tenants, John Evans and others, taken from them by the marshal, on *the writ of possession mentioned in their petition. The marshal's return showed, that he had turned John Evans, James McGuire and [*5 William Acres, who were the tenants of the petitioners, out of possession. At May term 1831, the court ordered a writ of restitution to be awarded to the petitioners, the plaintiffs in the motion, to restore them to the possession of the land from which their tenants had been removed by the marshal. To the opinion of the circuit court in overruling objections made by the defendant's counsel to the objects of the motion, and awarding possession to the plaintiffs, the defendant, now plaintiff in error, excepted, and prosecuted this writ of error.

The case was submitted to the court by *Allan*, on a printed argument for the plaintiffs in error. No counsel appeared for the defendants in error.

Upon the point decided by the court, viz., that the award of a writ of possession was not a final judgment, from which a writ of error would lie to this court, it was said: We are aware, that this court only grants relief where the decree or judgment is final, and that mere orders to correct

process do not come within the description of final judgment, because such orders, from their very nature, are within the control of the court, as an order to quash an execution, or to issue one, to correct taxations of costs; all these, though final in their language, are not so in their nature: but even a judgment correcting an execution may be final, as if the court were to decide, that the execution should be returned by the sheriff, without being levied, and adjudge the judgment satisfied. This would be final, or no remedy would be left but by writ of error against such judgment, erroneously entered. But the order of the court quashing a writ, because of excessive taxation, or because there were valuers appointed, or refusing the writ for any cause in its nature temporary, as the pendency of error, is not final. But if the court refuse a *fieri facias*, because, in the opinion of the judge, the judgment does not authorize one, or because, in his opinion, he is restrained by final decree; then the judgment is final. Such have been the distinctions observed and practised upon in both Virginia and Kentucky. Indeed, in *both states, where the judgment is for realty, on which the final process may issue, or the possession be changed, the judgment or decree is held to be final. *6]

Test this case by these rules, and see whether the judgment is final or interlocutory. It is a final judgment both for the possession and the costs; one on which execution may not only issue, but on which execution is ordered, and on which a *fieri facias* for costs is also ordered. This judgment, though on motion, is more final than if it were an ordinary case of ejectment; it lasts as long as the record lasts, whereas, the other may expire with the lease; and need we call to the mind of this court the monstrous evils that must grow out of the practice of permitting ancient judgments and rights to be overturned by these *ex parte* motions, founded on parol proofs.

If this court possess no power to correct, the present case is one of the strongest instances of abuse. Twelve years and more before this motion was made, Samuel Smith had recovered judgments for his land; under this judgment, by the laws of Kentucky, he had a right to make his personal entry, to sell out, or to tenant it; yet, without process served on him, without process served on the tenant, and without process served on his agent or alienee, strangers to the record, on a tale of their own, from the mouth of one of the defendants in the record, they obtain a judgment and execution for the possession; which being knit to a former possession, may not only change the right of entry, but destroy the remedy by writ of right.

Marshall, Ch. J., delivered the opinion of the court.—This is a writ of error to a judgment of restitution awarded by the court of the United States for the seventh circuit and district of Kentucky, whereby the tenant of the defendants in error was restored to the possession of a tract of land from which he had been improperly removed, under the process of that court.

The defendants in error filed their petition in the circuit court, stating that a declaration of ejectment had been brought by John Doe, on the demise of Samuel Smith, and notice served on Hiram and William Bryant, the tenants of the petitioners; *and a judgment was rendered against them in May term 1818, on which no writ of *habere facias possessionem* has been issued. In November term 1818, a judgment was rendered *7]

against other tenants, by virtue of which the marshal turned John Evans out of possession; who, as tenant of the petitioners, resided on the place which had been occupied by the Bryants. A rule to show cause was granted, and on its return, restitution was awarded. To this judgment of restitution, this writ of error is awarded.

The judiciary act authorizes this court to issue writs of error to bring up any final judgment or decree in a civil action or suit in equity, depending in the circuit court, &c. This is not a final judgment in a civil action, nor a decree in a court of equity. It is no more than the action of a court on its own process, which is submitted to its own discretion. This court takes no jurisdiction in such a case. It is not, we think, given by the judiciary act. The writ of error is quashed and the suit dismissed, the court having no jurisdiction.

In error to the circuit court of the United States for the district of Kentucky.—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 Kentucky, and was argued by counsel: On consideration whereof, it is the opinion of this court, that this is not a final judgment in a civil action, nor a decree in a court of equity, but no more than the action of a court on its own process, which is submitted to its own discretion, and that the court cannot take jurisdiction in such a case, it not being given by the judiciary act; and that the writ of error must be quashed and the suit dismissed, the court having no jurisdiction. Whereupon, it is considered, ordered and adjudged by this court, that this writ of error be and the same is hereby dismissed, for the want of jurisdiction.

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*United States, Plaintiffs in error, *v.* Joseph Nourse. [*8

Conclusiveness of former decree.

The treasury department of the United States, on the 14th of July 1829, issued a warrant of distress, directed to the marshal of the district of Columbia, commanding him to levy and collect, by distress and sale of his goods and chattels, a sum of money alleged to be due to the United States, on a treasury transcript, by Joseph Nourse, late register of the treasury; this warrant was issued in pursuance of the 3d and 4th sections of the act of May 15th, 1820, "providing for the better organization of the treasury department." Under the provisions of the 4th section of the act, Mr. Nourse obtained an injunction from the chief justice of the district of Columbia, to stay all further proceedings on the said warrant; the bill presented by Mr. Nourse to the chief justice of the district of Columbia, asserted that the United States were indebted to him for compensation for extra services he had rendered to the United States, in a sum exceeding the amount claimed by the United States: which claim was denied in the answer filed by the district-attorney of the United States, both as to the legality and the amount of the claim.

The court determined, that Mr. Joseph Nourse was entitled to compensation for the extra services he had rendered to the government, in the agencies mentioned in the bill; and appointed auditors to ascertain the value of his services and compensation, and to report thereon without delay; the report of the auditors allowed to the complainant a commission of two and a half per cent., on the sum of $943,308.83, disbursed by him in the several agencies in which he had been employed, leaving a balance due to him from the United States; the report was confirmed, and the injunction made perpetual.

The United States then instituted their suit against Joseph Nourse, in the circuit court for the district of Columbia, in the county of Washington, on an account authenticated according to law, by the proper accounting officers, being the same account, and claiming the same amount

as in the warrant of distress, and on which the decree of the chief justice was pronounced. It was agreed, that the defendant should have the benefit of the proceedings in that case, as if the same had been pleaded and given in evidence; the circuit court adjudged the proceedings in the former action a bar to this action.

It is a rule, to which no exception is recollected, that the judgment of a court of competent jurisdiction, while unreversed, concludes the subject-matter, as between the same parties; they cannot again bring it into litigation.

An execution is the end of the law; it gives the successful party the fruits of his judgment; and the distress-warrant is a most effective execution; it may act on the body and estate of the individual against whom it is directed.

It would excite some surprise, if, in a government of laws and of principle, furnished with a department whose appropriate duty is to decide questions of right, not only between individuals, but between the government and individuals, a ministerial officer might, at his discretion, issue this powerful *process, and levy on the person, lands and chattels of the debtor, any sum he might believe to be due, leaving to that debtor no remedy, no appeal to the law of his country, if he should believe the claim to be unjust; but this anomaly does not exist—this imputation cannot be cast on the legislature of the United States.

*9]

Under the act of congress, the chief justice of the district of Columbia had full jurisdiction over the case.

After a reference to auditors, according to the course of courts of chancery, in matters of account, a final decree was pronounced against the United States, and a perpetual injunction awarded; this decree is now in full force, and was in force when this suit was instituted. The act of congress gave jurisdiction in the specific case to the district judge; he might have enjoined the whole or a part of the warrant; his decree might have been for or against the United States, for the whole or a part of the claim; on the sum which he found to be due, he is directed to assess the lawful interest; he may add such damages as, with the interest, shall not exceed the rate of ten per cent. per annum on the principal sum. Had the district judge finally enjoined a part of the sum claimed by the United States, and decreed that the residue should be paid with interest, all would perceive the unfitness of asserting a claim in a new action, to that portion of the debt which had been enjoined by the decree of the court; and, yet, between the obligation of a decree against the whole claim, and against a part of it, no distinction is perceived.

The relief which is given by the act of congress, on which the warrant of distress may be issued, by application to any district judge of the United States, for an injunction to stay proceedings on such warrant, is not confined to an officer employed in the civil, military or naval departments of the government, to disburse the public money appropriated for the service of those departments respectively, who shall fail render his accounts, or pay over, in the manner required by law, any sum of money remaining in the hands of such officer.

When the legislature turns its attention to the individual against whom the warrant may issue, the language of the law is immediately changed; the word *person* is substituted for officer; and it declares, "that if any person should consider himself aggrieved by any warrant issued under this act, he may prefer a bill of complaint, &c.," and thereupon, the judge may grant an injunction, &c.

The character of the individual against whom the warrant may be issued is entirely disregarded by that part of the law; be he whom he may, an officer, or not an officer, a debtor, or not a debtor; if the warrant be levied on his person or property, he is permitted to appeal to the laws of his country, and to bring his case before the district judge, to be adjudicated by him.[1]

The district judge had full jurisdiction over the case, and his decision is final; the judgment on the warrant of distress, and the proceedings upon it are, consequently, a bar to any subsequent action for the same cause.

Error to the Circuit Court of the District of Columbia, for the county of Washington. This was an action of *assumpsit*, instituted by the United States, in the circuit court, on an account stated at the treasury of the United States, against "Joseph Nourse, late register of the treasury of the United States." The account was dated "auditor's office, 28th of

*10]

[1] S. P. United States *v.* Cox, 11 Pet. 162.

July 1829," showing a balance in favor of the plaintiffs, of that day, of $11,769.13, and was duly and regularly certified, according to the provisions of the acts of congress, by the officers of the treasury. The defendant pleaded *non assumpsit.*

The cause was submitted to the circuit court, on an agreement of the parties, stating that the suit was brought upon a transcript from the treasury, which was annexed to a record in a former proceeding, originating in the district court of the district of Columbia, and brought before the supreme court by appeal. It was also agreed, that the defendant should have the benefit of the proceedings in that case, as if the same had been pleaded, or as if given in evidence upon the trial. That upon this statement, judgment should be given, as on a case agreed, and that either party should be at liberty to refer to the printed record in the case of the *United States* v. *Nourse*, as if the same were fully incorporated in the record. (See 6 Pet. 470). The circuit court gave judgment for the defendant, and the United States prosecuted this writ of error.

The case was argued by *Butler*, Attorney-General, for the plaintiffs in error; and by *Coxe*, for the defendant.

For the United States, the *Attorney-General* said, that the only question in the case was, whether the proceedings against the defendant, under the warrant of distress, and the decision of the district judge in that case, were conclusive, and a bar to further action by the United States. The court will examine particularly the case in 6 Pet. 470. He contended, that the whole object of the act of congress of 1820 (3 U. S. Stat. 592), in giving to a public debtor, "an officer" of the United States, who had received public money, a right to apply to a district judge of the United States, when a warrant of distress was issued against him, was, to ascertain whether the United States were entitled to the summary process of a distress-warrant to which they had *resorted. This construction of the act will regulate the case before the court. An examination of the third section of the [*11 act (Ibid. 594), will fully maintain, that if the United States do not think proper to avail themselves of that act, they may proceed against their debtors as in other cases.

It is admitted by the plaintiff in error, that if this court had decided that the proceedings in the former cause were judicial, they would be conclusive. But the contrary has been the decision; and they have been held not to be judicial in their nature. The true view of the law is, that in cases where it is perfectly clear, on the books of the treasury, that there is indebtedness by a public officer for public money received by him, the proceedings by distress-warrant may be resorted to; and if the party submits to it, there is an end of the matter. But if he thinks proper to apply to the district judge, and satisfies him, the judge may restrain the United States from proceeding further on the execution. Afterwards, the United States may sue for the debt claimed by them, in the usual form, and as if the distress warrant had not issued. By this construction of the law, both the United States, and the defendant in the suit, have secured the right of a trial by a jury; while, by a different version of the law, this right is entirely taken away.

But supposing the proceeding, in a proper case, and one which the law was intended to comprehend, may be final; the case set up in bar to this suit was not such a case. It does not appear, that the person against whom the distress-warrant issued, was "an officer," within the act of 1820. The general rules as to the conclusiveness of judicial proceedings are perfectly settled. No one is to be twice vexed for the same matter, and former proceedings are a complete bar to all subsequent actions for the same cause of action; and may be pleaded and given in evidence as an estoppel. This case may stand for the consideration of the court, as if the former proceedings had been regularly pleaded in bar. When, in cases of such a character, or resting on the plea of former proceedings, it appears, that the merits have not been decided, as in causes of "nonsuit" and "*retraxit*," the matters may be examined and decided upon a subsequent suit. Stark. Evid. part 2, p. 198, and the cases referred to. *It must distinctly appear that the merits were examined. 3 Wend. 27, 33; 8 Ibid. 9.

*12]

In the bill filed by the defendant in the case in 6 Peters, Mr. Nourse took the ground, that the money charged to him in the treasury transcript, had not been received by him as "an officer of the treasury," but as a mere "agent" of that department. He claimed in his bill that the term "officer," in the act of congress, was applicable only to those who, in such a capacity, received the money charged to him, and which formed the items of the account. 6 Pet. 405. The other matters in the bill alleged that nothing was due to the United States, but that a balance was due to the complainant. Thus, it appears, that one of the material grounds for the application made to the district judge, was, that the money was not received by Mr. Nourse, as an "officer." In the case of *Randolph*,(*a*) which came before

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(*a*) Circuit Court of the United States for the Eastern District of Virginia, December 21st, 1833. Present, MARSHALL, Chief Justice, and BARBOUR, District Judge.

Ex parte Robert B. Randolph. [1]

BARBOUR, J.—This is a *habeas corpus*, issued by this court, upon the application of Robert B. Randolph, alleging that he was imprisoned by the marshal of the eastern district of Virginia, without lawful authority. The marshal returns as the cause of the retainer of the party, a warrant of distress, issued by the solicitor of the treasury of the United States, against Randolph, for a sum of money stated in the warrant to be due from him to the United States, and which he has failed to pay, in the manner and at the time required by law; which warrant was issued under the third section of the act of the 15th of May 1820, concerning the treasury department. From the warrant, and the account annexed to it, and referred to, as part of it, it appears, that the sum claimed from the party, is claimed as being due from him, a lieutenant in the navy, as acting purser, on board the frigate Constitution, for his transactions in that character, in the year 1828. It appears, from another document produced by the party, duly authenticated by the fourth auditor, and sanctioned by the comptroller, that Randolph had, in October in 1828, settled his account as acting purser on board the Constitution; but, notwithstanding this previous settlement, the account on which the warrant of distress was issued, under which the party is imprisoned, is one stated at the treasury of the United States, in February 1833, against him, as late acting purser of the frigate Constitution, for the same period embraced in the account above mentioned to have been settled in October 1828; the present fourth auditor of the treasury having opened the former account, and restated it, so as to produce the result

[1] 2 Brock. 448.

the chief justice of this court, *and the district judge of the eastern district of Virginia, in the circuit court of that district, it was decided, that it must appear in the account for which a distress-warrant shall issue,

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stated in the account of February 1833, before mentioned, upon the ground, as appears from the face of this last account, of the subsequent discovery of errors and omissions, since the settlement of that of 1828.

Upon this state of facts, the party's counsel have argued, that he is entitled to be discharged; and in the course of the argument, have brought into discussion, many and various points, the first of which is of the gravest import; it calls in question directly, the constitutionality of the act of congress under which this proceeding is had. The decision of a question of this sort, is certainly the highest, and most solemn function, which the judiciary could be called upon to perform; for, as was said with sententious brevity by the court, in one of the earliest cases on this subject, it involves the inquiry, whether the will of the representatives, as expressed in the law, is, or is not, in conflict, with the will of the people, as expressed in the constitution. Great, however, as is the responsibility involved in this exercise of judicial power, I should meet it without difficulty, if it were necessary to the decision of this cause. But I fully concur in the sentiment of counsel, that whilst, on a proper occasion, it ought to be met with firmness, on the other hand, it is the part of wisdom, to decline the decision of such a question, when not necessary.

From the view which I have taken of this case, I do not consider it necessary, and shall therefore, pass it, without further remark. It is wholly irrelative to the merits of this case, to inquire whether there may not have been error committed by the auditor, in the stating of the account, on which this proceeding is founded; because, we are not sitting here, to review this case, as an appellate court, on a writ of error, nor, is it before us, as the proceedings of special jurisdictions in England are before the king's bench, by *certiorari*. In either of those aspects, the decision which we should be called upon to make, would depend upon the result of the inquiry, whether there was or was not, error in the proceedings; but, sitting as we are, upon a *habeas corpus*, the question is not, whether there is error in the proceedings, but whether there was jurisdiction of the case, in the auditor of the treasury. It was settled as early as the great *Marshalsea Case*, in 10 Co. 76, and the principle has never been departed from, that where a court has jurisdiction, and proceeds *inverso ordine*, or erroneously, there the proceeding is only voidable; but where the court has not jurisdiction of the case, there the whole proceeding is *coram non judice*, and void; the books, both English and American, abound in cases exemplifying this principle.

But a *habeas corpus* will not lie, where the imprisonment is under voidable process, but only where it is merely void; for void process is the same thing as if there were none at all; and then the party is in effect imprisoned without any authority whatever. Hence, the question would seem naturally to arise, whether the auditor had jurisdiction in the case—in other words, whether the person and subject-matter are such as to bring the case within the provisions of the act of congress—for these are the *criteria* of jurisdiction. This question was elaborately argued at the bar, and I have considered it with great care. I forbear, however, to enter into the discussion of it here; because, although it should be clearly made out, that the auditor had once had jurisdiction, yet upon the facts in this case, another question arises, which, in my opinion, is decisive of the case; and that is, after the auditor shall once have settled an account of a public officer, and closed it, as in this case, is it competent for him, at an after time, upon an allegation of error, or omission, or for other cause, to open it, restate it, and upon the account thus restated, to institute proceedings by a warrant of distress against the debtor? I think it is not. Let us try the question by reference to some analogous cases. I take it to be a sound principle, that when a special tribunal is created, with limited power, and a particular jurisdiction, that whenever the power given is once executed, the jurisdiction is exhausted and at an end—that the person

that the money claimed has been received by the debtor to the United States as an officer. The statute, it was held, should be construed strictly.

*14] *It will be said, that the district judge proceeded, in the former case, on the ground, that Mr. Nourse was "an officer;" that he took

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thus invested with power is, in the law, *functus officio*. This proposition is, I think, sustained by the case in 6 Bing. 85, where it is said by the court, that when a magistrate, who has power to convict, has once convicted, his jurisdiction is at an end—he is *functus officio*. Could he, at any after time, upon some supposed error, quash, or in any way impair the efficiency of his own conviction? Suppose, a controversy to have been submitted to arbitrators, and that they had made a final award, and delivered it, could they, afterwards, on their own mere motion, change or set aside their own award? Lest, however, it might be supposed, that there might be any thing peculiar in this case, by reason of these being judges of the parties' own choosing, let us suppose some cases of special jurisdiction, or powers given by law. Under the acts imposing direct taxes, assessors were appointed to value the lands and slaves of the country, with a view to a just apportionment. After the had made and completed their assessment, so that it was once communicated, agreeable to the requirements of the law, could they, afterwards, in any manner, have altered it, so as to change the valuation? Suppose, that commissioners of bankruptcy had once decided in a given case,—that the party was a trader, that he had committed an act of bankruptcy—and had, in all respects, completely executed the power conferred upon them, could they, afterwards, by their own authority, have vacated or set aside their act? Finally, suppose, that the commissioners appointed (under any one of the treaties, under which we procured an indemnity from Spain, France or Naples) to adjudge the claims of our citizens, had fully executed that trust—had made and announced an entire distribution of the fund —could they, at an after time, have varied their own adjudication? In all the cases which I have put, I inquire into the power of the special jurisdiction, of its own mere authority, to alter or impair what they had done. Examples might be indefinitely multiplied—these are sufficient to illustrate my idea, viz., that whenever a special jurisdiction has once executed the power with which it was invested, their power is at an end, as to the subject in relation to which it has been executed. Let us trace the injurious consequences of a contrary doctrine. Until the power of the auditor is once executed, the officer knows that it is his duty to account, and having accounted, to pay. But if, after the account had once been stated and closed, he could open it again, how often, and within what period of time, shall he do it? There is obviously no limitation, either as to length of time, or to frequency. Suppose, after once stating it, and then opening it, and restating it upon alleged error, he should think he had discovered error, he must open and restate it again. It will be observed, too, that though the auditor in this case did give the party notice, the law does not require it; unless, therefore, he shall be restrained to one settlement, it would be competent to him, years after the death of the original party, without notice, in the absence of his representatives, who might be dispersed through the United States, and in the absence of all proof on their part, to resettle the account in a manner which would produce great injustice. But again, if it be competent to him to open the account in favor of the United States, the converse of the proposition must be equally true, upon the principles of justice; it must be competent to him also, after the lapse of years, to open it against the United States, and in favor of the party. Might not this course most injuriously affect the public interest? It seems to me, that a doctrine, which leads to such consequences, cannot be sound; and that the government is not without ample remedy, though this power shall be denied to the auditor. I suppose, there can be no doubt, that a bill in equity would lie, to surcharge and falsify, as in case of a settled account between individuals, and moreover, according to the doctrine of the supreme court (11 Wheat. 237), even at law, although a settled account would be *primâ facie* evidence, yet it could recover, upon proving mistakes or omissions, any

jurisdiction of the case, upon that view of it; but it is submitted to this court, that this must manifestly appear; it must be fully and clearly established, that in the decree, or opinion of the judge, he was an officer

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sum, of which it had been thus unjustly deprived. Nobody doubts the power of the auditor to settle the accounts of the public officers, from time to time, as they shall fail to account, or pay, any sums accruing after previous settlements; the objection is, to resettle an account, once settled, and which must have imported to have been a full and final settlement, at the time when made; for the law requires that to be done.

I have felt some difficulty upon the question, whether a *habeas corpus* could be sustained in favor of a party imprisoned under civil process, as in this case. The difficulty arose from the doubt expressed by two high authorities, although decided by neither. In Ex parte Wilson, 6 Cranch 52, the party was arrested by a *capias ad satisfaciendum*, and was in prison-bounds. An application was made for a *habeas corpus*, on the ground, that the creditor had refused to pay his daily allowance. The court said, it was not satisfied, that a *habeas corpus* was the proper remedy, in the case of arrest, under civil process. In 15 Johns. 152, the supreme court of New York, except one of the judges, express the same doubt, and refer to the case in Cranch. The judge, in delivering the opinion of the court, says, if it were necessary to decide the point, he should say, it would not lie in such a case.

I suppose, that, probably, the doubt originated from this fact. The celebrated *habeas corpus* act of 31 Car. II., which, as Judge KENT, in his Commentaries, says, is the basis of almost all the American statutes on the subject, and which, in practise, by reason of its valuable provisions for insuring speedy action, has almost superseded the common law, has been held in England to be confined to criminal cases. All the judges of England, in answer to a question propounded to them by the House of Lords, answered; that it did not extend to any case of imprisonment, detainer, or restraint whatever, except cases of commitment for criminal or supposed criminal matters, 3 Bac. Abr. 438, n. At the same time, this question, in substance, was put to them; whether, if a person imprisoned apply for a *habeas corpus ad subjiciendum*, at common law, and make affidavit that he does not believe that his imprisonment is by virtue of a commitment, for any criminal or supposed criminal matter, would such affidavit, as the law then stood, be probable cause for awarding the writ? The question being objected to, was not put. This would seem to leave the point in an unsettled state. Yet there are two books of authority, which, I think, sustain the doctrine, that the writ is not confined to criminal cases. Blackstone, in his 3d. vol. p. 132, says, that the great and efficacious writ, in all manner of illegal confinement, is the *habeas corpus ad subjiciendum*. Bacon, 3d. vol. p. 421, says, whenever a person is restrained of his liberty, by being confined in a common jail, or by a private person, whether it be for criminal or civil cause—he may regularly, by *habeas corpus*, have his body and cause removed to some superior jurisdiction, &c.

Now, the act of congress authorizes us to issue the writ, "for the purpose of inquiring into the cause of commitment." Upon this, the supreme court, in Ex parte Watkins, 3 Pet. 201, remarks, "that no law of the United States prescribes the cases in which this great writ shall be issued, nor the power of the court over the party brought up by it. The term is used in the constitution as one which was well understood. This general reference to a power which we are required to exercise, without any precise definition of the power, imposes on us the necessity of making some inquiry into its use, according to that law, which is, in a considerable degree, incorporated in our own." If, in making this inquiry, we were to consult the British statute alone, we should find it, as already stated, confined, in its construction, to criminal cases. But, if we look to the common-law authorities which I have mentioned, it seems to me, that we are justified in applying it to a case of civil process. Indeed, we know it to have been repeatedly applied in England to the domestic relations of life, such as the liberation of a wife from the unjust restraint of a husband, and a child

within the intendment *of the statute; and this is not the fact. In the former case, a reference of the accounts between the United States and the complainant in the bill, was made to auditors. The credits

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from that of a parent. And certainly, we are well warranted in making this reference to the common law; because, although it is admitted by all, that it is not a source of jurisdiction, yet it is habitually, rightfully, nay, necessarily, referred to, for the definition and application of terms—indeed, there are many terms in the constitution which could not otherwise be understood. Nor do even the doubts expressed in the cases from Cranch and Johnson apply to this; for both of those were on process of civil execution, issuing from a court of record and general jurisdiction, whereas, this is a case of process, issuing from a special jurisdiction, which can neither be supervised by *certiorari*, nor re-examined by writ of error. In this case, then, if a *habeas corpus* would not lie, there would be no relief from imprisonment without lawful authority. In cases of execution from courts of record, the courts themselves can quash it, if it do not conform to the judgment; if it do, and that judgment be erroneous, it can be corrected in a court of appellate jurisdiction. Upon the whole view of the subject I am of opinion, that the party should be discharged.

MARSHALL, Ch. J.—Robert B. Randolph, late acting purser of the frigate Constitution, was brought into court, on a writ of *habeas corpus*, and a motion is now made for his discharge from imprisonment. The writ was directed to the marshal of this district, in whose custody he is. The return of the officer shows the cause of caption and detention to be a warrant issued by the accounting officers of the treasury, under authority of the act passed the 15th day of May 1820; which, after reciting that Robert B. Randolph, late acting purser of the United States frigate Constitution, stands indebted to the United States in the sum of $25,097.83, agreable to the settlement of his account, made to the proper accounting officers of the treasury, and has failed to pay it over, according to the "act for the better organization of the treasury department," commands the said marshal to make the said sum of $25,097.83, out of the goods and chattels of the said Randolph; and in default thereof, to commit his body to prison, there to remain until discharged by due course by law. If these proceedings fail to produce the said sum of money, the warrant is to be satisfied out of his lands and tenements. The return shows, that the body of the said R. B. Randolph was committed to prison, and is detained by virtue of this process.

Several objections have been taken to the legality of the warrant, the first and most important of which is, that the act of congress under the authority of which it issued, is repugnant to the constitution of the United States. If this objection be sustained, the warrant can certainly convey no authority to the officer who has executed it, and the imprisonment of Randolph is unlawful. The counsel of the prisoner rely on several parts of constitution, which they suppose to have been violated by the act in question. The first section of the third article, which establishes the judicial department, and the seventh amendment, which secures the trial by jury in suits at common law, are particularly selected, as having been most obviously violated. No questions can be brought before a judicial, tribunal, of greater delicacy than those which involve the constitutionality of a legislative act. If they become indispensably necessary to the case, the court must meet and decide them; but if the case may be determined on other points, a just respect for the legislature requires, that the obligation of its laws should not be unnecessarily and wantonly assailed.

The act of congress, under the authority of which the process by which Mr. Randolph is imprisoned, was issued, makes it the duty of certain officers of the treasury, to settle and cause to be stated, the account of any collector of the revenue, &c., who shall fail to render his account, or pay over the same, in the manner or in the time required by law, exhibiting truly the amount due to the United States, and certifying the same to the agent of the treasury, who is authorized and required to issue a war-

claimed against the balance of the accounts stated at the treasury, were founded on items of expenditures made by Mr. Nourse, as agent for their disbursement; and a perpetual *injunction was awarded. It does not appear in the decreee, what the decision of the judge was, as to [*16

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rant of distress against such delinquent officer and his sureties, directed to the marshal of the district in which such delinquent officer and his surety or sureties shall reside; which officer is commanded to make good the money appearing to be due to the United States, by seizing and selling the goods and chattels of such delinquent officer and his sureties, and by committing the body of such delinquent officer to prison, there to remain until discharged by due course of law. If this ascertainment of the sum due to the government, and this issuing of process to levy the sum so ascertained to be due, be the exercise of any part of the judicial power of the United States, the law which directs it, is plainly a violation of the first section of third article of the constitution, which declares, that "the judicial power of the United States shall be vested in one supreme court, and in such inferior courts as congress shall, from time to time, ordain and establish. The judges, both of supreme and inferior courts, shall hold their offices during good behavior." The judicial power extends to "controversies to which the United States shall be a party." The persons who are directed by the act of congress to ascertain the debt due from a delinquent receiver of public money, and to issue process to compel the payment of that debt, do not compose a court ordained and established by congress, nor do they hold offices during good behavior. Their offices are held at the pleasure of the president of the United States. They are, consequently, incapable of exercising any portion of the judicial power, and the act which attempts to confer it, is absolutely void. In considering the validity of this act, therefore, it is necessary to discard every idea of its conferring judicial power. We must not view the statement or certificate of the account as a judgment, or the warrant which coerces payment as judicial process. They must be viewed as mere ministerial agents. They cannot be otherwise sustained.

I will, for the present, assume, that the power of collecting taxes and of disbursing the money of the public, may authorize the legislature to enact laws by which the agents of the executive may be empowered to settle the accounts of all receiving and disbursing officers, and to issue process in the nature of an execution, to compel the payment of any sum alleged to be due. But these agents are purely ministerial, and their acts are necessarily to be treated only as ministerial acts. The inevitable consequence is, that their validity must be decided by those legal principles which govern all acts of this character. These require that the authority, whether given by a legislative act or otherwise, must be strictly pursued. Such agents cannot act on other persons, or on other subjects, than those marked out in the power, nor can they proceed n a manner different from that it prescribes. This is a general rule, applicable to such cases generally; it applies with peculiar force to that now before the court.

I will not attempt to detail the severities and the oppression which may follow in the train of this law, if executed in contested cases. They have been brought into full view by counsel, in their arguments, and I will not again present them. It may be said, with confidence, that the legislature has not passed any act which ought, in its construction, to be more strictly confined to its letter. By this rule, its words will be examined. The first objection to this warrant is, that Mr. Randolph is not one of those persons on whom the law was designed to operate. The act does not declare, that every debtor of the public shall be subject to this summary process. The particular persons against whom it may be used are enumerated. Those stated in the second section are, "any collector of the revenue, receiver of the public money, or any other officer who shall have received the public money, before it is paid into the treasury of the United States." The obvious construction of these words is, I think, that they describe persons who hold offices under government, to whose hands the public money comes, before it reaches the treasury. A collector of the revenue is an officer

the capacity in which Mr. Nourse acted, in the receipt of the money; nor does he say anything to negative or affirm the fact. Nor is it material to the claim of the United States, that the proceeding is not a bar to this

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of this description; so is a receiver of the public money; and the following words, "or other officer who shall have received the public money, before it is paid into the treasury of the United States," denominate the kind of persons who were in the mind of the legislature. The subsequent words preserve the idea, that regularly appointed officers only were intended. The word *officer* is retained, and is regularly used throughout the section, showing plainly, that no other debtor than one who was properly designated by the term *officer*, was contemplated by the act. Throughout the section, too, the sureties of such officer are regularly connected with him, and subjected to the same process, so far as respects their property. I do not mean to say, that the liability of the officer is made to depend on his having actually executed an official bond, with sureties. I do not mean to say, that an officer, regularly appointed, who should receive the money of the public, before the execution of his bond, might not be liable to this treasury execution. But I mean to say, that this language proves incontestibly, that the legislature contemplated those officers only, who were required to give bond, with surety, as the objects of the law. The sureties are spoken of throughout, as inseparable from the officer—as existing whenever the officer exists.

This section does not comprehend the case of a purser in the navy, but I have thought it necessary to enter into its exposition; because it has a material bearing on the third section, which does comprehend persons of that description. The third section enacts, "that if any officer employed, or who has been heretofore employed in the civil, military or naval departments of the government, to disburse the public money appropriated to the service of these departments, shall fail to render his accounts, or to pay over in the manner, and in the time required by law, or the regulations of the department to which he is accountable, any sum of money remaining in the hands of such officer, it shall be the duty," &c. To what person does the word *officer*, as used in this section, apply? Is it to every commissioned officer in the army or navy of the United States, to whose hands any public money may be intrusted, or is it to those officers only whose regular duty it is to receive and disburse the public money, and who are appointed for that purpose? The language of the sentence, I think, answers these questions to a reasonable certainty. It is, "any officer employed to disburse the public money appropriated to the service of these departments respectively." A military or naval officer is employed for military or naval duties, not to disburse the public money appropriated to the service of his department. I cannot suppose, that a military or naval officer, to whose hands money belonging to the public may come, is, from the words of the act, more liable to this summary and severe proceeding than any individual, not bearing a commission, to whom the same money might be confided for similar purposes. The subsequent words of the sentence, "shall fail to render his accounts, or to pay over, in the manner and in the time required by law, or the regulations of the department to which he is accountable," &c., also convey the idea, that a regular disbursing officer, whose duty was prescribed by law, or by the regulations of the department, was contemplated. The idea is still more strongly supported, by that part of the section which adopts all the provisions of the second section, and applies them to the sureties of the officer who is designated by the act, as well as to the officer himself. I think, then, the fair construction of the law is, that regularly-appointed officers who are required to give official bonds, were alone contemplated by the legislature. If we take into consideration the character and operation of the act, the extreme severity of its provisions, that it departs entirely from the ordinary or judicial proceeding, and prescribes an extreme remedy, which is placed under the absolute control of a mere ministerial officer, that in such a case, the ancient established rule is in favor of a strict construction; my own judgment is satisfied that this is the true construction.

suit, that this did not appear. It is enough, that the *allegation was made by Mr. Nourse, that the did not act as "an officer," in making the disbursements, and that the judge so decided the case. The judge says,

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Was Mr. Randolph an officer of this description? The process, by authority of which he is in prison, designates him as "Robert B. Randolph, late acting purser of the United States frigate Constitution." The word acting, qualifies the word purser, and shows that he did not hold that office under a regular appointment, but for the time being, during the existing emergency. The omission to include his sureties in the warrant, as the law directs, shows that he had given no sureties; and this fact, unexplained, is evidence that no official bond with sureties was required. It might be added, that the explanatory accounts, to some of which reference is made in the warrant, prove with sufficient clearness, that Mr. Timberlake was purser of the frigate Constitution, then cruising in the Mediterranean, and that on his death, Lieutenant Randolph was directed to perform the duties of purser, during the cruise. It is then apparent, that he was a mere acting, and not a regular purser. Mr. Nicholas has contended, with much plausibility, that having taken upon himself the office, he takes upon himself also all its responsibilities. This argument is true, to a certain extent, and, so far as respects responsibility alone, is unanswerable. In a regular proceeding against Mr. Randolph, no person will be hardy enough to deny his responsibility, to the same extent as if he had been a regular purser. It is not his responsibility to the United States, but his liability to this particular process, which is the subject of inquiry. Is a mere acting purser designated by the law as one of those officers against whom this summary process may be used? It is in vain to say, that he comes within the same reason, and is within the mischief against which the statute intends to provide. The statute does not reach all public debtors, and has selected especially those for which it is intended. No others can be brought within its purview. Those principles of strict construction, which apply, I think, to all laws restrictive of common right, forbid it. These reasons satisfy my own judgment, that Mr. Randolph was not an officer to whom the law applies the process under which he is imprisoned.

If it were necessary to assign any reason for this distinction between temporary and permanent officers, it would not be difficult to find them. The permanent officer usually receives his money from the treasury, or by its order, so that the document which charges him, appears on the books of that department. The temporary officer will seldom be placed under the same circumstances. He may, and generally does, receive the money with which he is chargeable, in such a manner as to leave the amount subject to controversy. In this particular case, purser Timberlake must stand charged, I presume, with all the moneys advanced to the purser of the Constitution. The portion of this money which came to the hands of Mr. Randolph, would not appear on those books, and may be matter of controversy between him and Timberlake's representatives. Congress might very reasonably make a distinction, when giving this summary process, between an officer whose whole liability ought to appear on the books of the department, and an agent whose liability was most generally to be ascertained by extrinsic testimony. But it is enough for me, that the law, in my judgment, makes the distinction.

The accounts extracted from the books of the treasury, and laid before the court, furnish other matter for serious consideration. The second section of the act requires, that the account stated by order of the first comptroller of the treasury, "shall exhibit truly the amount due to the United States." For what purpose was the word *truly* introduced? Surely, not to prohibit the officers of the government from exhibiting an account known to be erroneous. Congress could not suspect such an atrocity. Its introduction, then, indicates the idea, that this summary process was to be used only when the true amount was certainly known to the department—when the sum of money debited to the officer, appeared certain, and either no credits were claimed, or none about which a controversy existed. The amount due to the United States cannot

that the services were extra-official; and the sums due as an off-set, were for services not official; and that the money received from the United States, was not received by him as register of the treasury.

*18] *Because the United States submitted to the proceeding, it has not validity. All the proceedings, after the warrant of seizure, would

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be truly exhibited, when the claim is shown, by the account itself, to exceed what is really due. I do not mean to say, that the debtor is not bound to show, with precision, the credits to which he is entitled. I do not mean to say, how far this failure to separate payments made from his own funds, and from those of his predecessor, may deprive him, in a suit at law, of the credits he claims. I mean to say only, that the amount claimed, is not the amount truly due to the United States, if the account itself shows that a smaller amount is due. The necessity of withholding the credit may justify proceedings against the debtor, in a court of justice, in which he must make good his credits; but will not, I think, justify issuing an execution, without any judicial inquiry, against the body and estate of the delinquent, for a sum confessedly more than is due. The third section omits the word truly, but requires that the account shall be stated, and directs the agent of the treasury to proceed in the manner directed in the preceding section, all the provisions of which are declared to be applicable to every officer of government chargeable with the disbursement of public money. It may be contended, that the provisions of the preceding section, thus adopted in the third, are those only which relate to proceedings after the account is stated. But I do not think this the fair construction of the statute. I think, the legislature can no more have intended, in the one case than in the other, that a treasury execution should issue for confessedly more than is due, by which the person of the debtor should be imprisoned, probably interminably, and his property sold. Congress must have designed to leave such cases to the regular course of law.

If these principles be correct, let them be applied to the case before the court. Mr. Randolph is charged in the account on which the warrant issued, with cash left by purser Timberlake, on board the frigate Constitution, and, according to his own confession, received by him, $11,483. That he must account for this sum, is certain. I shall not inquire now, whether the treasury might issue an execution for it, or ought to have applied to a court of justice. I will proceed to other items of th account. He is recharged with slops, issued by him, which belongs to the estate of Mr. Timberlake, as appeared by his books. Is this to be settled at the treasury, under this act of congress, or does the inquiry properly belong to a court of justice? He is charged with German linen, belonging to his private stores, which he turned into the navy-store at Charlestown, as slops. This item had been allowed to him, on a former settlement of his accounts. It is not alleged, that this linen has been returned to him. The United States may, and probably, have used it. Whether he is entitled to any, and to what credit, for this item, is a proper inquiry for a court of justice. The treasury may refuse the credit, and refer the question to a court of justice, but cannot, I think, issue an execution for it, as the case now stands. The material item allowed in a former settlement of accounts, and now re-charged, is the amount of advances on his pay-roll to officers and men, while he acted as purser of the Constitution, it now appearing by the memoranda of sales, by the evidence of Commodore Patterson and others, and by the general state of the account, that portions of these advances were made out of the money and stores of purser Timberlake, and out of the ship's stores. I will not make the obvious objection to this item, that if Mr. Randolph paid the money, or sold the stores of Mr. Timberlake, on his own account, he is responsible to the estate of Mr. Timberlake, and that the treasury department of the United States does not represent him, nor that credit given for money paid by Mr. Randolph as his own, cannot be rescinded, by alleging that the money really belonged to another person, nor will I inquire by what authority the treasury department settles the accounts between Timberlake's representatives and Randolph. But I will say, that

be illegal, if the government had not a right to issue it; and no act of the officers of the United States could be of avail, to give it validity. Suppose, the warrant had issued by direction of the solicitor *of the treasury, who has no authority to order it, and no exception had been to it; [*19 would the proceedings under it have had a legal existence? As it may be considered, that the decree was made by the district judge, on the allegation in the bill for the injunction, that the money was not received as an officer, this court will not infer that this was the point decided.

Coxe, for the defendant, contended, that the whole proceedings in the case, which is reported in 6 Peters, were judicial. Two [*20 grounds for relief were presented to the district judge. The judge ordered the accounts between the United States and Mr. Nourse to be audited, thus passing by one of the grounds, and considering Mr. Nourse as "an officer;" and *deciding the case, after the report of the auditors, in that view [*21 of it. As to the nature of such a proceeding, he cited 5 Dane's Abridgment 223: "where one acts as a judge, and the matter is within his jurisdiction, his sentence binds, until reversed." In awarding the injunction, he acted judicially, and no other *view can be taken of his [*22 action in this case, when the record and the decree are examined. In the case of *Arredondo*, 6 Pet. 709, 711, this court have said, the power to hear and determine a cause, is jurisdiction; it is *coram judice*, whenever a cause is presented which brings this power into action. 6 Pet. 709. All questions arising in the case are to be *decided. Ibid. 700. By consenting to be sued, and submitting the decision to judicial action, [*23 the United States have considered it as a purely judicial question. Ibid. 711. The United States, by adopting the proceeding authorized by the act of congress of 1820, claimed that the party against whom the warrant issued, was within the act; and in the *answer to the bill presented to the district judge by Mr. Nourse, his liability as an officer is re-asserted. [*24 The district judge acted on this state of things, and gave a final decree upon them thus presented to him.

If the decree in this case had been in the form of chancery proceedings in England, it would have been drawn up at large, and the whole audit of the accounts would then appear in the decree; and it would be seen, that the very accounts upon which the United States have now instituted this

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this entry admits that part of the money was paid by Randolph out of his own funds, and certainly diminished his debt to the United States to that amount. Consequently, the whole amount for which execution issued was not due.

If I am correct in saying that this summary process can be used only to coerce the payment of the sum actually due, not to coerce the payment of more than is due, that such controverted question ought to be decided in a court of justice; then this warrant has been issued in a case which the law does not authorize—in a case which ought to have been submitted to a court of justice. On both these points, I am of opinion, that the agent of the treasury has exceeded the authority given by law, and consequently, that the imprisonment is illegal. I have not had time to state my opinion on the remaining point on which my brother judge has given his opinion. It is of no importance, as I concur with him on it. Mr. Randolph is to be discharged from custody.

action were the subject-matter of the whole proceeding. In the case of the *Bank of the United States* v. *Ritchie*, 8 Pet. 128, this court held, that although the decree did not set forth the whole of the matters in which it was given, yet a party on a bill of review may take advantage of anything appearing in the record. The application of this rule is asked to the case before the court; and the objections on the part of the United States, that the character and object and purpose of this suit, and of the warrant of distress, are not shown to be the same, will not be urged.

As to the position, that it does not appear in the first proceeding that Mr. Nourse was "an officer," within the objects of the statute: it is sufficient to say, that however the money claimed by the United States came into his hands, he was entitled to a legal and valid set-off to the claim. The United States proceeded against him as "an officer," claiming from him a
*25] *balance for money he received as the register of the treasury; and he exhibited a set-off, beyond the whole sum demanded by the United States, to the satisfaction of the auditors appointed by the district judge, which report was confirmed by his decree.

Marshall, Ch. J., delivered the opinion of the court.—The United States had instituted their suit against Joseph Nourse, in the circuit court for the district of Columbia, in the county of Washington, on an account authenticated according to law, by the proper accounting officers. The cause being at issue on the plea of *non assumpsit*, the following case was agreed between the parties.

"In this case, it was agreed, that the suit is instituted upon a transcript from the treasury of the United States, which is annexed to the record, in a former proceeding originating in the district court of the district of Columbia, and brought before the supreme court by appeal. And it is further agreed, that the defendant shall have the same benefit of the proceedings in said case, as if the same had been pleaded, or as if given in evidence upon the trial of the general issue; and upon this statement, judgment shall be given as upon a case agreed, and either party be at liberty to refer to the printed record in said case of *Nourse* v. *United States*, as if the same were fully incorporated into this record."

The case referred to in this special statement grew out of a warrant of distress, issued by the treasury department, on the 14th day of July 1829, directed to the marshal of the district of Columbia, commanding him to levy and collect the sum of $11,769.13, by distress and sale of the goods and chattels of Joseph Nourse, late register of the treasury. This warrant was issued in pursuance of the act of May 15th, 1820, "providing for the better organization of the treasury department." The third section of this act enacts, in substance, that "if any officer employed in the civil, military or naval departments of the government, to disburse the public money appropriated for the service of those departments respectively, shall fail to render his accounts, or pay over, in the manner required by law, any sum of
*26] money remaining in the hands of *such officer, it shall be the duty of the officer charged with the revision of the accounts of such officer, to cause the same to be stated to the agent of the treasury, who is required to proceed against the delinquent in the manner directed in the preceding

section." That section directs the agent of the treasury to issue a warrant of distress against such delinquent officer and his sureties, directed to the marshal, who shall proceed to levy and collect the money remaining due, by distress and sale of the goods and chattels of such delinquent officer, having given ten days' notice of such intended sale; and if the goods and chattels be not sufficient to satisfy the said warrant, the same may be levied on the person of such officer, &c. The fourth section provides, that if any person shall consider himself aggrieved by any warrant issued under the act, he may prefer a bill of complaint to any district judge, setting forth the nature and extent of the injury of which he complains, and thereupon, the judge may grant an injunction to stay proceedings on such warrant altogether, or for so much thereof as the nature of the case requires; and the same proceeding shall be had on such injunction, as in other cases, except that no answer shall be required on the part of the United States. Under the authority given by this section, an injunction was awarded by William Cranch, chief justice of the district of Columbia, and judge of the court of the United States for that district, to stay all further proceedings on the said warrant.

In his bill, the complainant states, that his public accounts, as register of the treasury of the United States, and agent of the treasury department, in disbursing certain funds, and settling certain accounts of contingencies and other miscellaneous matters, and as agent for the joint library committee of congress, have been settled at the treasury, since his removal from office; upon which settlement, a pretended balance has been found against him for the sum of $11,250.26, for which warrant of distress has been issued by the agent of the treasury, which has been levied on his lands, tenements, goods and chattels, by the marshal of the district. That the said account is unjust and illegal; and so far from any balance being due thereon to the United States, a considerable balance should have been struck thereon in favor of the complainant; *as appears by an account annexed to the bill, which [*27
he declares to be just and true. That besides his regular duties as register, he was, from the year 1790 till his recent dismissal from office, employed by the proper department of the government, in the separate business of special agent for the disbursement of the contingent funds of the treasury department, and for the settlement of the numerous accounts connected therewith. These duties devolved upon him great labor and responsibility, and occupied a great portion of his private hours. When he undertook this branch of public employment, no stipulation was made for the precise amount of compensation. The usage of the treasury and other departments of the government has invariably been, to allow commissions not only to unofficial persons so employed, but to official persons and clerks of the departments, when such duties were distinct from the stated duties appertaining to their offices. That he has regularly made out and presented his account to the proper accounting officers of the treasury; charging his commission at the rate of two and a half per cent. on the amount of disbursements; which, if allowed, would leave the United States indebted to him in the sum of $9886.24, which he believes to be justly due to him. The complainant further states, that he is advised, that the act of congress under which the said warrant of distress is pretended to have been issued, being a

law in derogation of common right, ought to be construed with the utmost strictness: but that, on no reasonable construction, can this complainant or his accounts, either as register of the treasury, or as agent of the joint library committees of congress, be brought within the descriptions of persons over whom that act gives jurisdiction to the agent of the treasury. The bill prays for an injunction and for further relief.

The United States, in their answer, refer to and rely on the general account of the complainant, settled by the proper officer of the government, by which he was found indebted in the sum of $11,769.13. They admit that the complainant had rendered an account, charging a commission of two and a half per cent. on all the moneys which had passed through his hands in the different agencies in which he had acted, exhibiting a balance in his favor of $9367.87. *They deny the right of the complainant to a commission on the moneys disbursed by him; and contend, that they were authorized by law to enforce the payment of the balance due to the government, by warrant of distress. They, therefore, pray, that the injunction may be dissolved, and that they may be permitted to pursue their legal remedies for the sum due to them.

*28]

The court determined, that the said Joseph Nourse was entitled to compensation for the extra services he had rendered to the government, in the agencies mentioned in the bill; and appointed auditors to ascertain the value of his services and compensation, and to report thereon without delay. The report of the auditors allowed to the complainant a commission of two and a half per cent. on the sum of $943,308.83, disbursed by him in the several agencies in which he had been employed, leaving a balance due to him from the United States. The report was confirmed, and the injunction made perpetual. Some further proceedings were had in that cause, which do not affect the case now before this court.

This suit is instituted on the same account on which the distress-warrant was issued, and against which the decree of the district judge was pronounced. The defendant relies on that decree, as a bar to the action. The circuit court adjudged it to be a bar; and that judgment is now to be revised in this court.

It is a rule, to which no exception is recollected, that the judgment of a court of competent jurisdiction, while unreversed, concludes the subject-matter as between the same parties. They cannot again bring it into litigation. An execution is the end of the law. It gives the successful party the fruits of his judgment; and the distress-warrant is a most effective execution; it may act on the body and estate of the individual against whom it is directed.

It would excite some surprise, if, in a government of laws and of principle, furnished with a department whose appropriate duty it is to decide questions of right, not only between individuals, but between the government and individuals; a ministerial officer might, at his discretion, issue this powerful *process, and levy on the person, lands and chattels of the debtor, any sum he might believe to be due, leaving to that debtor no remedy, no appeal to the laws of his country, if he should believe the claim to be unjust. But this anomaly does not exist; this imputation cannot be cast on the legislature of the United States.

*29]

While it was perceived, that the public interest required a prompt remedy against public defaulters, the legislature was not unmindful of the rights of individuals, and provided that this remedy should not be used oppressively. The party who thinks himself aggrieved may appeal from the decision of the treasury to the law, and prefer a bill of complaint to any district judge of the United States, setting forth therein the nature and extent of the injury; who may grant an injunction to stay proceedings on such warrant altogether, or for so much thereof as the nature of the case requires. And the same proceedings shall be had on such injunctions, as in other cases, except that no answer shall be required on the part of the United States.

Joseph Nourse, in pursuance of the permission given by this section, did file his bill of complaint, alleging, among other things, that he owed nothing to the United States, and praying the judge to enjoin all further proceedings on the warrant. The injunction was granted, and the whole cause thus transferred before the district judge, who was directed to proceed therein as in other cases. He had, consequently, full jurisdiction over it. After a reference to auditors, according to the course of courts of chancery in matters of account, he pronounced his final decree against the United States, and awarded a perpetual injunction. This decree is now in full force, and was in force, when this suit was instituted. The act of congress gave jurisdiction in the specific case to the district judge; he might have enjoined the whole or a part of the warrant; his decree might have been for or against the United States, for the whole or a part of the claim. On the sum which he found to be due, he is directed to assess the lawful interest; he may add such damages as, with the interest, shall not exceed the rate of ten per cent. per annum on the principal sum. Had the district judge finally enjoined a part of the sum claimed by the United States, and decreed, that the residue should be paid with interest, all would perceive the unfitness of asserting *a claim, in a new action, to that portion of the debt which had been enjoined by the decree of the court. And yet [*30 between the obligation of a decree against the whole claim, and against a part of it, no distinction is perceived.

Aware of the difficulty of maintaining an action on a claim on which a court of competent jurisdiction has passed a judgment, still in force; the attorney-general questions the jurisdiction of the district court, and rests his argument for the reversal of the judgment of the circuit court, chiefly on this point. He contends, that Joseph Nourse was not an officer contemplated by the act providing for the better organization of the treasury department; that the warrant of distress could not legally be issued against him; and, consequently, that this is not a case in which the district court can exercise jurisdiction. He refers to the bill of complaint, which is drawn with a double aspect; it alleges, that the complainant is not indebted to the United States; and that, were it otherwise, he is not an officer contemplated by the act against whom a distress-warrant can legally be issued. This argument has been considered.

Did the case depend upon the question whether Joseph Nourse, in any of the characters in which he is charged in the account accompanying the warrant, was an officer subjected by law to this process, some difficulty would exist in finding in the record sufficient information on

which to decide it. The following are the items of the account. To balance due—

As agent for the joint library committee of congress,	$2502 55
As agent for paying the expenses of stating and printing the public accounts,	934 98
As agent for paying the superintendent and watchmen of the buildings occupied by the state and treasury departments,	1325 41
As agent for paying the expenses of printing certificates of the public debt,	1011 29
As agent for paying the contingent expenses of the treasury department,	5994 90
	$11,769 13

*31] Whether in any or all of these agencies, Joseph Nourse acted *as an officer against whom a distress-warrant could legally be issued, for any sum in which he might be found a defaulter, the record does not furnish the means of deciding clearly. But the district court took no notice of that part of the bill which suggests this objection. It acted on the merits of the case, and decreed against the United States on those merits. Still, however, the attorney-general contends, that in so doing, it transcended its jurisdiction, and has taken cognisance of a case which could not legally be brought before it. This is founded entirely on the assumption that the warrant was issued against a person not liable to it. Let this be conceded.

It would be strange indeed, if the legislature, intending to give a prompt remedy against a particular class of debtors, should carefully guard that class against any abuse of the remedy; and yet leave all other persons, whether debtors or not, exposed to that abuse; that an officer liable to the process should be enabled to correct it, if it issued injuriously, by appealing to the law; and yet that an individual not liable to the process, should be compelled to submit to the oppression and to suffer the wrong. The act is not chargeable with this inattention to the rights of individuals. The sections which regulate the proceedings of the treasury department on the warrant, contemplate the officer against whom it may be issued, and confine it to him; but when the legislature turns its attention to the individual against whom it may issue, the language of the law is immediately changed. The word person is substituted for officer, and the act declares, "that if any person should consider himself aggrieved by any warrant issued under this act, he may prefer a bill of complaint, &c., and thereupon, the judge may grant an injunction, &c." The character of the individual against whom the warrant may be issued is entirely disregarded by this part of the act. Be he whom he may, an officer or not an officer, a debtor or not a debtor; if the warrant be levied on his person or property, he is permitted to appeal to the laws of his country, and to bring his case before the district judge, to be adjudicated by him.

*32] *The district court then had complete jurisdiction over this case, and its decision is final. The judgment is, consequently, a bar to any subsequent action for the same cause. The judgment of the circuit court is affirmed.

Bank of Alexandria v. Swann.

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 Columbia, holden in and for the county of Washington, and was argued by counsel: On consideration whereof, it is adjudged and ordered, that the judgment of the said circuit court in this cause be and the same is hereby affirmed.

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*The President, Directors and Company of the BANK of ALEXANDRIA, Plaintiffs in error, *v.* THOMAS SWANN. [*33

Promissory notes.—Notice of non-payment.

The general rule, as laid down by this court in Lenox *v.* Robert, 2 Wheat. 373, is, that the demand of payment of a promissory note should be made on the last day of grace; and notice of the default of the maker be put into the post-office, early enough to be sent by the mail of the succeeding day.

The note on which the action in this case was brought, having become due at the Bank of Alexandria, where it was made payable, payment of the same was demanded at the bank, before three o'clock on that day; notice of non-payment was put into the post-office on the following day, directed to the indorser, the defendant in error, who resided in Washington; according to the course of the mail from Alexandria to the city of Washington, all letters put into the mail, before half-past six o'clock, P. M., at Alexandria, would leave there some time during the night, and would be deliverable at Washington, the next day, at any time after half-past eight o'clock. The defendant in error contended, that as demand of payment was made before three o'clock, P. M., notice of the non-payment of the note should have been put into the post-office on the same day it was dishonored, early enough to have gone with the mail that evening. The court held, that the law does not require the utmost possible diligence in the holder in giving notice of the dishonor of the note; all that is required is ordinary reasonable diligence; and what shall constitute reasonable diligence ought to be regulated with a view to practical convenience, and the usual course of business.

The law, generally speaking, does not regard the fractions of a day; and although the demand of payment at the bank was required to be made during banking hours, it would be unreasonable, and against what the special verdict finds to have been the usage of the bank at that time, to require notice of non-payment to be sent to the indorser on the same day. This usage of the bank corresponds with the rule of law on the subject.

If the time of sending notice is limited to fractions of a day, it will always come in question, how swiftly notice could be conveyed. The notice sent by the mail, the next day after the dishonor of the note, was in due time.

The law has prescribed no particular form for such notice; the object of it is merely to inform the indorser of the non-payment by the maker, and that he is held liable for the payment thereof.

The note on which the suit was brought was for $1400, made by H. P., in favor of the defendant in error, and the notice described it as for the sum $1457; in the margin of the note, was set down in figures $1457, and the special verdict found, that the note was discounted at the bank, as for a note of $1457; the defendant in error was not an indorser on any other note drawn by H. P. and discounted at the bank, or placed there for collection. This case falls within the rule laid down by this court in the case of Mills *v.* Bank of the United States, 11 Wheat. 431, that every variance, however immaterial, is not fatal to the notice; it must be such a variance as conveys no sufficient *knowledge to the party of the particular note which [*34
has been dishonored. If it does not mislead him, if it conveys to him the real fact, without any doubt, the variance cannot be material, either to guard his rights, or avoid his responsibility. In that case, as in the one now before the court, it appeared, that there was no other note in the bank, indorsed by Mills; and this the court considered a controlling fact, to show that the indorser could not have been misled by the variance in the date of the note, which was the misdescription complained of.[1]

Where it did not appear on the record, that a bond had been given to the clerk of the circuit

[1] See note to Mills *v.* United States Bank, 11 Wheat. 431; also. United States Bank *v.* Watterson, 4 Cr. C. C. 445.

court to prosecute the writ of error, the court continued the case to a subsequent day of the term, to ascertain whether a bond had been given.

Bank of Alexandria *v.* Swann, 4 Cr. C. C. 136, reversed.

ERROR to the Circuit Court of the District of Columbia, and county of Alexandria. This was an action in the circuit court of the county of Alexandria, instituted by plaintiffs in error against the defendant, on a promissory note made by H. Peake, and indorsed by the defendant, payable and negotiable at the bank of Alexandria.

The first count in the declaration set forth the liability of the defendant on a note for $1400, dated the 23d day of June 1829, and payable in sixty days from the date thereof. The declaration stated, that after the time limited in the note for the payment thereof, viz., on the 25th day of August 1829, the note was shown and presented to the maker, at the bank, and payment requested of the same, which was refused, of which notice was afterwards, on the said 25th day of August, given to the defendant. The second count was for the sum of $1500, money laid out and expended. The defendant pleaded *non assumpsit*, and on the trial of the issue, the jury found the following special verdict :

"We, of the jury, find, that one Humphrey Peake, on the 14th day of March 1826, obtained, for his own accommodation, a discount at the bank of the plaintiffs, for the sum of $1457.57, on his note for that amount, indorsed by defendant, on the day and year aforesaid, payable sixty days after date ; that the said discount was regularly continued from that time until the 5th day of February 1828, by new notes of the said Humphrey Peake, for this same sum, indorsed by the defendant, and discounted at the said bank, to take up the preceding notes, the sums discounted on which new notes were regularly so applied ; that on the said 5th day of February 1828, a note of the said Humphrey Peake for $1457, of that date, payable sixty days after date, to the defendant, and *by him indorsed, negotiable and payable at the said bank, was there discounted towards taking up a note of the said Humphrey, indorsed by defendant, and discounted as aforesaid, for the sum of $1457.60, which became due on the said 5th day of February 1828 ; and that the discount so made on the said note of $1457, on the said 5th of February, was regularly continued by a series of notes of the said Humphrey, indorsed by the defendant, for the said last-mentioned sum, negotiable and payable at said bank, until the 23d of June 1829 ; all which discounts, so made, were applied regularly towards the discharge of the notes before discounted as aforesaid at the said bank. We find, that on the 23d day of June 1829, a note of the said Humphrey Peake, for the sum of $1457, indorsed and discounted as aforesaid, became due and payable at the said bank ; and that, on the said 23d day of June 1829, the note in the declaration mentioned, was, at the instance of the said Humphrey, discounted at the said bank, as and for a note of $1457, for the purpose of taking up the note of the said Humphrey, indorsed and discounted as aforesaid, which became due on the said 23d of June ; and that the sum of $1441.45, the discount so made, was applied towards that purpose ; that, when the said discount was made, the said note was, from reference to the figures in the margin only, mistaken as a note for $1457. We find, that the body and signature of the said note, dated the 23d day of June, including the date and figures in the margin, are wholly in the handwriting of the

*35]

said Humphrey, and were written by him; and that the indorsement of the name of the defendant thereon, is in the handwriting of the defendant, and was made by him, for the purpose of having the said note discounted at the said bank, for the object before expressed; and we find, that the said note and indorsement are in the words and figures following:

"$1457. Alexandria, June 23, 1829.

Sixty days after date, I promise to pay to Thomas Swann, Esq., or order, for value received, fourteen hundred dollars, payable and negotiable at the Bank of Alexandria. HUMPH. PEAKE."

Indorsed—THO. SWANN.

*"We find, that during the whole period of time before mentioned, that is to say, from the 5th day of February 1828, and from thence to this day, there was no other note of the said Humphrey, indorsed by the said defendant, discounted by the said bank, or in the said bank for collection or otherwise. We find, that the business of the said bank always has been, and yet is, transacted at their banking-house, in the town of Alexandria; and that the defendant, on the 25th day of August 1829, for a long time before, and ever since, was, and ever has, continued to be, an inhabitant and resident of the city of Washington, in the district of Columbia, distant about seven miles from Alexandria. We find, that during the whole month of August, in the year 1829, the mail from Alexandria to the said city of Washington, and to other towns on the main northern route, was made up, once a day; that it closed at nine o'clock, P. M., on each day, and that letters for Washington and for the north, put in after half an hour after eight o'clock, P. M., were not, in the general course of proceedings in the post-office at Alexandria, sent by the mail which closed on that day, but were post-marked on the succeeding, and sent by the mail made up on such succeeding day; and that all letters for Washington and the north, put into the post-office at Alexandria, before half-past eight o'clock, P. M., were post-marked on the day they were so put in, and sent by the mail which closed at nine o'clock, P. M., as before stated; that the mail for Washington and other northern towns, which was closed at Alexandria, as aforesaid, at nine o'clock, P. M., was sent off from Alexandria, between twelve o'clock at night of the same day, and two o'clock in the morning of the succeeding day; sometimes, but very rarely, leaving Alexandria before twelve o'clock at night, as aforesaid, and generally leaving that place about two o'clock in the morning of the day succeeding the making up and closing of the mail at Alexandria, as aforesaid. [*36

"We find, that letters from Alexandria to Washington, sent by mail, were, during the period aforesaid, delivered out at Washington at any hour after eight o'clock, A. M., on the day succeeding that on which the mail was closed at Alexandria for that place. We find, that the hours of business at the said Bank of Alexandria, during the winter, have always been from ten o'clock A. M., to three o'clock, P. M., and during the *summer, from nine o'clock, A. M., to three o'clock, P. M.; after which latter hour, the clerks and officers left the bank, and attended no more to banking business during the day. We find, that it is, and for a long time past, including the year 1829, has been, the usage of the Bank of Alexandria, and other banks in the town, to deliver out to the notary, [*37

on each day, at three o'clock, all notes and bills discounted by, or to be paid at such banks, which have become due on such day, for demand and protest; and for the notary to return such notes, with the protest for non-payment, to the said bank, on the morning of the succeeding day, soon after the bank opened. We find, that on the 25th day of August, being the third day of grace on the note in the declaration mentioned, it was, by Benjamin C. Ashton, teller of the said bank, and during bank-hours of that day, presented at said bank to James L. McKenna, cashier of the said bank, for payment; that the said McKenna examined the books of the said bank, and found that the said Humphrey Peake had no money or funds there, and stated that fact to the said teller; that neither the said Peake, nor any other person appeared for him at the said bank, to pay the said note; and that before the 28th day of August 1829, the said Peake had failed, and had left the town of Alexandria, where he had before that time resided. We find, that the said note having remained unpaid on the said 25th of August 1829, it was, on the closing of the bank on that day, taken out by the said Benjamin C. Ashton, who was also a notary-public, for protest, and was, on the morning of the 26th of August 1829, returned to the said bank, with the protest, which was drawn up on the said 26th of August 1829; and that the said note, in the said declaration mentioned, remained in the said bank as its property, from the said 23d day of June 1829, until about the 30th of October, in the same year, when it was delivered to their attorney for suit, with the exception only of the time it was in the hands of the said Benjamin C. Ashton, as notary as aforesaid.

"We find, that on the 26th day of August 1829, and long before the closing of the mail of that day, at Alexandria, Benjamin C. Ashton, on behalf of the said bank, put into the post-office at Alexandria a letter written by him, addressed to the defendant, at Washington, intended by the
*38] said letter to *give him notice of the non-payment of the said note, which letter was post-marked at the post-office in Alexandria, 'Alexandria, D. C., August 26,' and is in the words and figures following:

'Alexandria, August 26, 1829.

Sir:—A note drawn by Humphrey Peake, for 1457 dollars, dated Alexandria, 23th of June 1829, payable to you, or your order, at the Bank of Alexandria, sixty days after its date, by you indorsed, and for payment of which you are held liable, is protested for non-payment, at the request of the President, Directors & Co. of the said bank.

Respectfully, your obedient servant,

Benj. C. Ashton, Not. Pub.

Thomas Swann, Esq., Washington City.'

"Which letter was received by the defendant, in due course of mail, on the 27th day of August 1829. We find the protest, before referred to, in the words and figures following:

'$1457. Alexandria, June 23, 1829.

Sixty days after date, I promise to pay to Thomas Swann, Esq., or order, for value received, fourteen hundred dollars, payable and negotiable at the Bank of Alexandria. Humph. Peake.

Indorsed—Tho. Swann.'

'United States of America, District of Columbia, county of Alexandria, to wit: On the 25th day of August, in the year of our Lord 1829, at the request of the President, Directors and Company of the Bank of Alexandria, I, Benjamin C. Ashton, public notary in and for the county of Alexandria, by lawful authority duly appointed and qualified, dwelling in Alexandria, in the county and district aforesaid, demanded payment of a note, of which the above is a copy, of the cashier of the Bank of Alexandria, at the said bank, and he answered, that no funds were there for its payment; and on the 26th day of the same month, I *gave notice to the indorser, by mail, that the drawer of the said note had failed to pay it. Whereupon, I, the said notary, at the request aforesaid, did protest, and by these presents do publicly and solemnly protest, as well against the drawer and indorser of the said note, as against all others whom it doth or may concern, for exchange, re-exchange, and all costs, charges and interest already incurred, or to be hereafter incurred, for the want of payment thereof. In testimony whereof, I have hereunto set my hand, and affixed my seal notarial, the day and year aforesaid. [*39

[L. S.] BENJ. C. ASHTON, Notary Public.

Protesting—$1.75.'

"We find, that no part of the said sum of $1400, of the note in the declaration mentioned, has been paid. We find, that the said Bank of Alexandria kept a book called an offering-book, in which the different sums and notes offered for discount were entered; and that this book was always laid before the board of directors, on the discount days in the bank, and the discounts agreed to be made by the board regularly entered in the said discount book. We find, that the 23d day of June 1829, was one of the regular discount days in the said bank; and on that day, the said book was laid before the board of directors, and, among the other entries made for discount on that day, was one in the following words and figures: 'Humphrey Peake, Thomas Swann, Humph. Peake. June 23, August 22, 1457, 15.54, 1441.46.'

"We find, that the said entry was intended to mean that the said Humphrey Peake, had offered for discount his note for $1457, indorsed by the said defendant, and payable sixty days thereafter. We find, that no note for $1457, drawn by the said Humphrey Peake, and indorsed by the said defendant, had been offered for discount to the said bank, on the said 23d of June 1829; but that the note in the declaration mentioned, was, on that day, offered to the said bank for discount, and for the purpose of renewing for that amount the note of $1457, then due at the said bank. We find, that no note for $1400, drawn by the said H. Peake, and *indorsed by the said defendant, was ever entered on the books of the said bank for discount; nor is there any entry made upon the books of the said bank, that any such note had ever been discounted by the said bank. We find, that, upon the offering for $1457, before stated, the board of directors agreed to make a discount for that sum, and the same was entered in the discount book, as discounted, and the proceeds carried to the credit of the said Humphrey Peake. We find, that the said discount was intended by the board as a renewal of the note of $1457, then due to the said bank; and that the note in the declaration mentioned, was intended to be designated in [*40

the offering book, by the said description of a note drawn by the said Peake, and indorsed by the defendant as a note for $1457.

"If, on the whole matter aforesaid, the law be for the plaintiffs, then we find for the plaintiffs, and assess their damages to the sum of $1400, being the principal sum due, to bear interest from the 26th day of August 1829, till paid; and if the law be for the defendant, then we find for the defendant."

Upon this verdict, the circuit court gave judgment for the defendant, and the plaintiffs prosecuted a writ of error to this court.

Swann objected to the plaintiffs' proceeding in this case, as it did not appear on the record from the circuit court, that a bond had been given to the clerk of that court to prosecute this writ of error. The court continued the case to enable the parties to ascertain, by a reference to the clerk of the circuit court, if a bond had been given. On the subsequent day of the term, a certified copy of the appeal bond was filed in this court, and the argument in this case proceeded.

Jones, for the plaintiff in error.—The first objection is to the notice of protest, that it was not expedited by the notary from Alexandria in due time. The facts were, that the last day of grace expired on the 25th of August, and at the closing of the bank, on that day, at three o'clock, P. M., the note, after having been duly presented and demanded at the bank, was
*41] given out to the notary *for protest, was duly protested the same day, and on the next, at the opening of the bank, at nine o'clock, A. M., war returned by the notary into bank, under protest; and by the regular mail of the same day (26th of August), the notice in question was sent to the indorser in Washington. The bank, as usual, remained closed, without having any of its officers present, or any business transacted there, from three o'clock, P. M., on the 25th, to nine o'clock, A. M., on the 26th. The daily mail, from Alexandria to Washington, was closed at half-past eight o'clock, P. M., was sent on the same evening, and opened next morning at eight o'clock. And the precise objection is, that the notice was not expedited by the mail that closed at half-past eight o'clock, P. M., the same day the note fell due and was protested.

It is considered to have been fully settled as the law, and this is the known custom with all the banks in the district of Columbia, that notice of the dishonor of a note shall be given the day after the dishonor of a note. On the strict principles of the common law, the notice could not be sent until the following day; as, according to those principles, the party to the note had the whole of the day on which it became due to pay it. The cases to show that the notice to the indorser is properly sent on the day following the non-payment, are in Chitty on Bills 225, 303; *Lenox* v. *Roberts*, 2 Wheat. 373.

The second objection goes to the certainty of the letter of notice, addressed by the notary to the indorser; which, it is said, gave a wrong description of the note, as being one for $1457, instead of $1400; the latter sum being that inserted in the body of the note. In point of fact, it is found, that $1457 was the true and proper amount for which the note ought to have been drawn, and was intended to have been drawn, and that was the amount set down in figures on the margin of the note; but by a mistake

committed by the maker himself, in writing out the note, and overlooked by the officers of the bank, when it passed for discount (and in fact discovered for the first time when the objection was taken at the trial), the sum was written "fourteen hundred, omitting the fifty-seven," in the body of the note. The original discount, commencing in March 1826, *had been [*42
of a note for $1457.60, and ran on, by renewals of the note, every sixty days, for the same amount, till February, 1828; when it was renewed and continued for the precise amount of $1457, and so ran to the time of putting in the note now in question; which was discounted in June 1829, as a renewal and continuation of the same standing accommodation, and "as and for a note of $1457;" which was the precise amount of the next preceding note replaced and taken up by it. The verdict expressly finds that no note made by Peake and indorsed by the defendant, as a note for $1400, was ever discounted, or offered for discount, at the said bank; but that all the entries in the books of the bank import the discount on the 23d day of June 1829, when this note was discounted, as a note so made and indorsed, for $1457, and for no other sum.

The object of the law is, that the party to the note, who is to be held responsible, shall have substantially a notice of its dishonor—sufficient notice to enable him to act for his own protection. This was done. The letter from the notary accurately described the note which the defendant supposed he had indorsed, with the exception of the amount of the same. The parties to the note supposed it to have been given for $1457, as it was intended to renew a note due at the bank for that sum. He cited *Mills* v. *Bank of the United States*, 11 Wheat. 431, to show that no form of notice to the indorser of a promissory note is required, if the party has, from the notice given, sufficient knowledge of the particular note which has been dishonored.

As to the form of the declaration, it was contended for the plaintiffs in error, that it is not necessary to state anything but that a demand and refusal took place; no particulars of the demand need be stated. Chitty on Bills 248, 252; 3 Wend. 456; 8 Cow. 424.

Coxe and *Swann*, for the defendant.—If the case was one of a demurrer to the evidence, the court could infer everything against the party demurring; but it is that of a special verdict, and no other than the facts found can be considered by the court. The jury do not say that, substantially, notice was given; but that the notary intended to *give notice. The [*43
case of *Mills* v. *Bank of the United States*, does not therefore apply. They cited also, 2 Johns. Cas. 337. Upon the insufficiency of the notice, as found in the special verdict, they cited, 1 T. R. 167; 6 East 3; 12 Mass. 404; 14 Ibid. 116; 5 Cow. 303.

I. To sustain this action, the bank must show that they were entitled to this note. It is said, they discounted it, and therefore, it belonged to them. Was it discounted? The finding upon this question is contradictory. The note for $1400 was never offered for discount, and acted upon by the board. The offer for discount was for $1457, and that was granted. There was no action of the board upon any note, after this. The officers of the bank kept the note for $1400, and considered that as the discounted note. Had they a right to do so? It was, to be sure, a benefit to the indorser; but

was it in the power of the officers to do it? Would the bank be bound by it? If they could take a note for $1400, they might for $100. If the bank had a right to reject this note, the indorser had the same right to do so. If so, it was not a discounted note; and the bank had no right to it.

II. If it was a discounted note, the next inquiry would be, whether the notice of protest was properly given?

1. Was the note truly described? If not, then it became necessary to satisfy a jury, that it was intended to be truly described, and that it was known by the indorser to be the same note. 12 Mass. 6; 2 Johns. Cas. 337. The question whether the indorser knew that the note alluded to in the notice was the same with that produced in evidence, was left to the jury. The court say, in the case in Johnson, that it was a fact proper for the decision of the jury. In this case, the jury have not found this fact. They say, that the notary intended to refer to the note in question; but they do not say, that the indorser knew that the notice alluded to the same note. The knowledge of the indorser is the most material fact. The intention of the notary is of no moment; and in this case, it is clear, that he never intended to allude to a note of $1400. *The verdict then has not found what was necessary to make this good notice. Can the court intend it? Can the court say that the indorser knew that this notice alluded to the note of $1400? This was decided in both the above cases to be a question for the jury, and not the court.

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2. Was the notice given in time? The court will look at the facts found by the jury. If the indorser had lived in Alexander, he would have been entitled to notice that evening. If so, was he not entitled to have the notice put into the post-office that evening? In the case of the *Bank of the United States* v. *Carneal*, 2 Pet. 551, the court say, it is difficult to lay down any universal rule as to what is due diligence in respect to notice to indorsers. Many cases must be decided upon their own particular circumstances, however desirable it may be, when practicable, to lay down a general rule. In *Lenox* v. *Roberts*, 2 Wheat. 373, the court say, that the demand should be made on the last day of grace, and the notice of default put into the post-office early enough to be sent by the mail of the succeeding day. This opinion was founded upon the special facts of that case. What would be the next mail in this case? This notice, then, upon these grounds seems to be defective. Upon this view of the case, judgment cannot be rendered for the bank.

Now, let us look at the declaration. It counts upon a note, negotiable and payable at the Bank of Alexander, on the 25th day of August. To charge an indorser upon such a note, a demand must be make at the Bank of Alexandria, on the day of payment, within the banking-hours. 2 Pet. 549. The declaration then must state a demand, at the time limited for the payment. The demand by a holder may be made at any time within the banking-hours. If the bank possesses the paper, this demand will be considered to have been made, by showing that the paper was there; so that a demand, or that which amounts to a demand, must be shown in the declaration. How then does this declaration stand? The demand is alleged to have been made at the bank, upon Peake, after the expiration of the time of payment. It may have been at four, six, eight or ten o'clock. *Of what avail is a demand upon Peake anywhere? Of what avail

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is a demand at the bank, after the banking-hours? The declaration then is defective, and the defect not cured by the verdict. *Slacum* v. *Pomery*, 6 Cranch 221; *Rushton* v. *Aspinall*, 2 Doug. 679. But if not defective, the proof does not support it.

THOMPSON, Justice, delivered the opinion of the court.—This suit was brought in the circuit court of the district of Columbia, for the county of Alexandria, upon a promissory note made by Humphrey Peake, and indorsed by the defendant in error. Upon the trial, the jury found a special verdict, upon which the court gave judgment for the defendant, and the case comes here upon a writ of error. The points upon which the decision of the case turns, resolve themselves into two questions. 1. Whether notice of the dishonor of the note was given to the indorser in due time? 2. Whether such notice contained the requisite certainty in the description of the note?

The note bears date on the 23d day of June 1829, and is for the sum of $1400, payable sixty days after date, at the Bank of Alexandria. The last day of grace expired on the 25th of August, and on that day, the note was duly presented and demand of payment made at the bank, and protested for non-payment; and on the next day, notice thereof was sent by mail to the indorser, who resided in the city of Washington.

The general rule, as laid down by this court in *Lenox* v. *Roberts*, 2 Wheat. 373, is, that the demand of payment should be made on the last day of grace, and notice of the default of the maker be put into the post-office, early enough to be sent by the mail of the succeeding day. The special verdict in the present case finds, that according to the course of the mail from Alexandria to the city of Washington, all letters put into the mail before half-past eight o'clock, P. M., at Alexandria, would leave there some time during that night, and would be deliverable at Washington the next day, at any time after eight or o'clock, A. M.; and it is argued on the part of the defendant in error, that as demand of payment was made before three o'clock, P. M., notice of non-payment of the note should have been put into the post-office on the same day it was dishonored, *early enough to have gone with the mail of that evening. The law does not [*46
require the utmost possible diligence in the holder, in giving notice of the dishonor of the note; all that is required is ordinary, reasonable diligence; and what shall constitute reasonable diligence ought to be regulated with a view to practical convenience, and the usual course of business. In the case of the *Bank of Columbia* v. *Lawrence*, 1 Pet. 583, it is said by this court, to be well settled at this day, that when the facts are ascertained, and are undisputed, what shall constitute due diligence is a question of law; that this is best calculated for the establishment of fixed and uniform rules on the subject, and is highly important for the safety of holders of commercial paper. The law, generally speaking, does not regard the fractions of a day; and although the demand of payment at the bank was required to be made during banking-hours, it would be unreasonable, and against what the special verdict finds to have been the usage of the bank at that time, to require notice of non-payment to be sent to the indorser on the same day. This usage of the bank corresponds with the rule of law on the subject. If the time of sending the notice is limited to a fractional part of a day, it is well observed by Chief Justice HOSMER, in the case of the *Hartford Bank*

v. *Stedman*, 3 Conn. 495, that it will always come to a question, how swiftly the notice can be conveyed. We think, therefore, that the notice sent by the mail, the next day after the dishonor of the note, was in due time.

2. The next question is, whether, in the notice sent to the indorser, the dishonored note is described with sufficient certainty. The law has prescribed no particular form for such notice. The object of it is merely to inform the indorser of the non-payment by the maker, and that he is held liable for the payment thereof. The misdescription complained of in this case, is in the amount of the note. The note is for $1400, and the notice describes it as for the sum of $1457. In all other respects, the description is correct; and in the margin of the note is set down in figures $1457, and the special verdict finds that the note in question was discounted at the bank, as and for a note of $1457; and the question is, whether this *was
*47] such a variance or misdescription as might reasonably mislead the indorser as to the note, for payment of which he was held responsible. If the defendant had been an indorser of a number of notes for Humphrey Peake, there might be some plausible grounds for contending, that this variance was calculated to mislead him. But the special verdict finds that from the 5th day of February 1828 (the date of a note for which the one now in question was a renewal), down to the day of the trial of this cause, there was no other note of the said Humphrey Peake, indorsed by the defendant, discounted by the bank, or placed in the bank for collection, or otherwise. There was, therefore, no room for any mistake by the indorser as to the identity of the note. The case falls within the rule laid down by this court in the case of *Mills* v. *Bank of the United States*, 11 Wheat. 376, that every variance, however immaterial, is not fatal to the notice. It must be such a variance as conveys no sufficient knowledge to the party of the particular note which has been dishonored. If it does not mislead him, if it conveys to him the real fact, without any doubt, the variance cannot be material, either to guard his rights or avoid his responsibility. In that case, as in the one now before the court, it appeared, that there was no other note in the bank, indorsed by Mills; and this the court considered a controlling fact, to show that the indorser could not have been misled by the variance in the date of the note, which was the misdescription then complained of.

The judgment of the circuit court is accordingly reversed, and the cause sent back, with directions to enter judgment for the plaintiffs, upon the special verdict found by the jury.

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 Columbia, holden in and for the county of Alexandria, 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 sent back to the said circuit court, with directions to that court to enter judgment for the plaintiffs, upon the special verdict found by the jury.

*Bank of Georgia, Appellants, *v.* James Higginbottom, Administrator of William S. Gillett, and others.

Cautionary judgment.

G., the executor of his father, who had devised his estate to G. and his other children, sold the estate, and became himself the purchaser thereof; and in order to secure the portions of the other devisees, who were minors, confessed a judgment, June 1st, 1819, on a promissory note, in favor of two persons, without their knowledge, in a sum supposed to be sufficient to be a full security for the amount of the portions of the minors. The judgment was kept in full operation, by executions regularly issued upon it, so as, under the laws of South Carolina, to bind the property of G.; he was then engaged in mercantile pursuits, and had other property than that so purchased by him; G. afterwards became insolvent, and the claims of the devisees of his father under the judgment, were contested by his creditors, as fraudulent—the plaintiffs in the judgment having no knowledge of it, when it was confessed, the amount of the sum due to the co-devisees not having been ascertained, when it was confessed, no declaration of trust having been executed by the plaintiffs, and false representations of his situation having been made by G., after the judgment, whereby his creditors were induced to give him time on a judgment confessed to them subsequently.

The judgment of June 1st, 1819, was held to be valid, and the plaintiffs in that judgment entitled to the proceeds of the sales of the estate of G., for the satisfaction of the amount actually due to the co-devisees by G.

Appeal from the Circuit Court of South Carolina. The appellants, on the 4th of April 1827, filed their bill in the circuit court of the United States for the district of South Carolina, to set aside a judgment, or postpone the effect of the same, which had been confessed by William S. Gillett, in the Barnwell district court of the state of South Carolina, for the sum of $30,000.

The judgment was founded on a promissory note made by William S. Gillett, in favor of James Higginbottom and William Provost, for $30,000, dated the 1st of June 1819, and payable on demand. The judgment was confessed on the 1st of June, as of the fourth Monday of March 1819. William S. Gillett was the acting executor of the last will and testament of his father, Doctor Elijah Gillett, by which a specific portion of the estate was devised to him, and other parts of the estate *were given to the children of the testator. By the terms of the will, the executors had [*49 power to sell such part of the estate devised, as it might be beneficial or expedient so to dispose of. William S. Gillett was also, at the time of the confession of the judgment, the guardian of his infant brothers and sisters, the devisees of his father of all the estate not especially devised to him. In December 1818, the personal estate of the testator, Elijah Gillett, was appraised at $56,475, and on the 22d day of March, William S. Gillett, after having selected or taken by lot a portion of the estate to which he considered himself entitled, sold, at public auction, a large number of the negroes, and all the personal estate of the testator. The proceeds of the sale exceeded $40,000, and William S. Gillett was the principal purchaser at the sale.

The judgment for $30,000 was confessed for the use and benefit of the younger children of Elijah Gillett, the testator, all, at that time, minors; was for about the sum which was supposed to be in the hands of their guardian, after the sale; and was alleged to have been given in trust to the said Higginbottom and Provost, to secure to them their interest in the estate of their father.

At the time of the confession of this judgment of the 1st day of June 1819, William S. Gillett was largely indebted to the complainants, and concerned in a mercantile house in Savannah, the affairs of which, a witness stated, he did not seem to consider very prosperous; he did not represent the house to be bankrupt, or likely to become so; but, on the contrary, he then and long afterwards, appeared confident that the affairs of the house would wind up satisfactorily. On the 21st of October 1821, William S. Gillett confessed a judgment in the circuit court of the United States for the South Carolina district, for the sum of $7849, in favor of the Bank of Georgia, under an agreement that time should be given to pay the amount thereof, viz., one, two, three and four years.

The bill stated, that the debt due on that judgment being unpaid, the complainants, to have satisfaction thereof, lately sued out a *fieri facias* against William S. Gillett on it, under which a sufficient sum was made to
*50] pay the debt due on the *same; but the proceeds of the said execution were claimed under the judgment in favor of Higginbottom and Provost, for the payment and satisfaction of the same. The bill prayed for general relief, &c.

It appeared in evidence, that on the 12th day of April 1825, James Higginbottom and William Provost, the plaintiffs in the judgment of June 1st, 1819, at the request of Robert, Isaac and William Scarborough, who had been named as co-executors of the will of Doctor Gillett, assigned over under their respective hands and seals, to them, the judgment of June 1st, 1819, to the use and benefit of the testator's younger children, for the purpose of securing and assuring to them, respectively, their interest in the testator's estate.

In answer to an interrogatory propounded to him on behalf of the complainants, the counsel who prepared the confession of the judgment of June 1st, 1819, stated, "the judgment confessed by William S. Gillett to Higgin bottom and Provost was prepared by me, as a security for the parts or portions of the younger children of Doctor Elijah Gillett, deceased, of the estate of their father; and I think, that, at the time, I wrote or sketched off a draft of a declaration of the trust upon which the judgment was given, to be signed by Higginbottom and Provost, neither of whom were present. I do not recollect to have seen this paper, after it was executed; although I may have seen it. Indeed, I always believed, that I had seen it, till I came to tax my recollection, for the purpose of answering this interrogatory. My impression has always been, that such a paper was executed, and I have now no doubt but that it was. I recollect perfectly, that Gillett expressed a determination not to confess the judgment, unless a declaration of its object was signed by the nominal plaintiffs."

The plaintiffs in the judgment of the 1st of June 1819, issued a *fieri facias*, to October term 1819, of the Barnwell district court, which was entered in the sheriff's office, on the 19th of July 1819; an *alias fieri facias* was lodged in the sheriff's office, on the 3d of February 1824; and a *pluries fieri facias* was "lodged to bind," in the sheriff's office, on the 31st of December 1824.

The accounts of William S. Gillett, as the executor of his father, were
*51] audited, and a balance found due by him to the estate, including interest to July 11th, 1831, of $48 961.92. *After appropriating to the

payment of the balance due by the executor on the judgment to Higginbottom and Provost, all the proceeds of the sales under the judgment of the Bank of Georgia, there would be a deficit, to make up the amount due by William S. Gillett to his co-devisees and legatees, of $14,138.66.

On the 25th of June 1825, the circuit court, by a decree, held that the declaration of trust contained in the assignment of the judgment of the 1st of June 1819, executed by Higginbottom and Provost, under which the minor children of Doctor Elijah Gillett claimed precedence, "was a sufficient declaration in writing; and that a regard to the interest of the minors, sanctioned the court in sustaining the judgment for any amount that should be justly due to them." Afterwards, on the 22d of July 1832, the circuit court gave a decree in favor of the defendants in that court, and the complainants entered this appeal.

The case was argued by *Key*, for the appellants; and by *Preston*, for the appellees.

Key, for the appellants, contended, that the evidence in the case shows that the judgment in favor of Higginbottom and Provost, was confessed on a promissory note for $30,000; that that note was given on no consideration, and was never delivered, but was only signed by Gillett as a foundation for the judgment; that neither of the parties, the payees of the note and the plaintiffs in the judgment, nor the *cestuis que trust*, knew of the note or judgment, or assented to it, till several years afterwards; and that there was no written declaration of the trust, connected in any manner with said note or judgment; that nothing was due from said Gillett, at that time, to his brothers and sisters, and that he was then largely indebted to the complainants.

The appellants claim a reversal of the decree of the court below, on the following grounds: 1. That the promissory note, on which the judgment was confessed, is without consideration, and the judgment founded upon it, being a voluntary judgment, must be declared void, or postponed to the demands of *bonâ fide* creditors. *2. That if a judgment may be taken to cover a future debt, the intent should appear on the face of [*52 the proceeding; or, at all events, be evidence by contemporary written declarations, in a solemn and authentic manner. But in this case, the judgment is assumed as a security for a debt to third persons, not named in the proceedings, growing out of transactions foreign from any allegations in the pleadings, and unconnected with the purposes for which it is now used, except by parol evidence. 3. That the sanction for such a security for confidential and favorite creditors will be attended with great inconvenience, by putting it in the power of the debtor, and irresponsible persons owing no duty to the supposed *cestuis que trust*, to make the judgment good or bad, and more or less, at their pleasure; to introduce all the mischief of secret liens, to the injury of *bonâ fide* creditors; and to corrupt the character, and destroy the certainty, of judicial records.

The facts in this case show a judgment-creditor in 1825, with an execution (his judgment in South Carolina obtained in 1821) stopped by the claim of another creditor with a judgment in 1819. He cannot be thus stopped:

1. Because the plaintiffs in the prior judgment have lost their priority

by *laches*. They never proceed with their judgment further than to issue executions (*fieri facias*), and leave them in the sheriff's office "to bind." For this he cited, Roberts on Frauds 198–205, 571–2; 11 Johns. 110; 17 Ibid. 174. It is thus, if the judgment of 1819 was fair.

2. But it was not fair, because it was intended to benefit the defendant in the judgment, by keeping his property in his possession, protected by this lien. This object for the confession of the judgment, is shown in Patterson's deposition.

3. Again, the judgment is fraudulent, because there was nothing due to the plaintiffs. The judgment, and the note on which it was founded, it is admitted, were for account of no debt due to plaintiffs, but for some trust to others. The judgment is absolute. No condition, no release, no such
*53] trust can be listened to. It must appear on the record of *the judgment, and can be shown nowhere else. Parol evidence is inadmissible, to show an absolute judgment to be a conditional one; except (which is not pretended here) in a case where there was a mistake or a fraud.

4. Again, it cannot be shown, because the security, whatever it be—a judgment or deed—must contain within itself the terms and conditions of the transfer, and a possession corresponding therewith. This is the doctrine of *Hamilton* v. *Russell*, 1 Cranch 309 (though doubted in 3 Cowen); *United States* v. *Hooe*, 3 Cranch 73. Here, there is neither. The trust is attempted to be shown by parol evidence, not connected with the instrument of transfer; and the possession of the property ought to have been divested by an execution levied. *Conard* v. *Atlantic Insurance Company*, 1 Pet. 386.

5. But, if it could be shown elsewhere, here it is shown nowhere. There was never any written declaration of this trust. That adopted as such by the court below, is not such; it is a mere assignment of the judgment. And again, it was secret, and kept in the plaintiff's pocket.

6. But take it as a sufficient declaration, and this trust is found to have all the marks of fraud in *Twyne's Case*, and collected in page 42 of Hammond's Chancery Digest. It is *secret;* it is for *all* the debtor's property; it is for future debts; and the purpose is concealed by an absolute judgment to other persons, for a different consideration. The possession, use and expenditure of the property is left in the defendant, by never levying executions. It was made without application of the pretended creditor, and without his knowledge; and is for *all* his proporty, when less than half would have been sufficient.

Preston, for the appellees, stated, that the question before the court was, as to the priority of lien of two judgments. If, in the judgment, there were any technical defects, the party who could show such defects, might avail himself of them in a court of law. There can be no doubt, but that if the judgment of June 1st, 1819, in favor of Higginbottom and Provost can inure to the benefit of those for whom it was confessed, the legatees of
*54] *Doctor Gillett, it will be supported. The court will look at the equities of the parties; and if one is higher than, or even equal to, the other, the priority of the first judgment will be suffered to prevail.

It must be remarked by the court, that if the exceptions taken to the first judgment will apply; they are equally, if not more, applicable to the second. The second judgment was confessed in 1821, and no proceedings took place

upon it until 1827. This was two years after the time given on it had expired, and six years after it had been rendered. There is no evidence of any declaration in writing, that this judgment was given on a trust to secure the bank for a debt, the whole of which was not due, and for the payment of which the plaintiffs had given time ; and yet the complainants seek to impugn the prior judgment, upon principles which will operate more forcibly against their own. While the whole amount of the judgment for $30,000 was actually due, at the time it was confessed ; the notes of the defendant in the judgment, in favor of the complainants were running in the bank ; and changes were made in them, by substituting other parties to them.

Suppose, the judgment on which the appellants rely to be good, how does that under which the appellees claim the fund in controversy stand ? A *bonâ fide* debt is shown to be due to them ; and thus, there was a valuable consideration for the judgment ; and it was also a *bonâ fide* consideration. The devisees of Doctor Gillett were the *bonâ fide* plaintiffs in the judgment, and nothing of a character to affect the integrity of the proceeding is alleged against them or the trustees. The record shows that the sales of Doctor Gillett's property were made by the executor, who was also guardian of the minor co-devisees, and that thereby the debt from him to them was incurred. The minors were entitled to have the amount due to them secured ; and this could best be done by a judgment, known to be for the purpose of security. By the laws of South Carolina, executors do not give security, and this made the proceeding which was adopted yet more proper, necessary and obligatory.

It is said, that Higginbottom and Provost had no interest in *the fund intended to be secured, and that, therefore, the confession of [*55 the judgment was a fraud and a nullity. The parties are in a court of equity ; and the court will make the plaintiffs trustees for the minors, and, if necessary, will compel them to act for them.

It has been argued on the part of the appellants, that although the judgment may have been valid, when confessed, the security it gave has been lost by the *laches* of the parties to it. A practical evidence of the law of South Carolina, as to the effect of judgments, is afforded by the conduct of the appellants. They wait six years, before they proceed on their judgment. The most usual practice in South Carolina, in securing debts, is by judgment. This course of proceeding has been recognised for thirty years in that state, by the judicial tribunals there, as well for prospective as for existing debts. This has been established by the uniform decisions of the courts of the state. *Greenwood* v. *Naylor*, 1 McCord 414, decided in 1820 ; 1 Bay 295 ; 3 Desauss. 543 ; 4 McCord 336. An execution binds, until length of time furnishes presumption of satisfaction. Even a dormant execution is a perpetual lien. This is too well established by the courts of South Corolina, to be brought into doubt. *State* v. *Laval*, 4 McCord 342. In the case before the court, the executions have been regularly kept in operation.

It is said, that this case is like an absolute deed of assignment, without possession being given of the property assigned. That there was a secret trust, and this invalidates the judgment. It is a radical error, to suppose there is no difference between an absolute deed, and an absolute judgment. Judgments are always absolute, yet they convey no right of property, but only give a lien ; which is carried into beneficial action by an execution.

Judgments give a right to sell the property of the defendant, but not possession of the defendant's property. The possession of the property of the defendant by him, is not adverse to the plaintiff's right to proceed against it. The right of possession is necessarily in the defendant, until a levy; and then the question of possession is between him and the sheriff, not the plaintiff in the execution. *The lodging an execution with the sheriff "to bind," is notice to all the world that the lien of the judgment is asserted. *56]

The doctrine of the appellant's counsel does not apply to a case of this kind; and the cases in 1 Cranch 315, 3 Ibid. 88, when examined, do not sustain the claims made upon them. So too, as to the case in 9 Johns. 337. The operation of judgment is not to prevent delay; for the plaintiff in any other judgment may proceed, when he pleases, and sell the property of the defendant, and take the surplus, after satisfying the prior judgment.

It is said, there was a secret trust; and that there should have been a declaration in writing, to show the purposes of the judgment. In the case before the court, there was a valid purpose to be effected by the judgment in favor of Higginbottom and Provost, and their names were used to give it full operation. There is no just imputation that there was a secret trust for the defendant; nor was there any necessity for a declaration in writing, if one was not given at the time the judgment was confessed, which may be inferred from the evidence. If there had been an understanding that the property should remain with the plaintiffs for a particular time, a written declaration to this effect might have been necessary. But this was not so, and all the objects of the parties were accomplished by lodging the execution with the sheriff, "to bind."

In South Carolina, there has been established by the judicial decisions of the courts, an equity, which fully operates in this case. Where a party, as a member of a family, is called on to account, a lien is held to exist on all the property of a testator in his hands, for the amount due to those interested in this trust. It has been established by the evidence, that Higginbottom and Provost were trustees for the minors; that the minors are creditors for a *bonâ fide* and valuable consideration; and if so, they are the oldest *bonâ fide* lien-creditors, and as such, this court will protect them.

McLean, Justice, delivered the opinion of the court.—This is an appeal from the decree of the circuit court for the district of South Carolina. In their bill, the complainants ask the court to set aside or *postpone a judgment for $30,000, confessed by Gillett in favor of Higginbottom and Provost, on the ground of fraud; and that certain moneys made by execution on a judgment subsequently obtained by the complainants, be directed to be paid over in satisfaction of such judgment. The judgment for $30,000 was confessed in 1819, on which executions were regularly issued, from time to time, and entered in the clerk's office; so as, under the laws of South Carolina, to bind the property of the defendant. *57]

The appellant insists, that this judgment, which was held to be valid by the circuit court, should be set aside; because the promissory note on which the judgment was confessed, was given without consideration; and that the judgment must consequently be declared void, or postponed to the demands of *bonâ fide* creditors.

From the facts of the case, it appears, that William S. Gillett was the acting executor of the estate of his father, and that under the will, he sold the property and became the purchaser of it, to a much larger amount than the sum for which judgment was confessed. He was then engaged in mercantile business, and had other property than that which he purchased at this sale; and the judgment was confessed to secure the payment of the purchase-money to the brothers and sisters of the defendant, who were the devisees in the will. This sale having been made by a trustee to himself, must have been set aside and annulled, on the application of the *cestuis que trust;* but no such application being made, it cannot be treated as a nullity, as it regards strangers to the transaction.

The appellants insist, that the plaintiffs in the judgment had no knowledge of it, at the time it was entered; that the amount to which the devisees were entitled had not been ascertained; that false representations were made by Gillett, subsequent to this judgment, as to the extent of his property, through which the complainants were induced to give time on the judgment entered in their behalf; and that these facts are evidence of fraud. The evidence does not show that, at the time the judgment was confessed, Higginbottom and Provost had any knowledge of it; but this is not deemed material, as they subsequently recognised the trust and acted under it. Nor is it essential to *the validity of the judgment, that the distributive shares of the devisees should have been ascertained, provided they [*58 exceed in amount the sum for which judgment was entered. And this appears to be the fact, from a final adjustment of the executor's account. The false representations by Gillett, respecting the extent of his property, if true, as charged by the complainants, could not affect the previous judgment, if entered in good faith. But, connected with other facts, they may go to show, in its true light, the conduct of the defendant. If he represented his property as wholly unincumbered, after the judgment for $30,000 had been confessed; it would show a design on his part to practise a fraud on the complainants, and might cast a suspicion over the first judgment. But these representations are not proved, as alleged in the bill. They were not, as made by the defendant, so incompatible with the facts of the case, as not to be accounted for by a somewhat partial estimate of the value of his property, free from motives of fraud. The defendant subsequently became a bankrupt, but this was produced by various occurrences, stated in his answer, which were not and could not be foreseen.

Shortly after the purchase, it appears, the defendant was solicitous to secure the devisees, and he consulted counsel as to the best mode of effectuating this object. A mortgage was at first suggested, but afterwards a judgment was deemed preferable. This mode, it seems, is frequently adopted in South Carolina, to secure the payment of money. A judgment being entered, it is only necessary to issue an execution, from term to term, which may remain in the clerk's office, to create and continue a lien on the personal property of the defendant. As a matter of form, a note was executed by the defendant for $30,000, and this was made the foundation of the judgment. Was this note given without consideration? The defendant had purchased the property of the infant devisees, to a greater amount than that for which the note was executed. And was not the executor bound, by every consideration arising from the agency he exercised, and the

relation in which he stood to the devisees, to secure for their benefit the purchase-money? They were infants, and consequently incapable of protecting *their own interest. The defendant was enriched by the purchase of their property, to a greater amount than the $30,000. And if, by the conditions of the sale, time was to be given for the payment of the money, that circumstance does not make either the note or the judgment fraudulent. The judgment was intended to operate as a security for the payment of the money, and the defendant was bound in good faith to give this security. Had he failed in this respect, he would have been guilty of a most aggravated fraud, against his infant brothers and sisters, whose property had been placed at his disposal.

*59]

But the appellants contended, if a judgment may be taken to cover a future debt, the intent should appear on the face of the proceedings, or, at all events, be evidenced by a contemporary written declaration; that, in this case, the judgment is assumed as a security for a debt to third persons not named in the proceedings, and whose interest in the judgment can only be proved by parol evidence. No written declaration of the trust, made at the time judgment was entered, is in evidence; but the counsel who procured the judgment swears that, at the same time, he thinks he wrote or sketched off, a draft of a declaration of the trust, upon which the judgment was given, to be signed by Higginbottom and Provost; and his impression has always been, that such a paper was executed; that in taking the judgment, he acted for the children of Doctor Gillett; and that William S. Gillett, the defendant, expressed apprehensions that the judgment, at some future period, might be used to his injury and contrary to his intention; and to obviate that difficulty, it was concluded that a declaration of the trusts upon which it was given, should be signed by Higginbottom and Provost. From this evidence, it is extremely probable, that a declaration of trust was executed, at the time of the judgment, or shortly afterwards; but whether this was done or not, the trust is clearly established by the evidence, and the transaction is not impeachable under the statute of frauds.

If, as contended by the appellants, the judgment was confessed by the appellee, with a view of covering his property from his creditors, it would have been fraudulent. And if he had expressed to no one the object of the trust, the confession *of a judgment for so large a sum, to persons who had no claim against him, would be evidence of fraud. But there are no facts or circumstances connected with the entry of the judgment, which cast a suspicion of fraudulent intent by the defendant.

*60]

It is insisted, that this judgment is void, as it gave a preference to certain creditors, and tended to delay others. There was no unjust or illegal preference in the case, and it is not seen how creditors were delayed by the judgment. It did not prevent any creditor from bringing suit and obtaining judgment and execution. This was done by the appellants, and a large sum of money was made on their execution, by a sale of the defendant's property. This proceeding was in no respect embarrassed by the previous judgment for the benefit of the infant devisees of Doctor Gillett. But that judgment having been kept in force by the issuing of executions from term to term, the money made under the junior judgment must be applied in discharge of the prior lien. There is no injustice or hardship in this. After the first judgment shall be paid, any money collected from the

defendant, by execution, would, of course, be paid on the judgment of the appellants.

But the counsel of the appellants contend, that the continued possession by the defendant of the property, on which the executions under the first judgment operated as a lien, is conclusive evidence of fraud. And a number of authorities are cited, to show that where an absolute bill of sale of property is made, and the possession does not accompany the deed, but remains with the vendor, the transfer is not only voidable, but is absolutely void. The authorities referred to, seem to have no direct application to the case under consideration. The judgment does not purport to transfer the property of the defendant, nor was it intended to produce this effect. Connected with the executions which were issued, a lien was created; and this was not only the fair and legal effect of the proceeding, but the one which the parties to the transaction intended to secure. The possession of the property by the defendant was perfectly consistent with the judgment, and affords no evidence of fraud. It was like every other case of judgment and execution, which bind the real and personal property of the *defendant, though in his possession. By the laws of South Carolina, [*61 this lien may be continued for any time, not exceeding twenty years. No one could have been misled by this judgment. It was entered on the public records of the district, and the executions which were issued on it, were duly noted on the clerk's docket, and these constituted the lien under the usages of South Carolina. It was, therefore, unnecessary to express on the record, or in any other manner, what the effect of these proceedings would be.

But it is contended, that the lien set up under these proceedings cannot be sustained, as it covered the entire property of the defendant, and that this must be considered evidence of fraud. The lien, it is true, extended to the entire property of the defendant, within the state of South Carolina; but it could at any time be discharged by the payment of the judgment. This lien, therefore, neither withdraws the property of the defendant from the reach of his creditors, nor delays the legal enforcement of their claims.

The circuit court, with the consent of parties, directed the sale of the entire property of the defendant; and as the proceeds of this sale fall many thousand dollars below the judgment, and a still greater sum below the amount the executor owes the devisees, it cannot be necessary to examine some of the principles settled by the circuit court preparatory to a final decree. We think, the application made of the money arising from the sale, by the final decree of the court below, was right; and it is affirmed. The bill of the complainants must, therefore, be dismissed, with costs.

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, adjudged and decreed by this court, that the decree of the said circuit court in this cause be and the same is hereby affirmed, with costs.

*John Coulson, Appellant, *v.* James Walton and others.

Proof of execution of ancient deed.—Statute of limitations.

A bond was executed in 1787, by which the obligor bound himself to pay one hundred pounds for a horse, or to make over to the obligee his interest in a certain entry and warrant of land; and if the deed or grant for the land should issue to him, to transfer the land by deed, and to warrant and defend the said deed; the obligor elected to pay the bond, by giving the land for the same; he made no valid conveyance of the land, in his lifetime; but it was taken possession of by the obligee, and had ever since been occupied under the title so acquired by the obligee. After the son and sole heir of the obligor came of age, he commenced an action of ejectment for the land, and those who claimed title under the obligee filed a bill for an injunction, and that the defendant, the plaintiff in the ejectment, be decreed to convey the land according to the stipulations in the bond; this bill was filed in 1822.

The court said, in considering the question as to the genuineness of the bond on which this controversy is founded, the first important fact that occurs to the mind is, the remoteness of the transaction; nearly half a century has elapsed since this instrument purports to have been executed; the obligor and the obligee, and both the witnesses, are dead; the contract belongs to the past age; it was executed, if at all, when the country was new and unsettled, and the parties to it seem to have been illiterate men, and unacquainted with business transactions. These circumstances are referred to, not to show that this bond should be received without proof, but to show that as strict proof should not be required of its execution, as if it were of recent date; the law makes some allowance for the frailties of memory, and where a great length of time has elapsed since the signing of an instrument attempted to be proved, circumstances are viewed as having an important bearing upon the question. Barr *v.* Gratz, 4 Wheat. 231.

Construction of the statutes of limitations of North Carolina of 1815 and 1819. Statutes of limitations are applied by courts of equity, in all cases where at law they might be pleaded; at law, to make the statute a bar, there must be an adverse possession, and by analogy, a court of equity, in a similar case, will hold the statute to be a good bar.[1]

But the statute insisted on as a bar in this case, does not depend upon possession; it bars a creditor who does not sue the heir within seven years. There can be no doubt, that the statute applies, where a creditor seeks to make the heir liable for the debt of his ancestor, on the ground that either personal or real property descended to him; and this appears to be the decision of the supreme court of Tennessee on the statute; there is nothing in their decisions referred to, which show that they have given effect to the statute beyond this. By the statute of 1819, which is wholly different in its language from the act of 1815, a bar is created, indiscriminately, to suits in equity, as well as at law. The statutes do not apply to this case.

*63] The instruments under which a part of the complainants set up an equity *derived from the heirs of the obligor, are proved, but they cannot be sanctioned by this court, except where such instruments were executed by heirs of full age. It is the duty of the court to protect the interests of minors, and the decree of the circuit court in this respect, as well as in every other, is correct.

Walton *v.* Coulson, 1 McLean 120, affirmed.

Appeal from the Circuit Court for the District of West Tennessee. The case is fully stated in the opinion of the court.

It was argued by *Bell*, for the appellant; and by *Key*, for the appellee.

For the *appellant*, it was contended, that, stripped of circumstances, the case is, that Payne held a title bond of Coulson, for 640 acres of land, dated in 1787. In 1781, Isaac Coulson, the obligee, died, leaving John Coulson, the appellant, his heir. This bill was filed for a specific decree, in 1822, more than thirty years after the ancestor's death. To the bill, John Coulson, the heir, pleaded in bar the act of limitations of 1715, ch. 48, § 9, declaring, "that creditors of any person deceased, shall make their claim

[1] See note to Elmendorf *v.* Taylor, 10 Wheat. 152.

within seven years after the death of such debtor, otherwise such creditor shall be for ever barred."

It is insisted by the appellees, that the word creditor does not embrace Payne, seeking the lands; but would, were he seeking damages. Had Payne attempted to enforce the bond at law, against Coulson's administratrix, and to recover damages, the act of 1715 would have barred him. 3 Yerg. 9. So, if the administratrix had been sued, had pleaded "fully administered," the damages had been found against her, but the plea for her; then a *scire facias* had been issued to subject the lands in the hands of the heir, he could have pleaded the act. Mart. & Yerg. 360. This is the only mode by which the heir can be reached in the state of Tennessee. The personal estate must be shown to have been exhausted, by the finding of the plea of "fully administered;" and it can be shown in no other form. Mart. & Yerg. 360; 1 Yerg. 40, 287.

In 1801, ch. 6, the courts of equity of Tennessee were *authorized to divest titles to lands by decrees; and enforce specific performance [*64 in this manner. Ever since, the common mode of enforcing contracts for lands, has been by specific decree against the obligor, or his heir. In the same year, 1801, ch. 25, the statute of frauds was enacted, requiring agreements for lands to be in writing, and to be signed by the party to be charged therewith. The form of contract has almost uniformly been a title-bond. Whether the obligee to such bond was a creditor, and his claim subject to be barred by the act of 1715, soon became a most important question; one of the most important, involving the protection of heirs, by the lapse of time, presented to the courts of chancery.

In 1809, the supreme court of Tennessee was established, consisting then of two judges, and having conferred upon it original chancery jurisdiction. In 1813, the court consisted of Hugh L. White and John Overton, men eminent in the distinguished class of ejectment lawyers of that day, who had the public confidence in a high degree, and especially, in matters affecting titles to lands. What they settled by a concurrence of opinion, has not been questioned in the state courts of Tennessee, up to this time. This is asserted with knowledge of its truth, that challenges contradiction. Before this court, was brought the cause of *Smith* v. *Hickman's Heirs*, in 1813; a bill for a specific decree on a title-bond. The title-bond had been executed by Edwin Hickman, in 1789. The report (Cooke 330) shows it to have been a naked case. The act of 1715, ch. 48, § 9, was pleaded in bar, that the suit had not been brought within seven years after the ancestor's death. And on the most mature consideration, the court decided, Judge Overton delivering the written opinion—"that it has been insisted, that the complainant is not a creditor, on account of the demand not being of a pecuniary nature; but, as it is the duty of this court to examine this point, they feel satisfied that, as to that, he is within the act. All persons are considered creditors, that have demands originating from contracts or agreements." The next year, 1814, *Lewis* v. *Hickman's Heirs* came before the same judges, 2 Overt. 317, when Judge White delivered the opinion of the court to the same *effect. These decisions have been followed in the state courts, [*65 with entire confidence of their correctness, ever since. Cases in confirmation cannot be adduced, as no lawyer would present such a case; but to show the sense of the supreme court on the subject, so late as 1832, a

year after the cause before the court was decided below, we quote a passage from the opinion of the chief justice in *Hooper* v. *Bryant*, 3 Yerg. 9.

"In 1814, the cause of *Lewis* v. *Hickman*, 2 Overt. 317, involved the question whether an heir or an administrator could defend himself by the plea of seven years, under the act of 1715, ch. 48, § 9. To a bill to enforce a title-bond, Edwin Hickman's heirs and his administrator relied upon the act of 1715, ch. 48, § 9, as a bar. The court went into an examination whether the act of 1715 was in force, it being insisted that the act of 1789, ch. 23, had repealed it. The court decided, that both the acts were in force, and barred the complainant. This was the only point made in the cause by the record, and has been followed ever since." And in delivering the opinion of the court, in *Peck* v. *Wheaton's Heirs*, Mart. & Yerg. 360, it is holden: "We are moreover of opinion, that the act of 1715, ch. 48, § 9, of seven years, will operate as a bar; and that that act is in force we consider one of the best-established positions litigated in our courts;" and Peck's claim was pronounced barred, in accordance to the decisions of 1813 and 1814.

But the federal circuit court disregarded these decisions, for the reason, in *Smith's Case*, that no particular tract of land was designated by the bond sued on, and no lien created; and therefore, the demand was in effect for damages. There is no such idea contained in the report of the case. The contract was made at a time, 1787, when no statute of frauds existed, nor any writing was required; and when proof could have been introduced to show the tract of land intended to be conveyed. The courts of Tennessee, the legal profession, and the country, have not now, nor have they ever had, an idea, that the bond formed no lien, and was not obligatory on Hickman's heirs. The distinguished counsel who argued the cause, and the court, so admitted; a new generation has grown up under the impression, governed by *the report of the case; and, as was holden by the supreme court *66] of Tennessee, in *Hooper* v. *Bryant*, 3 Yerg. 9, it is now too late to correct the error, if even error there be. It is the pride and pleasure of the courts of Tennessee, to follow and abide by the decisions of the supreme court of the United States, when construing the laws of the Union; as they have done us the honor of conforming to our decisions on our local statutes, especially, the seven years' act protecting possessions; and we earnestly insist, decisions of twenty years standing, whether made in mistake of the fact or the law, cannot now be overthrown, without great and manifest danger to our titles; without letting in upon our country evils little foreseen at this distance from it, and by strangers to it. If parol agreements for lands, for warrants, and for locating, made previous to 1801, are let in against the heir, and the agreements are enforced in the federal courts, the ligitation to enforce them may be appalling, especially, in the western part of our state.

The only objection made to the decision of *Lewis* v. *Hickman*, in the court below, was, that it did not appear whether the bill was filed to recover the land, or for damages. In the state of Tennessee, the heir cannot be sued for damages, in any kind of proceeding. There is no direct mode in which he can be sued, but for a specific decree to divest title. Further, no suit for damages is ever prosecuted with us in equity; there is no such

jurisdiction. It is idle to conceal it : if the decree below is affirmed, the two causes against Hickman's heirs will be flatly overruled.

But some stress has been laid upon a loose and obscure expression of Judge HAYWOOD, in *Haggard* v. *Mayfield*, 5 Hayw. 121. It was an action of ejectment. Mayfield died ; his wife administered. A title-bond was produced, and she, under the statute of Tennessee, made a deed ; but not for the land described in the bond ; the heir sued for the land, and the deed was declared void. The act of limitations of 1715, ch. 48, could not have, and did not have, the remotest bearing on the cause. It is not possible to introduce it in the action of ejectment. But those acquainted with the legal ideas of that distinguished common lawyer, Judge HAYWOOD, well know what he meant. He was prosecuting a favorite theory, that *equitable titles were not barred by the acts of limitation. That [*67 neither an entry, nor title-bond was operated on by any statute, because courts of equity were not bound, and the remedy was open. And if the honorable court is curious to understand the paragraph referred to, and to see the plausibility that genius can confer upon error, they will read Judge HAYWOOD's dissenting opinion in *Gaither and Frost's Case*, 3 Yerg. 208; but fearing our client's cause will be endangered from its masterly ability, we must insist, the court read the concurrent opinion, preceding, of the three other judges, overruling Judge HAYWOOD's ; and which declares equitable titles, equally with legal, subject to barred.

The heir must be at repose some time, so that he may say of his fireside —this is mine. We, of Tennessee, afford the same protection, by the act of limitations of 1819, to all others ; we declare, that no suit in equity shall be brought, had or prosecuted, but within seven years next after the cause of action come, accrued or fallen ; and all claims not sued within said seven years, shall be for ever barred. The courts have enforced the act to the letter. *Dunlap* v. *Gibbs and McNairy*, 4 Yerg. 94. The same act bars the ejectment in seven years, so that all stand on the same footing with the heir. The state of our titles, originating in land-warrants, required the protection ; and the hundred thousand people drawn to our western district, within the last ten years, and their almost entire exemption from litigation, bespeak the wisdom of our seven years' policy, which we hope this honorable court will not disturb.

We apprehend it most difficult for the court to give specific relief on a title-bond of thirty-four years' standing, when sued upon ; with the supposed obligor's name erased from it ; after the death of the obligor, obligee and the witnesses ; with the proof that no claim was set up under it by the obligee, in his lifetime, he averring no writing existed between him and Isaac Coulson : but this rests on facts, which we feel it our duty to leave with the court.

Key, in reply.—The facts show a possession of the land in controversy, on the part of the appellee and those under whom he claims, since 1788. It was held *under an agreement, dated in 1787, to convey the title, if 100 [*68 pounds was not paid within the year. The money was not paid, and the obligee held the land till the death of the obligor in 1791, and after his death, till ejectment was brought by his heir-at-law in 1814. On the recovery in ejectment, the bill was filed to enjoin the issuing of a writ of pos-

session and for relief; and the question is (and it seems to be now the only one insisted on in behalf of the appellant), is the statute of limitations a bar to the relief sought by the bill?

It is contended by the appellant, in the argument now submitted to the court, that this is settled by the Tennessee courts. *Smith* v. *Hickman*, Cooke 330, is the first case relied on. All that this case proves (the bond being for no specific land) is, that a party having a bond for so much land, may be considered a creditor, under certain circumstances, within the meaning of the statute of limitations. The observations of the court below on this case require nothing further to be said as to the effect of this decision. The case of *Hooper* v. *Bryant*, 3 Yerg. 1, has been mentioned. There is not a word in the opinion of the court touching the question; but the argument of the counsel in favor of the application of the statute to that case, pages 5, 6, very clearly shows, that no such doctrine as the appellant contends for, is considered as settled in the courts of Tennessee. Thus, he says, "it is admitted, that the act of limitations cannot be pleaded to an express and subsisting trust, as between trustees and *cestui que trust*. This rule only operates so long as the trust subsists between the parties." "When a trustee, who has trust property in his possession, dies, the trust is no longer a subsisting one; but if the trust property be specific or capable of being identified, &c., then it would not be assets in the hands of the executors, and the *cestui que trust* may follow it in the hands of the executor, and the act of limitations could not be pleaded, where the trust property in specie is sought to be recovered. But if it is not specific, and therefore, cannot be identified and followed, &c., it is then assets, &c. The *cestui que trust* in such cases becomes a general creditor," &c., page 7. "Where it is not
*69] capable of *being identified, as the *cestui que trust* is then only a creditor, his claim, like that of all other creditors, will be barred, unless prosecuted within the time limited by law." This argument is in accordance with *Smith* v. *Hickman*, and shows the distinction between that case and this. Here, the claim is for specific trust property, and therefore, *cestui que trust* is not a creditor, and the statute does not apply.

The next case relied on is *Le is* v. *Hickman*, 2 Overt. 317. The court below, in their opinion, have explained this case. There, the land could not be had; it was held adversely; the bond had been given up for a defective deed, and the object of the bill was, to set up the bond and relieve the plaintiff. It was, therefore, a claim for money; it was all the holder of the bond could get. It does not appear in the case, that the obligor ever got a patent, or had the legal title to the land. It was not, therefore, as here the case of a party in possession, claiming the protection of equity against the legal title of the obligor. *Peck* v. *Wheaton's Heirs*, Mart. & Yerg. 360, is cited. There, the claim was plainly for a debt; and, no doubt, the statute was a bar. 3 Yerg. 208, is also mentioned; but seems to have no application to the question. The case of *Haggard* v. *Mayfield*, 5 Hayw. 121, is not correctly understood by appellant. The heir was the defendant, not the plaintiff in the ejectment; and the judge decides against the legal title of the plaintiff, but admits his claim in equity, as not barred by the statute.

To show conclusively that no such doctrine as is contended for by appellant, is recognised in the Tennessee courts, the court is referred to the case of *Cocke and Jack* v. *Maginnis*, Mart. & Yerg. 361. It is there said, page

363, by the court, that "the true rule is, that courts of equity will apply the statute of limitations to all cases, unless it be such as are predicated upon a naked trust, in which courts of equity alone have jurisdiction, and of which courts of law have no cognisance." Is not this precisely such a case as the court here excepts from the operation of the statute? Payne is in possession of the land, under the agreement for the legal title; and the heir-at-law has only the naked legal title, and this he held in trust for *him who had the possession and the right to demand the legal title; no court of law could have cognisance of such a case. What remedy [*70 at law could Payne have? What could he claim as a creditor? The holding the legal title (Payne being in possession) could not be adverse, so as to put him on making a claim upon the trustee, within the time limited by the statute; as long as the trustee suffered him to be in possession, it was a recognition of a subsisting trust. The court is also referred to *Armstrong's Heirs* v. *Campbell*, 3 Yerg. 201. The marginal note at the head of the case, shows the points decided, and the opinion of the court, in pages 231 and 237, shows that such a trust as this is not barred by the statute.

In truth, the statute of limitations is attempted to be used in this case, not to protect, but to disturb a long-continued possession; the heir-at law wields it, not to protect *his* fireside, but to invade another's. With a naked legal title, he seeks to dispossess the party who has been allowed to hold possession under an agreement for a title, that allowed possession, confessing the right of the possessor; and when equity is invoked to prevent this injustice, he objects that the *cestui que trust* is barred by the trustee's acquiescing in his possession, and delaying to question his right. It is not easy to conceive, how the rejection of such a plea will overrule any doctrine of the courts of Tennessee, or disturb the repose of the possessor of lands.

McLean, Justice, delivered the opinion of the court.—This case is brought before this court by an appeal from the decree of the circuit court for the western district of Tennessee. In their bill, the complainants state, that on the 22d of February 1785, a certain entry in the land-office of North Carolina was made by Isaac Coulson, assignee of David Welles, for 640 acres of land; and that afterwards, on the 2d of January 1787, he executed a bond to one Josiah Payne, for the conveyance of said tract of land, agreeable to the terms therein expressed, to wit:

"Know all men, by these presents, that I, Isaac Coulson, of the state of North Carolina and county of Davidson, do oblige myself, my heirs and assigns, to pay to Josiah Payne one hundred pounds, in Virginia currency, in payment for a certain bay stud-horse I bought of him, within *twelve months from the date hereof, with lawful interest, otherwise, [*71 in lieu thereof, I do oblige myself to make over all my right and interest of a certain entry and warrant of land of six hundred and forty acres, lying on the north side of Cumberland river, on said river, about one or two miles above the mouth of the Caney fork, unto the said Josiah Payne, of the county and state aforesaid, or his heirs and assigns. And if a deed or grant should issue to me, before said entry or warrant should be transferred from me to said Payne, then and in that case, I do hereby oblige myself to make a transfer deed of all my right, title and interest of the aforesaid land, unto the aforesaid Josiah Payne or his assigns; which deed

and right, when made, is to be taken in full payment for the one hundred pounds and interest; and I do hereby oblige myself to warrant and defend said deed from me, my heirs and assigns, for ever, unto the said Payne and his heirs." Which bond purports to have been signed and sealed by the said Isaac Coulson, and witnessed by James Donelson and William Bush.

The complainants further state, that the obligor elected to pay the said sum of one hundred pounds, by giving the land, as expressed in the above recited bond; which mode of payment was assented to by the said Payne. That said Isaac Coulson died intestate, some time in the year 1791, leaving the defendant his only heir-at-law. That a grant was issued for the land, on the 15th of September 1787, but no valid conveyance was made to the said Payne for the land, although in his lifetime various means were tried to obtain a title. That possession was taken of the land in 1799 or 1800, and that it has been occupied ever since, under the title of Payne, and that the taxes have been paid. That since the defendant has arrived at full age, he commenced an action of ejectment, and recovered a judgment for the land; and the complainants pray an injunction, and that the defendant may be decreed to convey all his interest in the premises to the complainants.

In his answer, the defendant denies that the bond set forth in the complainant's bill, was ever executed by his father, Isaac Coulson, and states that it is a forgery; and he denies the other material allegations in the bill.

In considering the question as to the genuineness of the bond on which this controversy is founded, the first important fact *that occurs to
*72] the mind is, the remoteness of the transaction. Nearly half a century has elapsed, since this instrument purports to have been executed; the obligor and the obligee, and both the witnesses, are dead; the contract belongs to the past age. It was executed, if at all, when the country was new and unsettled; and the parties to it seem to have been illiterate men, and unacquainted with business transactions. These circumstances are referred to, not to show that this bond should be received without proof, but to show, that as strict proof should not be required of its execution, as if it were of recent date. The law makes some allowance for the frailties of memory, and where a great length of time has elapsed, since the signing of an instrument attempted to be proved, circumstances are viewed as having an important bearing upon the question.

In the case of *Barr* v. *Gratz*, 4 Wheat. 213, this court decided, "that where a deed is more than thirty years old, and is proved to have been in the possession of the lessors of the plaintiff in ejectment, and actually asserted by them as the ground of their title in a chancery suit, it is, in the language of the books, sufficiently accounted for; and it is admissible in evidence, without regular proof of its execution by the subscribing witnesses."

There is no proof of the handwriting of James Donelson, one of the subscribing witnesses to this bond; but it is proved, that he was supposed to have been killed by the Indians, many years ago. The handwriting of Bush, the other subscribing witness, is proved by three of his sons, who were well acquainted with his hand, one of them having administered on his estate. These witnesses, and especially two of them, speak with great confidence, not only as to the signature of their father, but they say, that the body of the bond appears to have been written by him. And they state, that

although, at the time the bond bears date, and for some years before and afterwards, until his death, his father lived in Clark county, Kentucky, yet he was absent the greater part of his time, on hunting expeditions ; and they understood, that he was several times in the western part of Tennessee. It appeared, that their father understood surveying, *was a pretty good [*73
scribe, and was frequently called on to write deeds and other instruments. Three witnesses testify to the original contract, and the circumstances which led to it. Payne sold to Coulson a valuable horse, in addition to the land, for which he agreed to pay one hundred pounds. Some time afterwards, Coulson, finding the horse did not suit his purpose, induced Payne, as his agent, to sell him ; which was done, for the tract of land now in controversy. It was after this sale, as these witnesses say, that they understood a bond was executed, by which Coulson was bound to pay to Payne one hundred pounds, or convey the land to him in lieu of the money. Two witnesses state, that Coulson agreed to pay Payne fifty dollars, in a horse. George Cumming, and the sister of Josiah Payne were acquainted with William Bush ; and the latter was also acquainted with the other witness, James Donelson.

Some time after the date of the bond, Coulson, it is proved, went to Virginia, under the expectation of obtaining money to pay off the bond, from the estate of his father ; but he found that the estate had been wasted ; and being disappointed in raising the money, he remained in Virginia, married, and afterwards died in 1791. In the year 1793, Payne went to Virginia, and obtained from the widow of Coulson a bond, in a penalty, dated the 6th of November 1793, with a condition to convey all her interest in the land in dispute ; and she authorized Payne to take possession of it. This bond was executed by the widow, on the advice of Jacob Coulson, her brother-in-law, that it was best to discharge the claim by the conveyance of the land. An attempt was made to obtain a conveyance, under the sanction of a county court in Virginia, and Mrs. Coulson attended the court for that purpose ; but the decision was, that it had no power to act on the subject. At another time, Payne made application to the widow, and said he ought to have something, as he should have to wait until the children became of age ; and she let him have a horse worth fifteen pounds. In 1797 or 1798, it appears, a man by the name of Johns was sent to Virginia for this title, and was informed by Payne that he would probably find it ready for him. At this time, Mrs. *Coulson, Jacob Coulson and [*74
Benjamin Johns went to the court in Grayson county, Virginia, and were three days in attendance on it, endeavoring to procure a title for the land, but failed.

Payne had then sold a part of this land to Johns, but as no deed could be obtained, Johns was unwilling to take the land, and he exchanged it with Walton, who, in 1799 or 1800, took possession of a part of the tract, and has ever since held it by himself and his heirs. At a subsequent period, he made other purchases of the tract. It was known as Payne's land, from the time Johns went to Virginia for a title. Payne died in 1805, and his heirs endeavored to obtain a title, by permitting the land to be sold for taxes, in 1806 ; and they became the purchasers. Shortly after this sale, George Payne, son and administrator of Josiah Payne, went to Grayson county, Virginia, and procured a release of all claim to the land, from the

representatives of Coulson ; and in which they stipulated not to redeem the land, under the sale for taxes. This instrument has been lost. George Payne was drowned, a few years after the writing was obtained by him. These are the material facts and circumstances relied on by the complainants, to prove the execution of the bond, and to lay the foundation to the equitable relief prayed for in the bill.

A great number of depositions were read by the defendants' counsel, to rebut the facts proved by the complainants, and show that they are not entitled to relief. Six witnesses state, that they were acquainted with William Bush, and several of them, with James Donelson. That they both came from the Indian nation, and were supposed to be tories and refugees. That Bush was a dissipated man, was occasionally deranged, and incapable of business. That he had a brother named Abner, who was a man of good capacity, and of respectable character ; that they were both hunters, and were well acquainted with the water-courses falling into the Mississippi river, south of the Tennessee. Donelson and William Bush were reported to have been killed by the Indians, in the years of 1786 or 1787.

The depositions of three witnesses were read by the defendant, who were well acquainted with William Bush, in Clark county, Kentucky, and who, from their intimacy with him and the short distance they lived from him, about the time the bond *bears date, seem to think he could not *75] have been absent from home at that time. And it is proved by Jeremiah Coulson, brother of Isaac, that when Payne was in Virginia, a conversation took place between him, the witness, and Jacob Coulson, at which time, Payne said he had no obligation or any instrument of writing from Isaac Coulson, respecting the land in dispute. And that Payne also said, he was to receive from Coulson a negro boy, under twelve years old, in discharge of the debt ; and at the same time, he agreed to pay the taxes on said land, and take care of it for the children of said Coulson ; and the witness was called on specially to remember the agreement. At this time Payne received a horse of Mrs. Coulson worth $50, in part payment of the claim.

The first inquiry which naturally arises in the mind, on reading the whole evidence, is, whether it may not be reconciled. Some parts of it, and especially those parts which relate to the subscribing witness, William Bush, would seem to conflict ; but this is susceptible of a most satisfactory explanation. There can be no doubt, from the fact stated by the witnesses, that there were two persons who bore the name of William Bush, and who were occasionally in the western part of Tennessee, about the same time. One of them, the Kentucky Bush, was a respectable man, a deacon in the Baptist church, a surveyor, wrote a good hand ; and he died in Clark county, Kentucky, about the year 1816. The other was believed to have come from the Indians, was an ignorant, dissipated man, incapable of business, accustomed to hunting in the country south of the Tennessee river, and was reported to have been killed by the Indians in 1786 or 1787. He had a brother named Abner, who is proved to have been in no way connected with the Kentucky Bush. The mere statement of these facts is enough to convince every one, that the different witnesses, in describing the character, capacity for business, pursuits, residence and death of William Bush, could not have referred to the same person. Even the witnesses examined by the defend-

ant, in proving the residence and death of the Kentucky Bush, proved enough to show that he could not have been the same person who was believed to have been a refugee and tory; and was suspected *of attacking boats on the Mississippi river, in connection with other [*76 persons, and of committing other depredations upon society.

The fact that there were two persons of the name of William Bush, may be safely assumed; and the question arises, whether the signature of the Kentucky Bush, as a subscribing witness to the bond, is satisfactorily proved? Some doubt is attempted to be raised as to this fact, from the statements of the witnesses who lived in the immediate neighborhood of Bush, and who have no recollection of his having been absent from home, about the time the bond bears date. But this evidence, at best, is of a negative character, and depends upon the memory of witnesses, for a great number of years, of a fact, not calculated to make any impression on the mind. No circumstances are related by the witnesses, which were calculated to impress upon their memories the absence of William Bush, in January 1787. What prudent person, in the absence of such circumstances, would undertake to state, positively, that his nearest neighbor was absent from home, any given month, some twenty-five or thirty years before? But the complainants have proved by the three sons of Bush and his widow, that he was from home hunting, the greater part of his time; and some of them say, that from his conversations and several facts, they believe he often visited Western Tennessee. And more than one witness, who lived in the neighborhood of Josiah Payne, became acquainted with Bush in his expeditions to Tennessee. From these facts, it would seem, that no presumption against the due execution of the bond can arise, from the statement of the witnesses who were the neighbors of Bush, and who could not recollect of his having been absent from home, about the time the bond is dated.

But how can the admissions of Payne, in the presence of Jeremiah and Jacob Coulson, that he held no instrument of writing on Isaac Coulson for the land in dispute, and that he had agreed to receive a negro boy in discharge of the claim, be explained; and also his agreement to pay the taxes on the land, and take care of it for the heirs of Coulson? And what *answer can be given, to his having received a horse worth $50, in [*77 part payment of the claim? The payment of the horse seems to have been in pursuance of the original agreement. Two of the witnesses state, that Coulson, in addition to the land, was to give Payne a horse worth $50. And it is not improbable, if the remarks were made by Payne, as stated by Jeremiah Coulson, that he held no written contract from Isaac Coulson, they must have referred to the fact, of there being no writing respecting the payment of this horse. That he agreed to pay the taxes, and preserve the land for the heirs of Coulson, is disproved, by the fact, that either then, or some time before, Payne procured a bond from Mrs. Coulson for the land. The language of this bond cannot be mistaken; and it goes to show, that instead of abandoning the land, and agreeing to pay the taxes for the heirs of Coulson, he was determined to perfect his claim to it, by the use of such means as he could resort to. By the statement of Mrs. Coulson, it appears, Payne complained that he should have to wait for a title, until her children became of age. This fact, as well as the deed and the whole

course of conduct of Payne, show, that he could not have made the remarks and agreement, as stated by Jeremiah Coulson.

From this view of the evidence, which has a bearing upon the fact of the contract and the execution of the bond, the proof is as clear and as satisfactory as could be reasonably expected, after the lapse of so many years. The handwriting of Bush is proved by the positive testimony of three witnesses, and the consideration of the bond is clearly proved by three other witnesses, all of whom stand without any impeachment of their credit. Conclusive as these facts would seem to be, as to the genuineness of the bond and the consideration on which it was given, there are others equally conclusive.

If no contract between Coulson and Payne had been made, what could have induced the latter to visit Virginia in 1793, and how can the conduct of Mrs. Coulson, in executing a bond to convey all her right in the land, with the advice of her brother-in-law, Jacob Coulson, be accounted for? This was about five years after the money was to have been paid, or the *78] *land conveyed. The circumstances were then known to the parties, and no objection seems to have been made, either by Mrs. Coulson, or the connexions of her deceased husband, to the claim set up by Payne. So far from any objections being made, everything was done, both by Mrs. Coulson and her friends, which they could do, to vest the title for this land in Payne. They applied to the court, and remained in attendance upon it for three days, at one time, under the hope of obtaining the necessary authority to execute the conveyance. And Payne complained of the hardship of being compelled to wait for a title, until the heirs of Coulson became of age.

These are facts established by the evidence, and do they not show beyond controversy, that there was a contract between Coulson and Payne respecting this land? and this important point being established, independent of the bond, the genuineness of that instrument must be extremely probable. Its language agrees with the contract as proved by parol; and several of the witnesses say, the contract was reduced to writing. And in addition to this, the clear proof of the handwriting of Bush, the subscribing witness, would seem to be conclusive. Taking into view all the facts and circumstances in favor of the due execution of this instrument, it has been as fully established as could be expected of any writing of so ancient a date.

But it is objected, that this bond has been multilated, and therefore, it must be rejected. It is true, that some alterations have been made on the face of the bond. The words North Carolina, or some other words, have been erased, and the word Virginia, in lieu thereof, has been inserted. This alteration would make the bond read Isaac Coulson, of the state of "Virginia," and county of Davidson, instead of the state of "North Carolina," &c. The signature of Isaac Coulson to the bond seems to have been scratched out and again written. That these alterations have been made since the death of Payne, is satisfactorily proved; and it is clear, that no one having any interest under the bond, could have had a motive to alter it, as seems to have been done. If, by the alterations, the obligation of Coulson had been increased, either as to the time of payment, the sum to be paid, or the num-
*79] ber of acres to be conveyed, Payne or his heirs might have had some *motive of interest to make them; but their interest was

directly opposed to any act, which would impair the validity of the bond, or cast suspicion upon it. It is proved, that after the death of Payne, the bond was in possession of those who claimed the land adversely to it; so that its destruction would have advanced their interests. It is fair, therefore, to presume, that if the alterations were made by design, they could not have been made by any one claiming under the bond, but must have been made by some one who had an interest in destroying it.

By this bond, Coulson agreed to pay to Payne one hundred pounds, in twelve months, or, in lieu of the money, to convey the land. It is alleged in the bill, that Coulson elected to pay the one hundred pounds, by a conveyance of the land, and that Payne agreed to receive it. This is a clear case of election by the obligor; and a conveyance of the land, or the payment of the money, within the time specified, would have discharged the obligation. The money has not been paid; and although there is no positive proof that an election was made, during the life of Coulson, to pay the land, yet, from the facts and circumstances of the case, and the condition of the obligation, there can be no doubt, that those who claim under it have a right to consider it now as an absolute bond for the conveyance of the land.

The statute of limitations is set up as a bar to the relief sought by the bill; and as this is a ground more relied on by the counsel than any other, it requires a most careful examination. In the ninth section of "an act concerning proving wills and granting letters of administration, and to prevent frauds in the management of intestates' estates," enacted by North Carolina, in 1715, and which is now in force in Tennessee, it is provided, "that creditors of any person deceased shall make their claim within seven years after the death of such debtor, otherwise, such creditor shall be for ever barred." Under this statute, the question arises, whether the representatives of Payne, in asserting their claim to the land in controversy, can be considered creditors? Whether, in a case where the relation of vendor and vendee exists, the consideration having been paid, and a naked trust only has descended to the *heir, he can protect himself, under this statute, after the lapse of seven years, against a bill for a specific performance. [*80

It is insisted by the defendant's counsel, that this is not considered an open question in Tennessee; and that in pursuance of the rule of decision in this court, to adopt the construction given to its statutes by the supreme court of a state, the question must be considered here also as settled. The first case (*Smith* v. *Hickman's Heirs*) referred to, is in Cooke 330. In this case, the reporter says, "the bill states that the ancestor of the defendants, some time in the spring of 1789, executed an obligation to the complainant, binding him to convey six hundred acres of land, within a reasonable time; that the said ancestor died intestate, in the year 1791, leaving the defendants his heirs-at-law; and that administration of the personal estate was committed to his wife and two other persons. That the obligation has not been complied with; and that the defendants refuse to satisfy the same, although there is a large estate descended to them, both real and personal. The bills prays for a specific performance." To this bill, the statute of limitations was pleaded in bar. In their opinion, the court say, "it has been insisted, that the complainant is not a creditor, on account of the

demand not being of a pecuniary nature; but, as it is the duty of this court to examine this point, they feel satisfied that, as to that, he is within the act. All persons are considered creditors that have demands originating from contracts or agreements." And in answer to the arguments of counsel, that the statute could have had no reference to heirs, but to the personal representatives and the personal estate, the court remark, "the only inquiry is, whether it were reasonable that the legislature should think of the situation of heirs, in respect to the debts of their ancestors;" and again, "if no lapse of time can secure the estate thus descended, the peace of society would be much disturbed. Recoveries might be made of one, of many heirs, and suits for contribution must take place." And further, "it is admitted, in argument, that it is reasonable, legatees and distributees should know when they may be at rest."

From the statement in the bill, it does not appear, that the conveyance of any specific tract of land was prayed for, and it would seem, from the fact of
*81] the personal representatives being *named in the bill, and an averment that a large estate, both real and personal, descended to the defendants, that the object of the suit could not have been a title, but to subject the property descended to the heir to the payment of the claim. On no other supposition, can the language of the bill receive a sensible construction. If the bill had been filed to obtain a decree for a title to a specific tract of land, would the administrators have been named in it; and could it have been thought necessary to aver, that a large estate, both real and personal, descended to the defendants? Whether the heirs inherited any estate, or not, beyond the particular tract, was wholly immaterial. If they were naked trustees, they could be held responsible as such; and the administrators were neither necessary nor proper parties to the suit. It is true, the language used by the court in the first quotation above made, is general, and would embrace a case of trust; but such does not appear to have been the case before them. And this fact seems to be clear of doubt, when the language of the court, from other parts of their opinion, as above quoted, is considered in connection with the case made in the bill.

The case of *Lewis* v. *Hickman's Heirs*, 2 Overt. 317, is also relied on. In this case, the bill stated, that Hickman, for a valuable consideration, executed a bond to Hughes for 500*l.* with condition for the conveyance of a tract of 274 acres of land, &c. Hickman died intestate, and his administrator, under a statute authorizing administrators to make deeds, executed one to the plaintiff's testator, in discharge of the bond. It was charged, that the deed was not in compliance with the statute, and therefore void. That a certain Roberts took possession of the land; and that, on account of the defect in the title, a recovery could not be had against Roberts. The object of the bill was, that the bond might be set up, and the plaintiff relieved. The statute was pleaded in bar, and the defendant stated also, "that he had distributed the estate among those entitled agreeable to law; and from length of time, he was not able to produce his vouchers," &c. This was
*82] clearly not a case where the plaintiff prayed a *specific performance; and yet it was admitted by the counsel to be the same in principle as the one above referred to, of *Smith* v. *Hickman's Heirs*.

In *Peck* v. *Wheaton*, Mart. & Yerg. 353, the supreme court of Tennessee say, "we are moreover of opinion, that the act of 1715, above quoted,

will operate as a bar ; and that that act is in force, we consider one of the best-established positions litigated in our courts." This bill was brought to subject the lands which had descended to the defendants, to the payment of the debts of their ancestor ; and the court very properly held, that the statute was a good bar. The complainants were, substantially and technically, creditors. This shows, too, that it was the ordinary course in Tennessee, by bill in chancery, to make the lands descended to heirs liable to the debts of the ancestor. The case of *Armstrong* v. *Campbell*, 3 Yerg. 208, is cited. In the margin, the reporter says, that the only exception to the operation of the statute of limitations is, where the trust is created by express contract, and where the relation of trustee and *cestui que trust* exists in fact, and not by implication. But in this case, the question did not come directly before the court.

That the statute of limitations is applied, by courts of equity, in all cases where at law it might be pleaded, is a well-settled principle. At law, to make the statute a bar, there must be an adverse possession ; and by analogy, a court of equity, in a similar case, will hold the statute to be a good bar. But the statute insisted on as a bar in this case, does not depend upon possession. It bars a creditor who does not sue the heir within seven years. There can be no doubt, that the statute applies, where a creditor seeks to make the heir liable for the debt of his ancestor, on the ground that either personal or real property descended to him. And this appears to be the decision of the supreme court of Tennessee, on the statute. There is nothing in their decisions referred to, which show that they have given effect to the statute, beyond this. By the statute of 1819, which is wholly different in its language from the act of 1715, a bar is created, indiscriminately, to suits in equity as well as at law. But this statute does not govern the case under consideration.

In the case of *Haggard* v. *Mayfield*, 5 Hayw. 121, the court *say, [*83
"as to the act of limitation of 1715, where is the obligee in such a case as the present barred as against the heir? He has no demand against the executor, when he elects the land ; and cannot, therefore, be barred as to him. His demand is only against the heir, and that too in equity, upon a trust to be performed by the heir, who, until performance, holds the land for the obligee ; and is only barrable, as in a case of equities, by the lapse of twenty years unaccounted for." This point was not involved in the case, but the question shows the view of the court.

From a careful examination of the cases in which the ninth section of the act of 1715 has undergone a judicial construction by the supreme court of Tennessee, we are satisfied, that the question raised in the present case has not been decided. And this court can have no hesitation in saying, that the complainants in this suit can, in no correct sense, claiming, as they do, a specific execution of the contract, be considered creditors, within the meaning of the statute. They do not seek to subject the lands which descended to the defendant, to the payment of debts contracted by his ancestor, but to divest a naked legal title in favor of an equity clearly established—an equity founded upon a contract which acknowledged the receipt of the consideration in full, in 1787 ; and, as is proved, the same consideration which was paid by the defendant's father for the land in question—an equity accompanied by a possession of more than twenty years.

Can lapse of time operate to the prejudice of the complainants? Have they slept upon their rights? In about five years after the conveyance should have been executed, we find Payne in Virginia, endeavoring to procure a title. And at that time, he did prove a recognition of his claim by the widow of the obligor, who was the only person, according to the views then entertained, that had an interest in the land, and was capable of entering into a legal obligation. Payne's visit is repeated to Virginia, for the same object, and he sends an agent at another time. In 1798, he sells a part of this land; and in the following year, or in 1800, possession is taken under this purchase, and subsequently, other purchases are made; and the possession of the land under Payne and his representatives, has been continued to the present time. In *1805, Payne died, and this land descended to his heirs-at-law, several of whom were infants; and it is admitted, that until the year 1801, there was no court of chancery in Tennessee, through which the specific execution of a contract could be enforced. And it is proved, that this land has been called Payne's land for thirty-five years.

*84]

These facts being proved, does the case come within any decision by the courts of this country, or of England, where the specific execution of a contract has been refused, on the the ground of lapse of time? When the condition of the parties, their remote residence from each other, their death, the state of the country and its tribunals, are considered; it would seem, that instead of being negligent in the prosecution of the claim for a title to this land, Payne and those who claim under him, have shown more than ordinary diligence. Even after the death of Payne, we find his son and administrator in Virginia, endeavoring to procure the title. And at this time, as well as at all times previously, when application was made, the right of Payne was acknowledged. Under such circumstances, this court cannot consider the lapse of time as operating against the right set up by the complainants.

The instruments under which a part of the complainants set up an equity derived from Payne's heirs are proved; but they cannot be sanctioned by this court, except where such instruments were executed by the heirs of full age. It is the duty of the court to protect the interests of minors; and we think the decree of the circuit court in this respect, as well as in every other, is correct; and it is, therefore, affirmed, with costs.

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 West Tennessee, and was argued by counsel: On consideration whereof, it is decreed and ordered by this court, that the decree of the said circuit court in this cause be and the same is hereby affirmed, with costs.

*Mayor, etc. of New York *v.* George Miln.

George Briscoe and others *v.* The Commonwealth Bank of the State of Kentucky.

Practice.

The court refused to take up cases involving constitutional questions, when the court was not full.

Mayor, etc., of New York *v.* George Miln.

Error to the Circuit Court for the Eastern District of New York.

George Briscoe and others *v.* Commonwealth Bank of the State of Kentucky.

Error to the Circuit Court of Kentucky.

Ogden, for the Mayor, &c., of New York; and *Wilde*, for George Briscoe and others, inquired, if the court had come to a final decision as to the argument of the cases involving constitutional questions at the present term.

Marshall, C. J.—The court cannot know whether there will be a full court during the term; but as the court is now composed, the constitutional cases will not be taken up.(*a*)

12th February 1835.

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*William Caldwell, Isaac Caldwell and Samuel Brents, Appellants, *v.* Sarah and George Carrington's Heirs. [*86

Statute of frauds.—State judgments.

A bill was filed in the circuit court of the United States for the district of Kentucky, claiming certain lands in Kentucky, under an agreement by parol, by Carrington with Williams, for an exchange of lands, and in which exchange, C., the husband and devisor of the claimant, agreed to give certain lands, then owned by him, in Virginia, to W., and of which W. took possession, and part of which he sold, and for which W. was to convey certain military lands in Kentucky to C. The bill prayed that the heir of W. should be decreed to convey the lands; and that certain persons who, knowing of the agreement between C. and W., had purchased from the heir of W., and who had obtained from the heirs of W., the legal title to a part of the same lands, should be decreed to convey the same to the complainant.

The court held, that although the statute of frauds avoids parol contracts for lands, yet the complete execution of the contract in this case, by Carrington, by conveying to Williams the land he agreed to give to Williams in exchange, prevented the operation of the statute, in this case.

This was, undoubtedly, supposed in Virginia to be the sound construction of the statute, when this contract was made; and as the lands then lay in Virginia, Kentucky being then a part of that state, this construction forms the law of contract.

The evidence in the cause showed, that the persons who had purchased part of the lands to which, by the agreement with Williams, Carrington was entitled, had notice of that agreement; they could derive no title from such a purchase, againt those who held under C.

According to the constitution and laws of the United States, and the decisions of this court, the

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(*a*) The court was, at the time this motion was made, and during the whole term, composed of six justices; the vacancy occasioned by the resignation of Mr. Justice Duvall, not having been filled.

regular proceedings and decrees of a county court of Virginia, are allowed the same full faith and credit in Kentucky, that they would receive in Virginia; if such a decree would be enforced in Virginia, or if such a decree pronounced in Kentucky, would be enforced in Kentucky, the decree of the circuit court of the United States, sitting in Kentucky, enforcing it was correct.[1]

Carrington *v.* Brents, 1 McLean 167, affirmed.

Appeal from the Circuit Court of Kentucky. In January 1821, Sarah Carrington, a citizen of Virginia, widow and devisee of George Carrington, filed a bill in the circuit court of the district of Kentucky, stating, that at October term 1817, of the county court of Halifax county, in the state of Virginia, she, as the devisee, obtained a final decree on the chancery side of the court, against a certain John R. Williams, heir-at-law of John Wil-
*87] liams, deceased, that he convey *to her his claims, as heir to the said John Williams, to all the military lands to which the said John Williams had title or claim in the state of Kentucky. The land so claimed by the complainant, consisted of one survey of 1000 acres of military land, in the county of Adair, and near to the town of Columbia, No. 158; of one other survey on military-warrant of 350 acres, situated on Beaver creek, in the county of Barren, No. 155; of another military survey of 500 acres, situated on Beaver creek aforesaid, and in the county of Barren aforesaid, No. 227; of a location for 1000 acres of land, south of the Tennessee river, and adjoining the land, or a tract, at the Iron Banks, founded on a military-warrant, No. 155; of another entry or location of 1000 acres, on said warrant, adjoining the lands of Girault. She stated, that her testator had, in his lifetime, to wit, at May term 1803, of said county court of Halifax, obtained a decree against the said John R. Williams, that he should, by his guardian *ad litem*, John B. Scott, assign and transfer the said surveys and locations to the said George, the testator. That the said John B. Scott, in pursuance of such decree, did assign said papers to the said testator, as appeared by his several indorsements on said papers. That in pursuance of the decree pronounced in her favor, as devisee aforesaid, the said John R. Williams did, afterwards, to wit, on the 18th day of March 1820, by his deeds, duly acknowledged and proved according to the law of Virginia, convey and assign to her the several tracts of land aforesaid, as fully appeared by his deeds, filed and made a part of the bill. That the said John R. Williams, after his arrival at mature age, prosecuted an appeal from the decree of the county court of Halifax aforesaid, to the superior court of chancery for the Lynchburg district; where and when, upon a final decree of the latter court, the decree of the county court aforesaid, was affirmed in all its parts. She averred, that the said county court of Halifax had full power, authority and jurisdiction, to hear and determine, and to decree in the said cause, and to pronounce and to make all orders, judgments and decrees which they have so made, touching the premises; and she further stated and averred, that the said superior court of chancery for the Lynchburg district,
*88] had full power, authority and jurisdiction to hear, determine *and to affirm the decrees, orders and judgments of the county court of Hali-

[1] Whitaker *v.* Bramson, 2 Paine 209; Warren Manufacturing Co. *v.* Etna Ins. Co., Id. 502; Green *v.* Sarmiento, Pet. C. C. 74; Field *v.* Gibbs, Id. 155; Lincoln *v.* Tower, 2 McLean 473; Westervelt *v.* Lewis, Id. 511; The General Isaac Davis, Crabbe 185.

fax. She further stated, that the said judgments, decrees and orders, as before stated, stood, remained and were in full force, and unreversed, as would appear from a full, true and perfect transcript of the records and proceedings, filed and made a part of her bill.

That having so obtained the decree, and obtained the possession of the assignments of the plats and entries aforesaid, and also the deed aforesaid, she had well hoped to have obtained and enjoyed the lands aforesaid; but she stated, that she was deprived of the benefit of her said decree and transfers, by a fraudulent combination between the said John R. Williams, who resided without the jurisdiction of the court, and a certain Samuel Brents, William Caldwell and Isaac Caldwell, citizens of the state of Kentucky, and who were made defendants to the bill. She stated, that the said defendants, with a full and perfect knowledge of her claim, and that of her testator, on or about the 6th day of January 1818, entered into a contract to purchase, for a price very inadequate, and no part of which have they paid, the 2000 acres of land, south of the Tennessee river, as fully appeared by certain articles, signed by the said defendants and the said John R. Williams, of that date, filed and made a part of the bill. That the said defendant, William Caldwell, for a consideration wholly inadequate, a very small portion of which, if any, had been paid to the said Williams, about the 30th day of August 1815, pretended to buy of said Williams, the aforesaid 1000 acres, near the town of Columbia; as appeared by certain articles of agreement between them, of that date, filed and made a part of the bill; and that the said defendant, Isaac, was fully apprised of the fraudulent combination to cheat and defraud her, and aiding and advising thereunto. She further stated, that the defendant, Samuel, with a full knowledge of her claim, and with a like intent to cheat and defraud her, about the 31st day of August 1815, entered into a contract with said John R. Williams for a part of said lands, as appeared by certain articles between them, of that date, filed and made a part of the bill; and that, notwithstanding that she was in possession of the original plats and certificates of survey, with the indorsements thereon, of which the defendants were well advised, they had artfully *contrived to obtain patents, in the name of the said John R. Williams, for the military surveys aforesaid; and had, as she was informed and believed, obtained to themselves, in some way, deeds for the whole of said surveys, and had also obtained assignments or transfers of the entries south of the Tennessee; and would, on such fraudulent assignments, obtain, or attempt to obtain, grants from the commonwealth, unless they were restrained by the interposition of the court. [*89

The bill prayed an injunction, enjoining and restraining the said defendants, and each of them, from taking or receiving from the said John R. Williams any letter of attorney, deed or writing, touching the land in controversy, until the matter could be fairly tried in equity; and also an order enjoining and restraining the said defendants, and each of them, from surveying, or attempting to survey, said entries south of the Tennessee river, or in any wise interrupting or hindering the complainant in surveying the same, or procuring a survey therefor; and also, that the defendants convey and release all and any title they had acquired in virtue of any contract made with John R. Williams, or otherwise, and render up possession of the lands conveyed; and for other and further relief.

The answer of Samuel Brents stated, that the lands in the complainants' bill mentioned, were entered in the name of John Williams, and so far as surveys had been made and registered, they had been in his name. He did not admit, that any valid sale of the lands had been made, such as could bind John Williams, in law or conscience. Since he had heard anything on the subject of a contract between Williams and George Carrington, he had understood it was a matter of doubt, whether a contract of any kind took place or not, and if any ever did take place, it was after the operation of the statute of frauds and perjuries; was merely verbal, very vague and uncertain, and not at any time reduced to writing, and consequently, not obligatory on the said Williams, or those claiming under him. Should any such verbal contract appear (and he verily believed there never was any), he pleaded and relied on the said statute to prevent frauds and perjuries, in bar and preclusion of the said contract, and of the claim of the complainants, or any person holding or claiming under the said contract. He was informed, and believed, that the said John Williams and the *said George Carrington lived many years in Virginia, in the same neighborhood, and had many opportunities of consummating an exchange, or sale of said lands, if any existed; but that no suit was ever brought in the lifetime of said Williams; and that the respondent was informed, and believed, that the said Williams died some time about the year 1795 or 1796, and that the suit mentioned in said bill, upon which the decree (if any such existed) was founded, was contrived, after the death of the said Williams (although it was pretended that the said contract was made many years before his death), when there was no person left who was able or willing to state the true nature of the dealings between the said Williams and said George Carrington. He heard of a suit depending in some county court of Virginia, but heard and understood, that it was founded on a contract not binding in law or equity. He stated, that he was informed, and believed, the said John Williams departed this life, leaving John Robert Williams, his son and only heir-at-law, and that the lands, in the bill mentioned, descended to his said son; and that about the last of August 1815, the said John Robert Williams called on this defendant to attend to the securement of the titles to said lands. The respondent undertook said business (the patents for said lands not having then issued), and proceeded, with much care, labor and expense, and obtained patents for said lands, so far as said lands had been surveyed. Patents to a part of said lands, had not yet been obtained. Two thousand acres thereof, in two different entries, had not then been surveyed, and he did not know, whether they were yet surveyed. The latter two thousand acres lay below the Tennessee river, in that state, and in the late purchase made of the Indians; the said lands lying in the Indian boundary, this respondent presumed was the reason why said two thousand acres had not been surveyed, registered and patented. The respondent, on the 31st of August 1815, entered into a written contract with the said John Robert Williams, by which the respondent was to have five hundred acres of said lands; and that, on the 12th of November 1816, patents issued to the said John Robert Williams for two of the tracts in the bill mentioned, one of three hundred and fifty acres, on Beaver Creek, and the other of five hundred acres, adjoining the said three hundred and fifty acres; and that, in satisfaction of the contract between the said John Robert Williams

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*and the respondent, the respondent took five hundred acres out of the said two tracts, including the whole of the three hundred and fifty acres, and the lower part of the said five hundred acres; and that, afterwards, to wit, on the 5th of January 1818, the respondent purchased the remainder of the five hundred acres aforesaid, and having satisfied and completed the payment of the consideration for said five hundred acres, embracing the three hundred and fifty acres, and one hundred and fifty acres of the five hundred acre tract, and having bought of the said John Robert Williams, the balance of the five hundred acres, the respondent received a deed of conveyance for said two tracts of three hundred and fifty, and five hundred acres, amounting to eight hundred and fifty acres. This deed was made, signed, sealed and delivered to the respondent, and bore date the said 5th day of January 1818. And the respondent then had the possession of said eight hundred and fifty acres of land, and hoped he would not be disturbed in the enjoyment thereof by the pretended claim of the complainants. At the time of receiving said conveyance, or at any time before, the respondent had no knowledge or information of any valid claim to said land, by any other person than the said John R. Williams, who conveyed to the respondent. The respondent did not recollect of hearing anything of the claim of the complainants, before his conveyance; but had only heard that some verbal or illegal claim was set up, in some bill filed in some county court in Virginia; and of which verbal claim, the respondent did not conceive himself bound to take notice. The respondent, on the 6th of January 1818, in conjunction with his co-defendants, William and Isaac Caldwell, purchased two thousand acres of land, lying in the Indian boundary, not then surveyed, and not yet patented, and received an assignment of the said John R. Williams of said land, being in two entries of one thousand acres each; one entry, No. 7, dated 2d August 1784, calling to adjoin the town; the other No. 384, dated 10th August 1784, calling to adjoin John Giralts, Richard Taylor and James Bradley; no other title to said lands had been obtained by this respondent. The foregoing statement of facts exhibited the extent of the respondent's interest in the said lands. He stated, that he knew nothing of the facts stated in said bill, of the guardian of said John R. *Williams, [*92
while said Williams was an infant, making assignments of the plats and certificates of said lands. If such were the fact, the respondent believed it was an unlawful act, and therefore, not binding in law or equity. He knew nothing of the conveyance alleged to have been made by the said John R. Williams, on the 18th day of March 1820. The respondent required its production, and proof of its legality, and that it conveyed to the complainants an interest in the lands previously sold and previously conveyed to the respondent. The deed of conveyance made by the said Williams to him, was of record in the county court clerk's office of Barren county, from whence a copy might be had. Copies of the patents of the said three hundred and fifty, and five hundred acre tracts of land might be obtained from the register's office. The complainants may easily obtain such copies; or, if it were at all material, the respondent would file the originals. The respondent protested against the jurisdiction of the court of Virginia, to operate on the lands in Kentucky, to compel conveyances, by any act done by the guardian of said Williams; and that, if the decree was only to operate upon the said John R. Williams, the title of the complainants could

only be considered as commencing from the date of the alleged deed to said Sarah, of the 18th of March 1820, as this respondent was not bound to take notice of a verbal sale, or the proceedings in a foreign court, not having jurisdiction of the subject-matter.

The answer of William Caldwell denied that any sale of the lands was made by John Williams to George Carrington, which was valid or binding; and if any was made, it was not reduced to writing, and was void by the statute of frauds; and he pleaded the same statute. The answer stated a proceeding by the widow of George Carrington, to compel John W. Scott, the guardian of John R. Williams, to convey the land. He stated some transactions with John W. Scott relative to the land, and information to have been received by a person appointed by him to make inquiry about the land, and to make a purchase of part of the land, and that an agreement was made for him with Scott and Paul Carrington for the land; but afterwards, when prepared to pay the purchase-money for the same, he found Scott and Carrington had no title to the land they contracted to sell to him.

*93] Afterwards, John R. Williams came to *Kentucky. He consulted several of the most skilful and learned lawyers in Kentucky, all of whom advised this defendant that the said Williams would hold the land; that the claim of Carrington was null and void. This defendant did verily believe, that the said John R. Williams was the only lawful owner of said land, and that the claim of Carrington was fraudulently put up to cheat an infant; that he did accordingly purchase the said land from the said Williams, for the same price he was to have given the said Scott and Carrington, which was considered a full and fair consideration, and not a small and invaluable one, as falsely set forth in complainants' bill. He stated, that he had not been party to any suit, in Virginia or elsewhere, between any of the complainants, or their ancestors, and the said John R. Williams; and consequently, as he believed, would not be bound by any decree pronounced by the courts of Virginia in any such case. He protested against the jurisdiction of the courts of Virginia to operate on the lands in Kentucky; and if the decrees of the courts of Virginia could only operate on the person of the said John R. Williams, the title of the complainants could only be considered as commencing from the date of the alleged deed from the said John R. Williams to Sarah Carrington, 18th of March 1820, as this defendant was not bound to take notice of verbal sales, or the proceedings of foreign courts who could not entertain jurisdiction of the subject-matter.

The answer of Isaac Caldwell admitted the purchase of part of the land as stated in the bill, from John R. Williams, under agreements for the purchase of the same. As to notice of the title of the complainants and of their proceedings to establish the same, the answer stated as follows: "This defendant states that, previous to his purchase of said lands west of Tennessee, he did see the record and proceedings of the Halifax county court, in Virginia, made in the suit decided in 1803, wherein George Carrington (the complainant's husband) was complainant, and said John R. Williams, by his guardian, was defendant; that his object in examining said record and proceeding, originally, was, to ascertain in whom the best right to said land vested; and at that time, this defendant was, for several considerations,

*94] desirous that the claim set up by the complainant should prevail; but upon exhibiting a full transcript of the *record of said suit to three

or four counsellors in this state, reputed the most learned in the law, he was advised by each of them, that John R. Williams would eventually succeed, under the land-laws of the country, against the claim under which the complainant alleges title ; and that the evidences of the purchase, charged by the complainant to have been made by George Carrington of said John Williams, were not sufficient to authorize and support a recovery against John R. Williams, the heir-at-law. Under this intelligence, this defendant, believing that he was purchasing the only right by which said land could be held, entered into the contract aforesaid with said John R. Williams. This defendant calls upon said complainant to produce and file complete transcripts of the several records and proceedings of the courts in Virginia, referred to in her bill. He denies that a knowledge of the record and proceedings, in the suit decided in 1803, would amount to notice of a superior equity in the complainant, or her ancestor or devisor, or that such notice would be obtained from the bill, answer and depositions in the latter suit, which were all the evidences upon that subject which this defendant had, at the time of his purchase aforesaid, from said John R. Williams ; for these documents, instead of presenting to the mind evidence of an equitable claim, go to repeal the very idea of its existence, as by the complainant's own showing, in the bills and depositions, the contract under which she attempts to obtain said lands, is uncertain, illegal and void. This defendant believes that the complainant was satisfied of the vagueness and insufficiency of the decree of 1803, as she seems, about the year 1816, to have instituted another suit, founded upon the same contract, and to have abandoned the decree formerly pronounced. This defendant submits to the court, whether his rights to lands within this commonwealth are to be thus bound by the decree of a court of another state, in a suit to which he was not party ; and which decree, upon the face of the record, was predicated upon facts entirely insufficient to sustain it, under the laws of this state, whatever may be the laws or rules of decisions with the courts of such other state ; and if the court should be of opinion, that this defendant is not bound by a decree pronounced in the state of Virginia, *subsequent to his purchase, or, at any rate, of which he had no knowledge until [*95 subsequent to his purchase, he then hopes that the complainant may be put upon the proof of the purchase, if any, as is alleged by her to have been made by her devisor from said John Williams. He conceives, that the transfer and assignment made by said John R. Williams to said Sarah Carrington in 1820, can have no relation to, or sanctity attached to it, on account of the decree pronounced between those parties in Virginia, as that decree could only operate and be executed upon the person of said John R. Williams—the thing which was the subject-matter of the decree, being without the control of the chancellor, and not subject to the laws of this state, or to be affected or operated upon by the process of this court ; and that, therefore, the assignment obtained by this defendant and his copartners, being prior in time, should prevail against the pretended equity of said complainant. The defendant is persuaded, that the assignment executed by said John R. Williams to the complainant was not obtained by process under the decree aforesaid, but that said complainant, being aware of the inefficacy and illegality of said decree, has confederated with said Williams, for the purpose of defeating the prior and better claim of the defendants, and

for that purpose has induced said Williams to execute the assignment dated in 1820. The respondent insists, that if any sale was ever made of the lands in question, by said John Williams to said George Carrington, that such sale was verbal, and not evidenced by any agreement or memorandum in writing; and therefore, was void, under the statute to prevent frauds and perjuries, upon which he relies."

Witnesses were examined in support of the allegations in the bill, whose testimony is stated in the opinion of the court. No counter-evidence was offered by the respondents.

On the 21st day of May 1832, the circuit court, by a final decree, ordered that the defendants do, by their joint or several deeds, on or before the 1st day of July next, by a sufficient deed, or by sufficient deeds, release and convey to the complainants all right and title which they have, either jointly or severally, in the several tracts of and referred to in the bill, and included in the deeds of John R. Williams to George Carrington, and also his deed
*96] to Sarah Carrington, with *special warranty against themselves and all persons claiming under them; and also, that they do, on or before the said day, severally or jointly, surrender to the complainants, their agent or attorney, possession of said tracts of land; and to enable the complainants to take the possession, the court do direct and order that the clerk do, on the request of the complainants, at any time after the said 1st day of July, issue to them a writ or writs of *habere facias possessionem*, directed to the marshal of the district, whose duty it shall be to execute the same. The defendants prosecuted this appeal.

The case was argued by *Bibb* and *Hardin*, with whom was *Loughborough*, for the appellants; and by *Jones*, with whom was *Coxe*, for the appellees.

For the *appellants*, it was insisted:—1. That the verbal contract of 1787 or 1788, alleged, was against the statute of frauds, and not such as courts of equity ought to enforce specifically. 2. That the proceedings and decree of Halifax, in 1803, did not constitute an equity; that those proceedings were inoperative and void. 3. That notice, in 1815, of those proceedings, did not convert them into an equity, but was notice of an illegal, insufficient claim; dead in fact and in law; proscribed by the statute of frauds, and extinguished by lapse of time. 4. That the proceedings and decree of 1817, and subsequently, in the courts of Virginia, did not bind the appellants, citizens of Kentucky, because they were not parties. 5. That notice of those proceedings, had in May and November 1818, cannot overreach the equities acquired by the appellants before such notice; nor make them parties to those proceedings and decrees. 6. That the appellees have not made out any equity prior or superior to the equities of the appellants; that the deeds of 1820, executed by John R. Williams, by force of the decree and attachment, are not evidence of a prior and superior equity on the part of the appellees, but posterior and inferior to the equities of the appellants. 7.
*97] That the appellants were in a predicament to re-examine *the decrees of the courts of Virginia against John R. Williams, the appellants not being parties, nor concluded by those decrees. 8. That this court ought not to decree against these appellants barely upon the foot of the decrees against John R. Williams, but will examine the grounds of those

decrees, before they make a new one. 9. That there is no basis for divesting the appellants of their legal titles and possession, nor for calling into activity the extraordinary powers of a court of equity; but abundant reasons for refusing to interfere against the interest of the appellants.

The decree of the circuit court is erroneous: 1. In divesting the title and possession of William Caldwell, acquired under his contract of 30th of August 1815, and his patent of 12th of November 1816. 2. In divesting Samuel Brents of his equity under his contract of 31st of August 1815; and also in divesting his title and possession to 850 acres, acquired thereunder by his deed of 1818. 3. In divesting the defendants, William Caldwell, Isaac Caldwell and Samuel Brents, of their equities and legal advantages under their joint contract of 6th of January 1818. 4. In divesting Brents of his legal title acquired under his deed for 850 acres, and his other interterests, without any allowance for services and expenses in surveying and obtaining the grants. 5. In sustaining the bill and making a decree, when the court should have refused to interfere, but leave the complainants to their remedy upon the deeds of John R. Williams.

Upon the effect of the proceedings and decree of the court of Halifax county, Virginia, upon the rights and interests of John R. Williams, the appellants' counsel cited, *Bond* v. *Hendricks*, 1 A. K. Marsh. 398, 471, 592; *Delano* v. *Jopling*, 1 Litt. 417; *Estill's Heirs* v. *Clay*, 2 A. K. Marsh. 200; *Moore* v. *Farrow*, 1 Ibid. 41; 3 Bibb 528, 525; 4 Ibid. 11, 96; 1 Call 1, 4; 1 T. B. Monr. 72, 109; 5 Litt. 80; 3 Bibb 525, 528; 2 Atk. 531; 1 P. Wms. 504; 2 Ibid. 403. As to the effect of the statute of frauds on a contract by parol for the sale of lands, the appellants' counsel cited, *1 Munf. 510, 518; 1 Bibb 203, 207, 209; 3 A. K. Marsh. 445; 1 Hen. & Munf. 92, 110; 5 Munf. 308; 3 A. K. Marsh. 555; 3 T. B. Monr. 41; *Miller* v. *McIntire*, 6 Pet. 67; 3 Litt. 264; 3 A. K. Marsh. 445. [*98

Marshall, Ch. J., delivered the opinion of the court.—This is an appeal from a decree pronounced in the court of the United States for the district of Kentucky, directing the appellants to release and convey to the appellees all the right and title which they hold, jointly or severally, in the tracts of land in the bill mentioned, with special warranty against themselves.

The bill, filed in January 1824, by Sarah Carrington, widow and devisee of George Carrington, deceased, claims from the defendants, as purchasers from John R. Williams, heir-at-law of John Williams, deceased, who is not an inhabitant of Kentucky, and therefore, not a party to the suit, all the military lands of the said John Williams, lying in the district of Kentucky, amounting to 4000 acres, which land was sold, as is alleged, by John Williams, in his lifetime, to George Carrington, the testator of the plaintiff in the circuit court. This claim is founded on a decree pronounced by the county court of Halifax, in the state of Virginia, sitting in chancery, in November 1817, on a bill filed in November 1815, by the said Sarah Carrington against the said John R. Williams, and on a deed of conveyance made, on the 18th day of March 1820, by the said John R. Williams to the said Sarah Carrington, in pursuance thereof; this decree was affirmed on appeal. The bill also refers to a suit brought by George Carrington, in his lifetime, against the guardians of the said John R. Williams, while an infant, in which a decree was obtained, directing the guardian of the said John R.

Williams to convey and assign the entries and surveys of the said military lands to the said George Carrington. The plaintiff prays that these decrees, with the proceedings on which they were founded, and the conveyances made in pursuance of them, should be taken as a part of his bill.

The bill filed in the county court of Halifax, in November 1815, charges that George Carrington, in his lifetime, exchanged certain lands, lying in the said county, with John *Williams, deceased, for a military claim of 4000 acres to which the said Williams was entitled. That the said George, by the direction of the said Williams, caused his land in Halifax to be conveyed to a certain John Camp, who was put in possession thereof; but the patents for the military lands not having been issued, no conveyance was made of the legal title to them. Some time after the death of the said Williams, the said Carrington instituted a suit in the court of Halifax, against John Robert Williams, then an infant, the only child of the said John Williams, to obtain an assignment of the entries and surveys for the said four thousand acres of military land. As the bill filed in that suit contains a full statement of the contract, with a description of the land it claims, the plaintiff prays that it may be taken as a part of the present bill, as fully as if literally inserted. On the 23d of May 1803, a decree was pronounced in the said suit, which, among other things, directed a certain John B. Scott, the then guardian of the said John R. Williams, to assign the entries and surveys of the said military lands to the said George Carrington, so as to enable him to obtain patents therefor in his own name; and did further order that the said John R. Williams should, on attaining his age of twenty-one-years, release all his right to the said George Carrington. The plaintiff prays that this decree and all the proceedings in the suit may be taken as a part of his bill. The assignments directed by the decree were made by the said John B. Scott, but George Carrington departed this life soon afterwards, not having obtained the patents. By his last will, he devised these lands to the plaintiff, who has applied for patents, but is informed at the land-office, that the assignment of the said Scott does not authorize the register of the land-office in Kentucky to issue them. The said John R. Williams having attained his full age, not only refuses to release his claim and to assign the said entries and surveys, but has gone to Kentucky with a view of selling the said lands. The bill prays for an assignment of the entries and surveys, and a release of the right of the said John R. Williams, and that he may be enjoined from performing any act which may disable him from making a complete title to the plaintiff.

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The defendant in his answer denies the contract, and adds, *that if such a contract did exist, it was verbal, that no note or memorandum thereof was signed by either of the parties, and that it is void by the statute of frauds which he pleads. A general replication was filed, and depositions were taken, after which the following entry was made: "And now, at this day, to wit, at a court holden for the said county at the court-house thereof, on the 27th day of October 1817, came the parties, by their counsel, by whose consent this case was this day heard upon the bill, answer, examinations of witnesses, *the bill, answer, examinations of witnesses*, in a cause formerly depending in this court between George Carrington, plaintiff, and the defendant, by his guardian, defendant, and was argued by counsel; on consideration whereof, it is decreed and ordered, that the defendant do forth-

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with assign to the plaintiff, in a proper and legal manner, the surveys and other title papers in the original bill mentioned. The defendant having appealed from this decree, it was affirmed at a superior court of chancery, held at the town of Lynchburg, on the 19th day of May 1818."

In pursuance of these decrees, the said John R. Williams did, on the 18th day of March, in the year 1820, by his indenture of that date, convey to the plaintiff the military lands in the bill mentioned, consisting of one tract of 500 acres, lying on Beaver creek; also of one tract of 350 acres, likewise lying on Beaver creek; also of one other tract of 1000 acres, lying on Russel's creek; also of one other tract of 150 acres, lying on the first creek emptying into Little Barren; also of one other tract of 1000 acres, lying in the county of ———, being the tract of land entered by John Williams on the 2d of August 1784; and also of one other tract of land, containing 1000 acres, lying in the county of ———, entered on the 10th of August 1784.

The bill filed in this cause farther charges, that Samuel Brents, William Caldwell and Isaac Caldwell, citizens of the state of Kentucky, with full knowledge of the plaintiff's claims, entered into a contract, on or about the 6th day of January 1818, with the said John R. Williams, for the purchase of the two tracts of 1000 acres each, lying south of the Tennessee, for which entries had been made by the said John Williams, in his lifetime, on the 2d and 10th of August 1784; and that the said William *Caldwell, [*101
on the 30th of August 1815, with full knowledge of the right of the plaintiff, entered into a contract with the said John R. Williams, for the purchase of the tract of 1000 acres, near the town of Columbia, in the county of Adair; and that the said Samuel Brents also, with the full knowledge of the plaintiff's title, hath entered into a contract with the said John R. Williams, for the said tracts, containing 500 acres, and 350 acres, lying on Beaver creek, in the county of ———, and for the tract containing 150 acres lying on the first creek emptying into the Little Barren, in the county of ———. Under these contracts, and other papers obtained from the said John R. Williams, the said Samuel Brents, William Caldwell and Isaac Caldwell, who are made defendants, have obtained legal titles to the said military surveys, and have also obtained assignments or transfers of the entries for the two tracts of 1000 acres each, lying south of the Tennessee, for which they will obtain patents, unless restrained by order of this court. The bill prays that the defendants may be decreed to convey to the plaintiff, and for general relief.

The defendants filed separate answers, each denying the contract, insisting that if any contract existed, it was by parol, and consequently, void by the statute of frauds and claiming to be purchasers without notice of any equity in the plaintiff. The several defences are now to be examined.

The proceedings in the county court of Halifax, in the suit brought in 1815, are perfectly regular; and, according to the constitution and laws of the United States and the decisions of this court, are allowed the same full faith and credit in the courts of Kentucky, that they would receive in Virginia. If the decree pronounced by the court of Halifax in 1817, and afterwards affirmed in the superior court of chancery at Lynchburg, would have been enforced in Virginia; or if, had it been pronounced in Kentucky, it would have been enforced in Kentucky, then the decree for enforcing it

which was pronounced by the court of the United States sitting in Kentucky, is correct.

The first point to be considered is the contract itself. It is not in writing, and consequently, admits only of parol evidence. Paul Carrington, the father of George, deposes, that he owned a tract of land, in the county of
*102] Halifax, called Dry Branch, *containing 596 acres, the whole of which, at the close of the revolutionary war, he gave to his son George, put him in possession, delivered the title papers, and directed him to prepare a deed. In 1787 or 1788, George requested the deponent to convey the land to John Williams, to whom he had sold it, in exchange for his military lands in Kentucky. Some little time afterwards, George requested the witness to convey the land to George Camp, to whom Williams had sold it. He conveyed to Camp. Some short time afterwards, Williams and George Carrington were both at the house of the deponent, when Williams stated, that he had purchased the land from George Carrington, and sold it to Camp for 400*l.* He has also frequently heard George Camp say, that he purchased the land from Williams for 400*l.* Has never heard Williams say he gave his military lands for the Dry Branch tract.

Clement Carrington has paid the taxes on the Kentucky military lands, on account of the estate of George Carrington, ever since they were taxed. Nathaniel Terry was acquainted with the Dry Creek tract, and has heard Williams say, he had given his western lands for it. He supposed Williams to have been in possession of the Dry Branch tract, but he never worked hands on it. Carrington did not work it, after the sale to Williams, farther than to finish his crop. James Eastham has frequently heard Colonel John Williams say, that he had given his lands in the western country to George Carrington, in exchange for the Dry Branch tract, which he afterwards sold to George Camp. William Yancy has heard John Williams say, that he purchased the Dry Branch tract from George Carrington, and had given his claims to land in the western country in payment for it. He has been frequently in company with the said John Williams, when this trade was the subject of conversation, and Williams always gave the same account of it. Williams sold the Dry Branch tract to George Camp. Thomas Roberts well recollects to have heard John Williams say, that he had exchanged his Kentucky lands with George Carrington for his Dry Branch tract. The depositions of William Yancy and Thomas Roberts were taken in the suit
*103] brought against the guardian of John R. Williams; *but as they were filed with the bill of 1815, and read by consent at the hearing, they are supposed to form a part of the record in this cause. No counter-testimony was offered.

We think the exchange by John Williams of his military land for the Dry Branch tract is fully established, and proceed to inquire into the validity of the contract. The statute of frauds, of which the defendants claimed the benefit, avoids parol contracts for land, and will, unquestionably, avoid that between John Williams and George Carrington, unless the transactions between the parties take the case out of the statute. The appellees maintain the affirmative of this proposition, and contend, that the complete execution of the contract on the part of George Carrington, by conveying the Dry Branch tract to the vendee of John Williams, supplies, in law, the want of a memorandum in writing. For a considerable length of time,

this principle appeared to be firmly settled in the court of chancery in England. Maddock, in his Treatise on Chancery, vol. 1, p. 301, says, "if, therefore, it be clearly shown, what the agreement was, and that it has been partly performed, that is, that an act had been done, not a mere voluntary act, or merely introductory or ancillary to the agreement, but a part execution of the substance of the agreement, and which would not have been done, unless on account of the agreement, an act, in short, unequivocally referring to, and resulting from the agreement, and such that the party would suffer an injury amounting to fraud, by the refusal to execute that agreement; in such case, the agreement will be decreed to be specially performed. 2 Bro. C. C. 140; 1 Ibid. 412; 3 Atk. 4; 2 Anstr. 424; Ambl. 586; 1 Sch. & Lef. 41; 14 Ves. 386. This principle has been lately questioned in England, and some of the judges have thought, has been carried too far; but it has not, we believe, been overruled. It was, undoubtedly, supposed, in Virginia, to be the sound construction of the statute, when this contract was made; and as the land then lay in Virginia, Kentucky being then a part of that state, this construction forms the law of the contract. In affirming the decree of the 27th of October 1817, the chancellor said, "the court being of opinion, that this is not a case *embraced by the act against frauds and perjuries, doth adjudge, [*104 &c." A change of the law afterwards made in Kentucky, cannot affect contracts previously valid.

It remains to inquire, whether the appellants are to be considered as purchasers without notice of the equity set up by the appellees. The defendants do not deny notice, in those explicit terms which courts of equity require. They deny notice of a valid claim; but no such notice as ought to put them on inquiry. They are the joint purchasers of the two tracts of 1000 acres each, lying south of Tennessee river. They purchased these tracts from Williams, on the 6th of January 1818. The articles of that date recognise the claim of Carrigton's heirs, and contain a stipulation on the part of Williams, "to use due diligence in having it extinguished and quieted." William Caldwell purchased the tract of 1000 acres in the county of Adair, on the 30th day of August 1815. The contract of that date contains this stipulation: "and the said Williams agrees that the said Caldwell shall not be bound to pay any further part of the consideration aforesaid, except what is this day paid, until he, the said Williams, shall settle the dispute between himself and the heirs and representatives of George Carrington, deceased, concerning the title to the said land." A contract was entered into between Williams and Samuel Brents, on the 31st of August 1815, by which Brents engages for a part of the land, "to attend to the securement of the titles to the said lands," "according to the laws of the state, by surveying, registering and patenting the same, or by doing such other acts as may be necessary for the purposes aforesaid." He says, in his answer, that on the 12th of November 1816, patents issued to the said John R. Williams, for two tracts on Beaver creek, the one for 350 acres, and the other for 500 acres. The defendant agreed to take the tract of 350 acres, and 150 acres, part of the 500 acre tract, for his services. Afterwards, on the 5th of January 1818, he contracted for the residue of the two tracts, for which he received a conveyance, dated on the same day. The answer proceeds, "at the time of receiving the said conveyance, or at any

time *before, this respondent had no knowledge or information of any valid claim to said land, by any other person than the said John R. Williams. This respondent does not now recollect of hearing anything of the claim of the complainants, before his conveyance; but had only heard that some verbal or illegal claim was set up, in some bill filed in some county court of Virginia; of which verbal claim this respondent did not think himself bound to take notice." He does not recollect, that the claimant was named Carrington, but he does recollect having heard that a suit was instituted in one of the county courts in Virginia; but as the contract was by parol, he did not think himself bound to notice it. Now, he knew, or might have known, that the suit was instituted in the county of Halifax, that being the residence of Williams, whose agent he was, and who was the defendant in the suit. He could have received full information from Williams himself, who never attempted to conceal the claim. His conveyance of the 2000 acres of his claim, lying south of the Tennessee river, dated the day after his conveyance to Brents, contains a stipulation respecting the claim of Carrington's heirs, showing plainly that the claim was previously well known to the parties. His deed to William Caldwell shows, that it was known as early as 1815. Isaac Caldwell's claim is limited to his third part of the 2000 acres south of the Tennessee, conveyed on the 6th of January 1818. In addition to the notice contained in the deed, he states in his answer, that he had seen the proceedings in the suit brought by Carrington against Williams, in which the decree of 1803 was pronounced; had consulted eminent counsel on it, and had been advised that the title of Williams would prevail over that set up by Carrington. Under this advice, he purchased. The record contains other evidence, to which it is thought unnecessary to refer.

In addition to these unequivocal proofs that the appellants had received notice of the contract made by Carrington with John Williams, it is worthy of observation, that, with the exception of Brents, they purchased equitable titles, and were bound to notice any prior equity. It is too clear for controversy, that the plaintiffs placed full confidence in the protection furnished by the statute of frauds; *and believed that the contract made between
*106] Carrington and Williams, being by parol, was void, notwithstanding its full execution on the part of Carrington. There is no error in the decree of the circuit court, and it is affirmed, with costs.

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 Kentucky, and was argued by counsel: On consideration whereof, it is ordered, adjudged and decreed by this court, that the decree of the said circuit court in this cause be and the same is hereby affirmed, with costs.

*William A. Bradley, Plaintiff in error, *v.* The Washington, Alexandria and Georgetown Steam-Packet Company.

Damages.

The original writ was issued out of the circuit court of the district of Columbia, dated 2d of December 1831, and was returned "executed," on the first Monday of the same December, the return-day of the succeeding term; the defendant appeared by his attorney, on the return-day, and obtained a rule on the plaintiffs to declare against him. The circuit court, on the trial of the cause, directed the jury to find damages against the defendant, for the hire of a steamboat, for which the action was brought, from the 20th of November 1831, to the 6th of February 1832, whereas, the suit was instituted on the 2d of December 1831. These instructions were erroneous, as damages were to be given to a time long posterior to the institution of the action.

Error from the Circuit Court for the District of Columbia, and county of Washington. On the 2d of December 1831, a writ of *capias ad respondendum*, in case, was sued out of the circuit court, by the Washington, Alexandria and Georgetown Steam-Packet Company against William A. Bradley, the plaintiff in error, and on the return-day of the writ, the first Monday in December 1831, the defendant appeared, and a rule on the plaintiffs to declare was entered, on the motion of his attorney. Further proceedings in the case were, by consent of the parties, continued until the fourth Monday in March 1833, when a declaration in *indebitatus assumpsit* was filed; in which it was alleged, that the defendant, William A. Bradley, was indebted to the plaintiffs, on the 7th of February 1832, in the sum of $2765, for the use and hire of the steamboat Franklin. The defendant pleaded *non assumpsit*, and the case was tried in November 1833. The jury, under the directions of the court, gave a verdict for the plaintiffs for $2415, upon which judgment was entered, and the defendant prosecuted this writ of error. On the trial of the cause, the following bill of exception was tendered and sealed by the court.

"Upon the trial of this cause, the plaintiffs, to sustain the issue *on their part, joined between the parties aforesaid, gave in evidence, and [*108 read to the jury, a paper, dated 19th November 1831, signed by William A. Bradley, the said defendant, in the words and figures following, viz:

"I agree to hire the steamboat Franklin, until the Sydney is placed on the route, to commence to-morrow, 20th instant, at thirty-five dollars per day, clear of all expenses, other than the wages of Capt. Nevitt.

"19th Nov. 1831. W. A. Bradley.

"And the paper purporting to be an acceptance thereof, of the same date, to wit:

"Washington City, Nov. 19th, 1831.

"On the part of the Washington, Alexandria and Georgetown Steam-Packet Company, I agree to the terms offered by William A. Bradley, Esquire, for the use of the steamboat Franklin, until the Sydney is placed on the route to Potomac creek, which is thirty-five dollars per day, clear of all expenses, other than the wages of Capt. Nevitt, which are to be paid by our company. W. Gunton, President.

"And also a paper addressed by said defendant to Pishey Thompson,

one of the directors of the Steam-Packet Company, and by him communicated to plaintiffs in the words following, to wit:

"PISHEY THOMPSON, ESQ. Washington, Dec. 5, 1831.

"Dear Sir:—I will thank you to advise the President and Directors of the Washington, Alexandria and Georgetown Steam-Packet Company, that the navigation of the Potomac being closed by ice, we have this day commenced carrying the mail by land, under our winter arrangement; and have, therefore, no further occasion for the steamboat Franklin, which is now in Alexandria, in charge of Capt. Nevitt. The balance due your company, for the
*109] use of the *Franklin, under my contract with Doctor Gunton, will be paid, on the presentation of a bill and receipt therefor. With great respect, your obedient servant, W. A. BRADLEY."

"Pishey Thompson, Esq., Present."

"And the reply thereto from William Gunton, President of the Steam-Packet Company, to the defendant, in the words following, to wit:

"Washington City, Dec. 6, 1831.

"Sir:—Your letter of the 5th instant to Mr. P. Thompson, has been this afternoon submitted to the Board of Directors of the Washington, Alexandria and Georgetown Steam-Packet Company, at a meeting holden for the purpose. After mentioning that the navigation of the Potomac is closed by ice, and that you had commenced carrying the mail by land, under your winter arrangement, you have therein signified, that you have no further occasion for the steamboat Franklin, and that she was then in Alexandria, in charge of Capt. Nevitt. The agreement entered into by you contains no clause making its continuance to depend on the matters you have designated, but on the contrary an unconditional stipulation to 'hire the Franklin, until the Sidney is placed on the route;' and I am instructed to inform you, that the board cannot admit your right to terminate the agreement on such grounds, and regard it as being still in full force, and the boat as being in your charge. However disposed the board might have been to concur with you in putting an end to the agreement, under the circumstances you have described, if the company had not been already in litigation with you and your colleague, for the recovery of a compensation for the use of the Franklin, under another contract, to the strict letter of which a rigid adherence is contended for on your part, notwithstanding it had undergone a verbal modification; the board could not but recollect this, and be influenced thereby. Yours, respectfully,

"William A. Bradley, Esq. W. GUNTON, President."

*"And further proved, by the testimony of William Chicken, a
*110] competent witness, and duly sworn in the cause, that he was employed as engineer by defendant, on board the steamboat Sydney, mentioned in the foregoing papers; that said steamboat was in Baltimore, in the month of November 1831, and continued there until the 26th day of January 1832, when she left that port for Washington city, and after several interruptions and delays, arrived at Washington on the 6th of February, and was placed on the route to Potomac creek, on the 7th of February 1832; and that said steamboat Sydney belonged to defendant, and that she was not finished, so

as to be able to start from Baltimore, until the 25th of January. And thereupon, the said plaintiffs claim hire of the said steamboat Franklin, from the 20th day of November 1831, to the 6th day of February 1832, seventy-nine days, at $35 per day, allowing credit for $350 as paid thereon, by the said defendants, and leaving a balance of $2415.

"After which evidence had been given on the part of plaintiff as aforesaid, the defendant, to support the issue on his part above joined, offered to prove, by competent witnesses, that for several years immediately preceding the date of said contract, he had been, and was still, contractor for the transportation of the United States mail from Washington to Fredericksburg; that the customary route of said mail was by steamboat, from Washington to Potomac creek; thence by land to Fredericksburg; in which steamboat-passengers were also usually transported on said route; that during all that time, the defendant had used a steamboat belonging to himself on said route; that he also kept an establishment of horses and stages for the transportation of said mail, all the way by land from Washington to Fredericksburg, at seasons when the navigation of steamboats was stopped by ice; and had been obliged, for a considerable portion of every winter, during the time he had been so employed in the transportation of the mail, to use his said stages and horses, for the transportation of the mails, all the way by land to Fredericksburg, in the meantime laying up his steamboat. That just before the date of said contract, the defendant's own steamboat, usually employed as aforesaid on said route, had been disabled, and the defendant was at the time about completing a new steamboat, called the Sydney, which *had been built at Washington, and sent round to Baltimore, for the purpose of being fitted with her engine, and other [*111 equipments necessary to complete her for running on said route; and that she lay at Baltimore, in the hands of the workmen there, at the date of said contract. That on the morning of the 5th of December 1831, the navigation between Washington and Potomac creek became obstructed by ice, and the steamboat Franklin, on her way from Potomac creek to Washington, while pursuing the said route under said contract, was stopped at Alexandria by ice, where the mail was taken out of said boat and sent up to Washington by land, and that said steamboat lay at Alexandria, frozen up in the harbor, from that time till the 5th of February 1832; that at the same time, the navigation of the Potomac became obstructed as aforesaid, the navigation at and from Baltimore became also obstructed from the same cause, and the said steamboat Sydney was also frozen up in the basin at Baltimore, before she had been completely equipped with her engine; that at the time she was so frozen up, she wanted nothing to complete her equipment but the insertion of two pipes, a part of her engine, which pipes had been made, but not then put in place, the completing of which would not have required more than two days, and then the boat would have been in complete order for being sent round to Washington, and put upon said route; but the ice having interposed, it was deemed by the workmen, and those in charge of the boat, that the insertion of said pipes ought to be postponed till the navigation was clear; that in January 1832, the said pipes were inserted, and the said boat, being completely equipped for her voyage, left Baltimore for Washington, as soon as the state of the ice made it practicable to attempt that voyage; was again stopped by the ice, and obliged

to put in at Annapolis, whence she proceeded to Washington as soon as the ice left it practicable to recommence and accomplish the voyage, and arrived at Washington on the 6th of February 1832, and was, the next day, placed by defendant on said route; that during the whole of the period from the first stopping of the navigation as aforesaid, until the said 6th of February, the defendant had abandoned the said route to Potomac creek, and prosecuted the land route from Washington to Fredericksburg.

*112] "That it was known to and understood by plaintiffs, at the *time that the contract in question was made, and was a matter of notoriety, that as soon as the navigation should be closed by ice, the United States mail from Washington to Fredericksburg would have to be transported all the way by land carriage, instead of being transported by steamboat to Potomac creek, and thence by land to Fredericksburg; and that the said steamboat Franklin would not be required by defendant, and could not be, under said contract, when the navigation should be so closed. That it was communicated to the plaintiff by defendant, or his agent, before the time of making said contract, that defendant intended to keep said steamboat in use under said contract, so long as the navigation remainded open, and no longer. To the admissibility of which evidence, the said plaintiff, by his counsel, objected, and the court refused to permit the same to go to the jury, but at the instance of plaintiffs gave the following instruction, viz:

"That if the jury shall believe, from the evidence aforesaid, that the said defendant did, on the 19th day of November 1831, write to said plaintiff the said paper of that date, bearing his signature, and that said plaintiff did accept the same, by the said paper of the same date, and that said defendant and plaintiff did respectively write to each other the papers bearing date the 5th and 6th of December 1831, and that the said steamboat Sydney did, in fact, first arrive in the Potomac river, on the 6th of February 1832, and was placed on the route to Potomac creek, mentioned in the said evidence, on the 7th of February 1832, that then the said plaintiff is entitled to recover, under said contract so proved as aforesaid, at the rate of $35 *per diem*, from the said 20th of November 1831, to the said 6th of February 1832, both inclusive."

The case was argued by *Jones*, for the plaintiff in error; and by *Coxe*, for the defendants.

Jones, for the plaintiff in error.—The question, whether plaintiff could recover in this action the *per diem* hire of the boat, accruing after action brought, is not one of variance between the writ and declaration, nor of any

*113] other vice either in the writ or declaration, whereof advantage *could be taken by plea in abatement, or any other plea. The date of the contract laid in any money count, is wholly immaterial; and any special plea, traversing the date, would be demurrable, as tendering a wholly immaterial issue. The count may assume any date, even a day after its own date, or a date one hundred years before; yet lay no foundation for any plea bringing the date in any manner in issue: if one hundred years preceding the suit were assumed, a defendant could not demur as to a claim *primâ facie* barred by limitations. The plea of *non assumpsit* put nothing in issue but the substance of the count—a contract or debt recoverable in this action, no matter of what date: the date is a mere question of evidence under the

general issue, and that evidence must show a subsisting debt, at the time of action brought; no matter when the debt accrued, whether on the day laid in the count or any other.

In this case, then, the plaintiff was let into the broadest proof, under the general issue, of a cause of action substantially conforming with that laid in his count, no matter of what date, so the cause of action accrued and was consummate at the time of action brought. That is the necessary limitation of time understood, indispensable, among the very elements in every action, whether for contract or tort; a consummate cause of action, at the time of action brought; and there is no way in which the question can, in an action of *assumpsit*, be regularly raised, in any form of special pleading. If the defendant were to plead to the count specially, that the cause of action did not arise till after action brought, it would amount to the general issue, and be demurrable; *à fortiori*, if he tendered any plea, going to traverse, or in any way put in issue, the date of the transaction. Whether a cause of action, substantially corresponding with that laid in the count, accrued before action brought, is involved in the terms of the general issue.

The specific objection here, is not any defect of form or substance in either writ or declaration, but a manifest error in the final instruction from the court to the jury, that it was competent for the plaintiff, in an action of *assumpsit*, to recover on a cause of action accrued after action brought. The objection goes fundamentally to the reach and competency of the particular remedy.

**Coxe*, for the defendants.—The point now made was not presented in the court below; had it been, the difficulty would have been removed by evidence which would have shown the understanding of the parties to the suit, both being desirous of a decision on the merits and law of the case. [*114

There is nothing in the exception taken in the circuit court, to show when the suit was instituted, and this is only to be known by looking at the writ, on which it is stated that it was issued on the 2d of December 1831. The declaration was filed in 1833, and states this case as it really existed—that the defendant was indebted to the plaintiffs on the 7th of February 1832. If there was a valid objection to the declaration, it should have been made in the court below; it is now too late.

The objection is not maintainable on any grounds. The declaration sets out a good cause of action; the court gave the case to the jury on the declaration, and they pronounced a verdict upon it. Now, it is asked to go into the record, and to look at the writ and declaration, for matters not stated in the exception. Before this court, the plaintiff in error is estopped from this, by his exception. If an exception is not taken in the court below, it cannot be made in an appellate court; which will look at nothing but that which was presented to the judges in the circuit court, whose decision is brought up by exceptions for revision. 13 Johns. 576; 1 Sch. & Lef. 712; 1 Wend. 415.

After pleading, advantage cannot be taken of a variance between the writ and the declaration. 12 Johns. 434. That which is pleadable, can never be made available in error. If pleadable in abatement, it can only be after *oyer*. Chitty's Pleading. The writ constitutes no part of the record; the

case begins with the declaration. 1 Chit. Plead. 277–9; Steph. Plead. 68–9; *Duvall* v. *Craig*, 2 Wheat. 55; 11 Ibid. 388. The writ should not have been introduced into the record; it is no part of it. 1 Chitty 295.

Marshall, Ch. J., delivered the opinion of the court.—This case depends on the correction of an instruction given *by the circuit court to the *115] jury, at the trial of the cause, to which instruction the defendant in that court excepted.

The suit was instituted by the Washington, Alexandria and Georgetown Steam-Packet Company, for the hire of the steamboat Franklin, during the absence of the steamboat Sydney, the parties having disagreed with respect to the time for which the contract was made. After the testimony was concluded, the court instructed the jury, that if they "shall believe, from the evidence aforesaid, that the said defendant did, on the 19th day of November 1831, write to the said plaintiff, the said paper of that date, bearing his signature, and that the said plaintiff did accept the same, by the said paper of the same date, and that the said defendant and plaintiff did respectively write to each other the papers bearing date the 5th and 6th of December 1831, and that the said steamboat Sydney did, in fact, first arrive in Potomac river, on the 6th of February 1832, and was placed on the route to Potomac creek, mentioned in the said evidence, on the 7th of February 1832, that then the said plaintiff is entitled to recover, under said contract so proved as aforesaid, at the rate of $35 per diem, from the said 20th of November 1831, to the said 6th of February 1832, both inclusive." The defendant excepted to this instruction, and has sued forth a writ of error to the judgment, which was rendered on the verdict of the jury.

The original writ appears in the record, and bears date the 2d day of December 1831. It was returned executed, on the first Monday in December, that being the first day of the succeeding term, the day to which it was made returnable. The following entry was made on that day: "and the said William A. Bradley, being called, appears in court here, by Joseph H. Bradley, his attorney, and thereupon, the said William A. Bradley, by his said attorney, prays, that the plaintiffs may declare against him, the said defendant, in the plea aforesaid; whereupon, it is ruled by the court here, that the said plaintiffs declare," &c.

One objection taken by the plaintiff in error to the instruction given by the circuit court is, that they directed the jury to find damages for the hire of the steamboat Franklin, from the 20th of November 1831, to the 6th of February 1832, whereas, the suit was instituted on the 2d of December 1831.

*The counsel for the defendant does not contend, that the hire of the *116] Franklin could be estimated, or damages given, to any time posterior to the institution of the suit, but he insists, that the writ is only intended to bring the party into court, and unless spread on the record by pleading, is no part of it. Without entering into this inquiry, it is to be observed in the present case, that the defendant appeared in the circuit court, in December 1831, and gave a rule to declare. These facts are entered on the record and must be noticed. This court, therefore, cannot fail to perceive that the jury was instructed to give damages to a time long posterior to the institution of the suit.

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

Delassus v. United States.

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 Columbia, holden in and for the county of Washington, and was argued by counsel: On consideration whereof, it is adjudged and ordered 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 directions to award a *venire facias de novo.*

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*Charles Dehault Delassus, Appellant, *v.* United States. [*117

Missouri land-claims.—Spanish treaty.

A claim was made by C. D. D., by a petition filed in the district court of the United States for the district of Missouri, under the act of congress of 25th May 1824, "enabling the claimants to lands within the limits of the state of Missouri, and territory of Arkansas, to institute proceedings to try the validity of their claims;" the tract of land claimed was a league square, and was granted to the father of the petitioner, by Don Zenon Trudeau, lieutenant-governor of the province of Upper Louisiana, on petition addressed to him for that object; the decree for that purpose being dated 1st April 1795: the land was situated on a branch of the river St. Francis, &c.; the decree ordered the captain-commandant of the post of St. Genevieve to put the grantee in possession of the land, which was done on the 15th of the same month; it was surveyed on the 14th of December 1799. The petition stated, that all the laws for the preservation of his rights had been observed; that his father was dead, and the title vested in him, and prayed that it might be enforced; regular documents in support of the concession accompanied the petition; and among them, a letter from the Baron Carondelet, governor-general of Louisiana, recommended the grant to be made by the Lieutenant-Governor Trudeau, and stating that the object of the petitioner was to open lead-mines, and that he had contracted with the intendancy to deliver a quantity of lead; after the concession should be made by the lieutenant-governor, the grantee was to present a memorial to the governor-general to have a decree confirming the same. The district court of Missouri refused to confirm the grant, and the petitioner appealed to this court; the grant was confirmed, and the decree of the district court reversed.

The act of 25th May 1824, gives the district court authority to hear and determine all questions arising in any cause brought before it, by the petition of any person claiming lands within the state of Missouri, "by virtue of any French or Spanish grant, concession, warrant or order of survey, legally made or issued before the 10th day of March 1804, by the proper authorities, to any person or persons resident in the province of Louisiana, at the date thereof, and which was protected and secured by the treaty between the United States and France of the 30th of April 1803, and which might have been perfected into a complete title, under and in conformity to the laws and usages and customs of the government under which the same originated, had not the sovereignty of country been transferred to the United States."

The stipulations of the treaty ceding Louisiana to the United States, affording that protection or security to claims under the French of Spanish government to which the act of congress refers, are in the first, second and third articles; they extended to all property, until Louisiana became a member of the Union; into which the inhabitants were to be incorporated as soon as possible, "and admitted to all the rights, advantages and *immunities of citizens of the United States." The perfect inviolability and security of property is among these rights. [*118

The right of property is protected and secured by the treaty, and no principle is better settled in this country, than that an inchoate title to lands is property. This right would have been sacred, independent of the treaty; the sovereign who acquires an inhabited country, acquires full dominion over it; but this dominion is never supposed to divest the vested rights of individuals to property. The language of the treaty ceding Louisiana, excludes any idea of interfering with private property.

The concession to the petitioner was legally made by the proper authorities. A grant or conces-

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[1] For a further decision, resulting in another reversal, see 13 Pet. 89.

sion made by that officer, who is by law authorized to make it, carries with it *primâ facie* evidence that it is within his powers; no excess of them, or departure from them, is to be presumed; he violates his duty by such excess, and is responsible for it; he who alleges that an officer intrusted with an important duty has violated his instructions, must show it. The cases of the United States *v.* Arredondo, 6 Pet. 691; Percheman *v.* United States, 7 Ibid. 51; United States *v.* Clarke, 8 Ibid. 436, cited and approved.

The instructions of Governor O'Reilly, relative to granting lands in Louisiana, were considered by the court, in 8 Pet. 455; these regulations were intended for the general government of subordinate officers, and not to control and limit the power of the person from whose will they emanated; the Baron De Carondelet must be supposed to have had all the powers which had been vested in Don O'Reilly, and a concession ordered by him is as valid as a similar concession directed by Governor O'Reilly would have been.

The act of congress on which this case depends, contains no reservation of lead-mines; it extends the jurisdiction of the court to all claims, "by virtue of any French or Spanish grant, concession, warrant or order of survey, legally made by the proper authorities."

APPEAL from the District Court of Missouri. On the 18th of May 1829, Charles Dehault Delassus, legal representative of Pedro Dehault Delassus, under the authority of the act of congress, entitled, "an act enabling the claimants to lands within the limits of the state of Missouri, and the territory of the Arkansas, to institute proceedings to try the validity of their claims," filed in the office of the clerk of the district court of the United States for the district of Missouri, the following petition:

"To the Honorable the judge of the district court of the United States for the state of Missouri. Respectfully showeth, Charles Dehault Delassus, of the county of St. Louis, state of Missouri, that on the third day of March 1795, Don Pedro Dehault Delassus De Luzieres, *the father *119] of your petitioner, addressed his petition to Don Zenon Trudeau, lieutenant-governor of the province of Upper Louisiana, praying that a concession or grant should be made to him and his heirs, of a tract of land containing 7056 arpens, French measure, being a league square. That said lieutenant-governor, in compliance with said petition, and in obedience to an official instruction addressed to him by the governor-general of the province of Louisiana, the Baron of Carondelet, did, by decree bearing date the 1st day of April 1795 aforesaid, grant to said De Luzieres, and his heirs for ever, a tract of a square league, situated on a branch of the river St. Francis, called Gaboury, and by said decree, ordered François Vallé, the captain-commandant of the port of St. Genevieve, to put the said De Luzieres forthwith into possession of said tract, and also directed that said tract should be surveyed in due form, by the surveyor then about to be appointed for the province of Upper Louisiana. That on the 15th day of April, in the year aforesaid, the said De Luzieres was formally put into possession of said square league, by said François Vallé, in pursuance of said decree. That some time elapsed from the said delivery of possession until the appointment of a surveyor for said province of Upper Louisiana, and by which delay, and other unavoidable difficulties, the said De Luzieres was prevented from obtaining a survey of the said tract, until the 14th day of December 1799, on which day, the surveyor-general of Upper Louisiana, Don Antoine Soulard, in pursuance of an order to him specially directed by the lieutenant-governor of said province, surveyed said tract and located the same according to the terms of the above-mentioned decree of concession, and the possession delivered as aforesaid to said De Luzieres, all which will more fully appear by said original decree of the lieutenant-governor,

said official instruction of said governor-general, the certificate of delivery of possession by said François Vallé, the said order of survey by the lieutenant-governor ; and lastly, by the official return and certicate of survey by the surveyor-general, which certificate bears date the 5th day of March 1800, and which original documents are here brought into court, and ready to be produced and proved, and to which your petitioner begs leave to refer. That said De Luzieres, at the date of said decree of concession, and until his decease, *was a resident of the province of Upper Louisiana. [*120
Your petitioner further showeth, that said concession and claim thereunder having been submitted to the board of commissioners for the adjustment of Spanish and French land-claims, was rejected, on the ground, that the land intended in the said concession contained a lead-mine, and on no other. That said tract of a league square has been reserved from sale in the public land-office, until a decision shall be had thereon by the proper tribunal, and that said tract, as laid down on the general plat in the office of the register, is situated and bounded as follows, viz., beginning in the south-east quarter of section No. 25, township No. 35, north of range No. 5, east, at a post, a corner of John Capehart's survey, and runs thence S. 8° W., with Capehart's line, five chains, eighty-three links, to Capehart's and D. Murphey's corner ; sixty-four chains, sixteen links, to D. and S. Murphey's corner ; one hundred and seven chains, ninety-one links, to S. Murphey and Coen's corner ; one hundred and thirty-seven chains and forty-one links, to Coen and W. Murphey's corner ; two hundred and five chains and thirty-two links, to the south-west corner of W. Murphey's survey ; two hundred and forty-five chains, to a point in the north-west quarter of section No. 13, in township No. 35, north, of range No. 5, east ; thence N. 82° W. 245 chains to a point in the south-west quarter of section No. 9, in township No. 35, north, of range No. 5 ; N. 8° E. 245 chains, to a point in the south-east quarter of section No. 28, in township No. 36, north, of range No. 5, east ; thence S. 82° E. one hundred and sixty-three chains, ninety-eight links, to the south-west corner of Joseph Murphey's ; seventy-two hundred and thirteen chains and fourty-five links to Joseph Murphey's south-east corner, on the west boundary of John Capehart's survey ; thence S. 38° W., with Capehart's survey, one chain and thirty-two links to his south-west corner ; thence S. 82° E., with Capehart's line, thirty-one chains and fifty links, to the place of beginning. Your petitioner further showeth, that said league square, and all claim and title thereto, since the decease of said De Luzieres, who *departed this life some years since, has been legally vested in [*121
your petitioner, and that no part of said tract is occupied or claimed by any person or persons adverse to the claim or title of your petitioner. Wherefore, your petitioner prays that the validity of said concession and claim to confirmation of said tract may be inquired into, and decided upon by this honorable court, and that inasmuch as said concession and survey might have been perfected into a complete title, under and in conformity to the laws, usages and customs of the government under which the same originated, had not the sovereignty of the country been changed or transferred to the United States, your petitioner prays that his title and claim be confirmed to said league square, located and bounded as aforesaid. And your petitioner prays that a citation be directed to the district-attorney of the United States, requiring him to appear and show cause, if any he

can, why the confirmation prayed for by your petitioner should not be decreed to him. And your petitioner will ever pray, &c.

CHARLES DEHAULT DELASSUS."

The answer of the attorney of the United States was filed, at the June session 1829, of the district court; denied the allegations of the petitioner, and required proof of the same. At the January session of the court, in 1830, the district judge made a decree against the claim set forth in the petition; and this appeal was prosecuted by the petitioner.

The documents annexed to the petition were the following:

"To Don Zenon Trudeau, lieutenant-governor of the western part of Illinois, &c. Pierre Charles Dehault, knight, lord of Delassus Luzieres, and knight of the great cross of the royal order of St. Michael, residing in New Bourbon, dependency of the post of St. Genevieve, has the honor to represent, that when he was at the city of New Orleans, in May 1793, he resolved to come up in the Illinois country, on the positive assurance given him by his lordship, the Baron de Carondelet, governor-general of Louisiana, that he would order and authorize you to grant him a tract of land for the exclusive exploration of lead-mines, and of a sufficient and convenient extent for said exploration, provided *it should not be formerly granted to another; which warranty and assurances of the government are to be found formally expressed in a letter here subjoined, and directed to your petitioner by the said Baron, under the date of May 8th, 1793, and which you have been pleased to assure me was exactly conformable to the official letter you received on that subject from the governor-general. The long and cruel disease which your petitioner experienced, on his arrival in Illinois, in August 1793, the hostile threats of an invasion on the part of the French against the country, some short time after, the orders you gave to the inhabitants not to go to any distance from their post, and the care and trouble which, to your knowledge, I have taken in that time to countenance the wise and efficacious means you have taken so successfully in putting the posts of Illinois in a state of defence, in case of an attack, of which care, endeavor and zeal on my part, his lordship, Luis de la Casas, captain-general of Havana, being informed, I received from him a letter, bearing date May 20th, 1794, by which he gives me the most honorable evidence of his satisfaction, as appears by copy of said letter here subjoined. That the occurrence of several circumstances hindered your petitioner to make a search of a tract of land containing lead mineral; he now, with the assistance of his children and son-in-law, and persons acquainted with the country, visited a place situated on one of the branches of the river St. François, called Gaboury, in the district of St. Genevieve, and about twelve leagues from this post, which has not been yet granted, makes part of the king's domain, and where it is ascertained some mineral had been anciently dug, besides the external and internal appearance, according to the mineralogical principles, indicates that the spot contains lead mineral; therefore, your petitioner has resolved to try in that place a general exploration of lead mine: he is so much induced to prosecute such an undertaking, that he expects the arrival of his eldest son, now emigrated to Germany, who is well learned in mineralogy, having studied it particularly, and having been engaged in a similar branch in Europe with your petitioner, and will be very

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useful in exploring and conducting the one now solicited. Your petitioner flatters himself that you will not refuse to give this concession the extent of a league square, in order to secure the necessary fuel for the melting of *the mineral, and other necessaries; under these considerations, your petitioner humbly prays you, sir, that in conformity to the intentions of [*123 the government, manifested in the subjoined letters, of which you have been notified by the governor-general himself, you have been pleased to grant for himself, his heirs and assigns, in full property, the concession of a league square of land, situated on said branch of river St. François, called Gaboury, in the district of St. Genevieve, with the exclusive right to explore the lead-mines in the same, to cultivate and raise cattle on the said land, if necessary; in so doing, your petitioner will ever pray, &c.

"New Bourbon, March 3d, 1795. DELASSUS DE LUZIERES."

"St. Genevieve, Illinois, March 10th, 1795.

"We, the commandant of said post do inform the lieutenant-governor, that the concession demanded in the within petition, is part of the king's domain, and has not been granted to anybody, and that is extent fixed to a league square, is indispensable and necessary to secure the timber for melting of mineral and other necessary supply. FRANÇOIS VALLÉ."

"To Zenon Trudeau.

"The Knight Don Pierre Dehault Delassus, has entered into contract with this intendancy, to deliver yearly, during the term of five years, thirty thousand pounds of lead in balls or bars. In order that he may comply with his contract, your worship will put him in possession of the land he may solicit, for the exploration, benefit and enjoyment of the mines; for which purpose, he is to present a memorial, directed to me, and which your worship will transmit, that I may give him the corresponding decree of concession, being understood, in the meantime, your worship will put him in possession. God preserve your worship many years!

"New Orleans, May 7th, 1793. EL BARON DE CARONDELET."

"To Mr. Dehault Delassus:—I send you back the primitive titles of the concession granted *Mr. François Vallé, of St. Genevieve, who transferred to Mr. Dodge, one moiety of which this last ceded to Mr. [*124 Tardiveau, who made a gift of it to your brother, with the approbation and advice you desired. By this opportunity, I write to Mr. Zenon Trudeau, to grant you the land where you will have made a discovery of lead-mines, with adjacent lands of sufficient extent for their exploration; provided, nevertheless, that it should not be conceded to another. Your son-in-law and your sons, shall have also, as you desire, a plantation in any place they will select in Illinois, of an extent proportionate to the establishment and improvement they propose to make. This is my answer to your letter No. 3. God have you in his holy keeping!

"New Orleans, May 8th, 1793. EL BARON DE CARONDELET."

"Sir Don Peter Dehault Delassus de Luzieres:—The Baron de Carondelet, governor-general of this province, has manifested to me, in his letter of the 27th of February last, the zeal and activity with which your lordship (although laboring under a weak state of health) has manifested in exciting

the inhabitants and Indians to join in the common defence of those settlements, and more particularly the post under your command. I do hope that your worship will continue with the same efficaciousness in similar circumstances, and give me an opportunity to reward your worship. God preserve your worship many years! LUIS DE LA CASAS."

"Havannah, May 20th, 1794.

"St. Louis, Illinois, April 1st, 1795.

"Decree.—Having read the present petition, the subjoined of the Baron De Carondelet, directed to the petitioner, under the date of May 1793, also the official letter to us directed by said governor-general, authorizing and giving us order to grant the petitioner a concession in the spot selected by him, and of a sufficient extent to explore exclusively the lead mines in the same; also the above information of the commandant of St. Genevieve, by which he testifies that the land petitioned for is *in the king's domain, *125] and that it is indispensable that the quantity should be a league square; we, the lieutenant-governor, in conformity with said orders and intentions of the government, have granted, and do grant unto the petitioner, and to his heirs and assigns, in fee, the concession demanded, situate on a branch of the river St. François, called the Gaboury, in the place selected by him, the extent of which shall be a league square, to the end that he may explore exclusively the lead-mines belonging to the same, and, if necessary, to cultivate and raise cattle; hereby commanding Don François Vallé captain and commandant of St. Genevieve, in whose district the land is situated, to put the petitioner in possession thereof, the regular survey of which will be done as soon as a surveyor will be appointed and commissioned for the Upper Louisiana. ZENON TRUDEAU."

"St. Genevieve, Illinois, April 15th, 1795.

"We, Don François Vallé, captain-commandant, civil and military, of the post of St. Genevieve, in compliance with the foregoing decree of Don Zenon Trudeau, lieutenant-governor of the western part of Illinois, bearing date the 1st instant, have this day, the 15th of the same month, put the knight Peter Delassus De Luzieres in possession of a league square of land, situated on a branch of the river St. François, called Gaboury, as granted to him by the aforesaid decree, conformably to orders, and with the approbation of his lordship, the governor-general of this province. The said concession, in future, to be regularly surveyed by the king's surveyor, who is soon to be named and appointed for this upper colony.

FRANÇOIS VALLÉ."

"To Don Charles Dehault Delassus, colonel of the royal armies, and lieutenant-governor of Upper Louisiana. Humbly petition Peter Charles Dehault Delassus De Luzieres, knight, &c., residing in New Bourbon, and has the honor to represent, that in conformity to orders of the governor of this province, your predecessor, Don Zenon Trudeau, did grant to your petitioner a concession of a league square of land, situate *on a branch *126] of the river St. François, called Gaboury, with the exclusive right to explore the lead-mines on the same, as appears by his decree bearing date April 1st, 1795, of which concession and land your petitioner was put in possession by Don François Vallé, captain-commandant of the post of St.

Genevieve, in whose district the land is situated, as appears by his act, bearing date the 15th day of April of said year; and whereas, it is mentioned in said decree of Don Zenon Trudeau, that said concession will be regularly surveyed by the surveyor who has to be appointed by the government for Upper Louisiana; and whereas, Don Antoine Soulard has been commissioned and appointed as such surveyor: therefore, under these considerations, your petitioner requests you, sir, that after mature consideration of the instruments here submitted, relating to said concession, you be pleased to give the necessary orders to Don Antoine Soulard, surveyor of Upper Louisiana, to proceed without delay to the regular survey of said concession of a league square, on the said branch of the river St. François, called Gaboury, to explore, exclusively to any other, the land, &c., and of which land he has been already put in possession by the commandant of St. Genevieve, and has already begun the exploration; he hopes to obtain his demand, inasmuch as he did not hurry the surveyor, in order to give him the necessary time to attend to the surveying of concessions belonging to other inhabitants, who wished to have their surveys quickly executed. In so doing, you will do justice. PIERRE DELASSUS DE LUZIERES."

"New Bourbon, November 25th, 1799.

"By virtue of the contents of the above memorial and the accompanying documents, and also from what it appears by the official letter of the Baron De Carondelet, late governor of these provinces, bearing date the 7th and 8th of May, 1793, on file in these archives, the surveyor, Don Antoine Soulard, will survey the league square of land which was granted to the party interested, by the decree of my predecessor, the lieutenant-governor, Don Zenon Trudeau, dated 1st April 1794, conformably to orders of his lordship, the governor; and of which land he has been put in possession, as appears by decree of François Vallé, commandant *of St. Genevieve, [*127
bearing date April 15th, of the year last mentioned, to be hereafter surveyed by the surveyor of this upper Louisiana, when appointed and commissioned. CHARLES DEHAULT DELASSUS."

"St. Louis, November 29th, 1799.

On the 6th of March 1800, Anthony Soulard, principal deputy-surveyor of Upper Louisiana, certified, that on the 14th of December 1799, he made a survey and return of the land claimed by the petitioner, in virtue of the decree of the 29th of November 1799.

The case was argued by *White*, for the appellant; and by the *Attorney-General*, for the United States.

White, for the appellant, submitted the following points.—1. That this is a valid Spanish concession, made in obedience to the orders of the superior officers of the crown of Spain; and in conformity with the laws of Spain. 2. That it is a claim protected by the treaty, and entitled to confirmation under the treaty and laws of the United States.

This was a petition in equity, presented under the act of 1824, authorizing claimants to lands under French and Spanish titles in Missouri, to institute proceedings to try the validity of their titles. The decision of the court below was against the title of the appellant here, who was the petitioner in that court. The grounds upon which the title was rejected neec

not be stated, further than the recital in the judge's opinion and decree, which appears to be a *formula*, reduced to words applicable to, and employed in, every case presented to him. The claim of the appellants, like all the rest, is rejected, because it is not made in conformity to the ordinance transferring the jurisdiction and power of conceding and distributing lands, and the regulations made under it, in 1798 and 1799, to the *intendencia* of the province of Louisiana. The title of the petitioner originated in the year 1795 ; and it is not, assuredly, a valid objection to it, that it was not made by an authority created in 1798, and according to forms prescribed for the grant and concession of lands in 1799.

The royal order of 1798, and the regulations of the intendant Morales, published on the 17th of July 1799, have no application whatever to this case, and need not be further considered in the argument or decision of it. The rules and principles by which all the cases depending in this court, from Missouri, under the act of 1824, are to be decided, will be found in the first and second sections of that act. Clarke's Land Laws 871. 1. The laws of nations: 2. The stipulations of a treaty: 3. The proceedings under the treaty : 4. The laws and ordinances of France or Spain.

In regard to the first, the law of nations, it has been considered in the cases of *Arredondo*, *Percheman* and *Clarke*, under a similar law, and the principle has been established ; that it is a universal principle recognised and acknowledged by all civilized states, that the property of the inhabitants of a conquered or ceded province is not affected by the change of sovereignty or dominion ; and that the law of nations, as applied to the interpretation of treaties, in favor of individuals, is to be classed among things favorable, and therefore, liberally expounded.

The stipulations of the treaty refer only to the second article of the cession of Louisiana ; in which *pro formâ*, private property is reserved in the general transfer of the sovereignty, dominion and public domain of the government making the cession. Property has been defined by this court to be every species of title, legal and equitable, perfect and inchoate, existing at the time of the treaty. It will not be contended, that the title, under which the petitioner claims in this case, is a full and complete grant ; but it will be contended, that it was held, at the time of the transfer to the United States, by an equitable title, which constituted in the petitioner a right of property, protected by the laws of nations and the treaty, which might have been consummated by complete grant ; and ought to be confirmed.

The proceedings under the treaty, and the several acts of congress in relation to the same, mean nothing more than the legislative construction of congress upon that instrument ; and the principles settled in the establishment of other claims of a similar character. The laws and ordinances of Spain are perhaps the most difficult to be ascertained of the several rules by which this court is to be guided, in its decision of these questions. The laws of all foreign countries are in a great measure inaccessible to, and difficult to be comprehended by, the courts of any other country. They consist of positive enactments, proclamations, letters of instruction, customs and usages, which often differ in the different provinces of the same country. In absolute governments, where the will of the prince is the law, it is still more difficult ; and though power always loves to consider itself infallible,

it is too often exhibited in the inconsistences of caprice, and the wantonness of arbitrary authority.

In this particular case, however, passing over the presumption arising from the act of a foreign officer, that it is to be considered legitimate, and not a usurpation, which imposes on the appellee the obligation of showing the want of authority in the granting officer; it is easy to show, in this particular case, that he was vested with competent power to make the cession in question. To explain the condition of that district of country, known formerly as Louisiana, and now embracing two states and one territory, will require a brief historical view of them, prior to 1803.

By the secret treaty of 1762, between France and Spain, all the territory west of the Mississippi river, including the island of New Orleans, was ceded to Spain, and designated as the colony of Louisiana, which cession was confirmed in the definitive treaty of 1763. Spain did not signify her acceptance of this province, until 1764. In the year following (1765), Don Antonio de Ulloa was appointed governor-general, and his instructions from the council of the Indies, were, to continue the laws in force in the province, which were then the laws of France. The colonists resisted the establishment of the Spanish authority; and on the 29th of October 1768, Lieutenant-General O'Reilly was commissioned by the king to proceed to the province, to suppress the insurrection, punish the rebels, and to organize the government. This lieutenant-general took possession of the province, visited various posts and commandancies, established Don Louis de Upzaga in the government, and returned to Spain. Lieutenant-General O'Reilly, upon his return to San Ildefonso, was directed to submit to the council of the Indies his plans of government for the province; and on the 18th of February 1770, he drew up some regulations for the concession of lands, which were approved by the king, on the 24th of March 1770. The first six articles of these instructions are confined to Lower Louisiana; the eighth and ninth, to Opelousas and Attacapas. The ninth contemplates a larger grant than of a league square; as to the quantity under that, there can be no question. It is doubtful, whether these instructions extended to St. Louis of Illinois, now Missouri; to the decision of this case, they are immaterial. The first six articles being confined to the Mississippi, it follows, that the power to grant to the same extent in Illinois existed, as that in Opelousas; and this claim being within the limit, is a valid order of survey or concession.

The royal order of the 28th of January 1771, incorporates Louisiana into the king's dominions on a footing with his other transatlantic possessions, and adopts the laws of the Indies. These laws, upon the principle that *leges posteriores priores abrogant*, control so much of O'Reilly's regulations as are inconsistent with them, being subsequent in date to the royal *cedula* which gave these regulations the force of law. Lieutenant-General O'Reilly drew up five sets of instructions for the government of Louisiana, as appears from a report of the council of the Indies, dated 27th February 1772; in which report they were recommended for the royal approbation, and were approved by a *cedula* of the king, on the 23d of March 1772. The commission of the governor and captain-general Galvez in 1779, refers to a *cedula* approving of one of O'Reilly's regulations, on the 21st of July 1776; from which it would appear, that all of the plans projected by Lieutenant-

General O'Reilly, were not approved until 1776. There is a slight error in the translation of a royal order, in White's Compilation 152, referring to *three* sets of instructions for the government of St. Louis de Illinois. The word *las* has been mistaken for *tres*, and it should be read *the* instructions instead of *three* instructions. This is shown by a correct copy recently obtained from Spain.

It may be important, in other cases, to inquire, whether these instructions for Illinois are the same as those of 1770 in other cases ; and, whether those for Upper Louisiana were not more liberal ; but in this case, it is unnecessary. The effect too of the introduction of the laws of the Indies in 1772, and the ordinance of 1786 upon grants as gratuities, and for services, will be more properly considered when such cases are on trial. The commissions of Galvez and Miro show that the offices of governor and intendant were united in the same officer. They were divided at the instance of the Baron De Carondelet. The power of conceding lands was vested in the civil and military governors, until 1798, when it was transferred to the intendant. The lieutenant-governor of St. Louis de Illinois, after 1798, stood in the same relation to the intendant, as sub-delegate, as he had previously done to the governor-general, as deputy.

Whether this title is to be considered under the general laws of Spain, with the presumption arising from the concession or not, or whether it be considered under O'Reilly's instructions ; being proved to be genuine, it must be confirmed. Cited in argument, Ordinance of 1754 ; Ordinance of 1786 ; Leyes de Espana, tit. Residencia ; Ordinance directing Report of deputy-governors ; Laws Indies ; White's Com. 57, 58, 35 ; Royal order for delivery of Louisiana, White's Com. 162 ; Treaty for cession of Louisiana, White's Com. 168.

Butler, Attorney-General.—The object of the argument on the part of the United States in this case, will be rather to lay before the court such views of the nature and extent of the titles set up in the cases which are before the court, by appeal from the district of Missouri, as are applicable to all these cases, than to resist the present case, which appears to be founded on equity, and in which, unless the documents are not genuine, or the court shall be compelled by some strict rule of law, the court will reverse the decree of the district court. The documents in the case show great merit in the claimant ; who, in consideration of this merit, and of a contract to *furnish a certain quantity of lead to the governor of Louisiana, was recommended to the special favor of the lieutenant-governor. This is shown by the letter of the Baron De Carondelet.

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The court will observe, that as to all action in the case by the governor-general, the title of the claimants stops at these letters. There is not shown any application to the governor-general for a complete grant. The decision of the district judge was, that no complete grant was exhibited, and that the claim rested on an inchoate and imperfect title.

As to the first point presented by the counsel for the appellant, it is necessary to explain, what is intended by the United States, when it is said, this is not a valid concession. It is denied, that the lieutenant-governors of Upper Louisiana had a right to grant land in Upper Louisiana. Although the commandant of St. Louis and St. Genevieve might not have been sub-

ordinate in other matters, yet he was, in reference to the grant of lands, subordinate to the governor-general of Louisiana, and in some respects subordinate to the governor-general of Havana. The supreme authority of the governor-general is fully established by the documents in this and the other cases before this court, on appeal from the district court of Missouri. The lieutenant-governors could not grant lands, without special authority from the governor-general. An express reference is made in the grant of Don Zenon Trudeau, to the authority given to him by the letter of the Baron De Carondelet. That letter states, that a memorial is to be presented by Mr. Delassus to the Baron De Carondelet, that a corresponding concession may be given to him. This clearly asserts the power to be in the governor-general; although it allows possession to be given of the lands for a concession, and negatives the authority of the lieutenant-governor to make a full grant.

The records in other cases, the examination of which will follow this now under consideration, will show the general understanding and practice of the officers of Spain in granting lands, and fully sustain the positions now assumed.

In 1798, the power to grant lands was transferred from the governor-general of Louisiana to the intendant. After the *transfer, the [*129
lieutenant-governor of Upper Louisiana acknowledged this transfer, and the obligation to apply to the intendant for the completion of grants; in the same manner as was before required to apply to the governor-general. This is fully established by the records in other cases before the court, and by repeated recognitions shown in state papers.

As to the second point presented by the counsel for the appellant, that there was a complete grant made to the appellant, it is not intended to deny, that if such a grant had been made, it was the duty of the court below and of this court to confirm the title. All the principles which have been decided in the cases of Spanish grants, which have been before this court, are not to be questioned. These decisions are sustained as well by the principles of international law, as by the treaty. It has been finally settled, that a claim for lands, founded on and conformable to the laws of Spain, if of such a character as that, by the laws of Spain, it would have ripened into a perfect title, will be confirmed by this court.

What is the real question in the case now under the consideration of the court? Certain regulations were made in 1770, by Don O'Reilly, which were intended to govern the granting of lands in all Louisiana; and these regulations were confirmed by a royal order of the King of Spain. White's Land Laws 204; Clarke's Land Laws 978. This confirmation was given on the 28th of January 1771. Documents relative to Louisiana and Florida 3. It will, therefore, be no longer disputed, that in the whole of Louisiana, these regulations were in full force, and applicable to the granting of lands, until they were altered.

The difficulty in this case grows out of the discrepancy of the grant, and the regulations of O'Reilly. The point intended now to be submitted, is, whether the lieutenant-governor of Illinois could make a larger grant than a league square. The grant does not conform to these regulations, and as they were in force, the grant would not have been confirmed under the laws of the Indies; and was, therefore, void, as against the United States.

It is said, that the governor-general of Louisiana had been in the habit
*130] of confirming grants which were not in conformity *with these regulations. This is admitted. When this case was decided by the district judge of Missouri, the cases of *Arredondo* and of *Percheman* had not been decided; and it was not, until the decisions in these cases, considered, that an equitable title was sufficient to entitle a claimant to a confirmation of his grant. The proceedings below were founded on the law of congress of 1824. (4 U. S. Stat. 52.) The district judge decided in the language of the law; and it is contended, that although an inchoate grant is shown in this case, yet, as it was in opposition to the regulations of O'Reilly, he could not do otherwise.

It is admitted, that although this grant does not conform to these regulations, yet grants of this kind have been confirmed by the Spanish authorities; and if this is a case within the same principles, this grant must be confirmed. But if the court hold the regulations of O'Reilly were the only authority to make such a grant, it will affirm the decree of the district judge. The act of congress gave powers to the commissioners to confirm grants, except those having lead-mines upon them. But the claim now before the court, is under the treaty with France, making a cession of Louisiana; and the court will decide whether the exception in the law can prevail against the treaty. The principal reliance of the United States to sustain the decree of the court below, is upon the non-conformity of the grant with the regulations of Don O'Reilly.

White, in reply.—The attorney-general admits that this is a genuine order or survey, dated in 1795, and that there is no evidence to impeach its date, or that the act, such as it purports to be, was duly executed at the date specified. He insists, that the lieutenant-governor of Upper Louisiana, or St. Louis of Illinois, was subordinate to the governor-general of Louisiana. It is admitted, on the part of the appellant, that he was subordinate to the governor-general; but *non constat*, that he had not authority to make the order of survey and concession. The governor-general himself (as all the transatlantic authorities were) was subordinate to the king; and it might with equal propriety be contended, that no grant was good, unless it emanated from the crown. Such a position, if maintained, would vitiate every title in upper or lower Louisiana.

He admits, that an order of survey and possession under it constitutes property; and as property is protected by the treaty, it must be conceded, that the claim of the appellant is embraced by the treaty, and entitled to confirmation. The distinction attempted to be drawn between incomplete titles and imperfect ones, or between full grants and inchoate titles, has been considered and rejected by this court. The correct principle of decision by the American government of Spanish titles, must be a recognition of perfect, and a completion of imperfect titles; as they would have been consummated by the former government, if the sovereignty had not been transferred to the United States. It cannot be denied, that the governor-general would have approved and confirmed this concession. The United States, taking the place of Spain, are bound, in the same manner, to ratify and confirm it, and that duty has been assigned by congress to this court.

It has been shown, that in all similar cases where applications were made

to the governor-general, he invariably gave a title in form, or confirmatory grant. He could not refuse, because, by the ordinance of 1786, the deputy-governors were subjected to the *residencia;* which was the account given to the council of the Indies of the administration of their governments. They were required, equally with the governors, to make a regular report of their proceedings; and if the governor-general refused his approval, the party was entitled to his appeal. There is no instance in which such a confirmation was ever refused.

There was no law of Spain which forbade the concession of a lead-mine; and the act of congress which interdicted the confirmation of such a title, was in violation of the treaty and of the constitution. Cited, various documents, commissions and *cedulas* recently received from Seville, in Spain, certified by the American minister.

Marshall, Ch. J., delivered the opinion of the court.—This is an appeal from a decree pronounced by the court of the United States for the district of Missouri, by which the claim and title of the petitioner, Charles Dehault Delassus, to a tract of land in his petition mentioned, under a concession alleged to be authorized by the laws of Spain, and protected by the treaties ceding Louisiana to the United States, was declared to be invalid. The suit was instituted under the act of the 25th of May 1824, "enabling the claimants to lands within the limits of the state of Missouri, and territory of Arkansas, to institute proceedings to try the validity of their claims."

*The petition, which is the institution of the suit, states, that on the 3d of March 1795, Don Pedro Dehault Delassus De Luzieres, [*131 father of the petitioner, addressed his petition to Don Zenon Trudeau, lieutenant-governor of the province of Upper Louisiana, praying that a concession or grant should be made to him and his heirs, of a tract of land containing 7066 arpents, French measure, being a league square. That said lieutenant-governor, in compliance with said petition, and in obedience to an official instruction addressed to him by the governor-general of the province of Louisiana, the Baron Carondelet, did, by decree bearing date the 1st of April, in the year 1795, grant to the said De Luzieres and his heirs for ever, a tract of a square league, situated on a branch of the river St. François called Gaboury, and by said decree, ordered François Vallé, the captain-commandant of the post of St. Genevieve, to put De Luzieres forthwith in possession of said tract of land, which was done on the 15th of the same month. A delay in the appointment of a surveyor for the province, prevented the survey from being immediately made; it was made on the 14th of December 1799. The petitioner proceeds to state, that the requisites of the laws for the preservation of his right had been observed, that his father is dead, and the title is vested in the petitioner. He prays that his title and claim be confirmed. The answer of the district-attorney professes ignorance of the facts; and insists that the petitioner be required to prove the validity of his claim.

The petition of Pierre Charles Dehault Delassus De Luzieres, presented to Don Zenon Trudeau, lieutenant-governor of the western part of Illinois, &c., states, that in May 1793, he resolved to come to Illinois, on the assurance of his lordship, the Baron De Carondelet, governor-general of Louisiana, that he would order and authorize him, the said Don Zenon Trudeau,

the lieutenant-governor, &c., to grant him, the petitioner, a tract of land for the exclusive exploration of lead-mines, &c., which assurance is fully expressed in a letter annexed to the petition, which, he adds, conforms to a letter addressed to the lieutenant-governor on the same subject. The petition then ascribes the delay in its presentation to long and severe illness, and
*132] to the difficulty of finding a tract of land adapted to the *object. This being at length accomplished, and having found a spot indicating that it contains lead mineral, on one of the branches of the river St. François called Gaboury; the petitioner prays a concession thereof to the extent of a league square.

The letter of the Baron De Carondelet is in these words:

"The Knight Don Pierre Dehault Delassus has entered into contract with this intendancy to deliver yearly, during the term of five years, thirty thousand pounds of lead, in balls or bars. In order that he may comply with his contract, your worship will put him in possession of the land he may solicit, for the exploration, benefit and enjoyment of the mines; for which purpose, he is to present a memorial directed to me, and which your worship will transmit, that I may give him the corresponding decree of concession; being understood in the meantime your worship will put him in possession. God preserve your worship many years!

"To Zenon Trudeau. EL BARON DE CARONDELET."

"New Orleans, May 7th, 1793."

Other letters from the Baron De Carondelet, sustaining that above recited, were annexed to this petition; and on the 1st of April 1795, Zenon Trudeau, the lieutenant-governor of the province, granted the required concession. The regular documents to prove the survey, and the possession of the premises by Delassus, were also laid before the district court.

The act of the 26th of May 1824, gives the district court authority to hear and determine all questions arising in any cause brought before it by the petition of any person claiming lands within the state of Missouri, "by virtue of any French or Spanish grant, concession, warrant or order of survey, legally made, granted or issued, before the 10th day of March 1804, by the proper authorities, to any person or persons resident in the province of Louisiana at the date thereof, or on or before the 10th day of March 1804, and which was protected or secured by the treaty between the United States of America and the French Republic, of the 30th day of April 1803, and which might have been perfected into a complete title, under and in
*133] *conformity to the laws, usages and customs of the government under which the same originated, had not the sovereignty of the country been transferred to the United States."

In the first article of the treaty referred to, the Consul of the French Republic ceded to the United States, in full sovereignty, the province of Louisiana, with all its rights and appurtenances. The second article declares, that in this cession "are included the adjacent islands belonging to Louisiana, all public lots and squares, vacant lands, and all public buildings, fortifications, barracks and other edifices, which are not private property." The third article stipulates, "that the inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted, as soon as possible, according to the principle of the federal constitution, to

the enjoyment of all the rights, advantages and immunities of citizens of the United States; and in the meantime, they shall be maintained and protected in the free enjoyment of their liberty, property and the religion which they profess."

These are the stipulations which afford that protection or security to claims to land under the French or Spanish government, to which the act of congress refers. They extend to all property, until Louisiana shall become a member of the Union; into which the inhabitants are to be incorporated as soon as possible, "and admitted to all the rights, advantages and immunities of citizens of the United States." That the perfect inviolability and security of property is among these rights, all will assert and maintain. The right of property, then, is protected and secured by the treaty; and no principle is better settled in this country, than that an inchoate title to lands is property.

Independent of treaty stipulation, this right would be held sacred. The sovereign who acquires an inhabited territory, acquires full dominion over it; but this dominion is never supposed to divest the vested rights of individuals to property. The language of the treaty ceding Louisiana excludes every idea of interfering with private property; of transferring lands which had been severed from the royal domain. The people change their sovereign; their right to property remains unaffected by this change.

The inquiry then is, whether this concession "was legally *made by the proper authorities;" "and might have been perfected into a [*134 complete title, under and in conformity to the laws, usages and customs of the government under which the same originated, had not the sovereignty of the country been transferred to the United States?" The concession was made in regular form, on the 1st of April 1795, by Zenon Trudeau, lieutenant-governor of the western part of Illinois, in which the land lay, by special order of the Baron De Carondelet, governor-general of the province; given in consequence of a contract entered into by De Luzieres with the government for the supply of lead. By the royal order of 1774, the power of granting lands, which had been vested in the intendants, by an order of 1768, was revested in the civil and military governors of provinces, who retained it till 1798. White's Compilation 218. In the execution of this power, the lieutenant-governors or commandants of posts, as is fully shown by the proceedings before the various tribunals appointed under the authority of the United States, were employed to make the original concession and order of survey, and to put the grantee into possession. In 1795, then, when these acts were performed by the lieutenant-governor, under the authority and by the special order of the governor-general, those officers were "the proper authorities;" and had full power to make the concession, and to perfect it by a complete title. Who can doubt, that it would have been so perfected, "in conformity to the laws, usages and customs of the Spanish government, had not the sovereignty of the country been transferred to the United States?"

A grant or a concession made by that officer, who is by law authorized to make it, carries with it *primâ facie* evidence that it is within his power; no excess of them, or departure from them, is to be presumed; he violates his duty by such excess, and is responsible for it. He who alleges that an officer intrusted with an important duty has violated his instructions, must

show it. This subject was fully discussed in *United States* v. *Arredondo*, 6 Pet. 691; *Percheman* v. *United States*, 7 Ibid. 51; and *United States* v. *Clarke*, 8 Ibid. 436. It is unnecessary to repeat the arguments contained in the opinions given by the court in those cases.

*135] *The concession is unconditional; the land was regularly surveyed, and the party put into possession. The objection made to this plain title is, that the concession is not made in pursuance of the regulations of O'Reilly. This objection was considered in the cases heretofore decided by this court, and especially in 8 Pet. 455. It is apparent, that those regulations were intended for the general government of subordinate officers; not to control and limit the power of the person from whose will they emanated. The Baron De Carondelet, we must suppose, possessed all the powers which had been vested in Don O'Reilly; and a concession ordered by him is as valid as a similar concession directed by Governor O'Reilly would have been. Had Governor O'Reilly made such a grant, could it have been alleged, that he had disabled himself by his instructions for the regulation of the conduct of his subordinate officers—instructions which the power that created must have been capable of varying or annulling—from exercising the power vested in him by the crown?

The lead-mine has been mentioned. But the act of congress, on which this case depends, contains no reservation of the lead-mines. It extends the jurisdiction of the court to all claims, "by virtue of any French or Spanish grant, concession, warrant or order of survey," legally made by the proper authorities, &c. This is such a concession.

The court is of opinion, that the claim of the appellant is valid, and ought to be confirmed. The decree of the district court is reversed and annulled; and this court, proceeding to pronounce such decree as the district court ought to have given, doth declare the claim of the petitioners to be valid; and doth confirm their title to the tract of land in their petition mentioned, according to the boundaries thereof, as described in the survey made by Antonio Soulard, principal deputy-surveyor of Upper Louisiana, on the 14th day of December 1799, and his certificate of the said survey, dated the 5th of March 1800, and appearing in the record of the proceedings of this cause.

This cause came on to be heard, on the transcript of the record from the

*136] district court of the United States for the district *of Missouri, and was argued by counsel: On consideration whereof, this court is of opinion, that the claim of the appellant is valid, and ought to be confirmed. Whereupon, it is ordered, adjudged and decreed by this court, that the decree of the said district court in this cause be and the same is hereby reversed and annulled; and this court, proceeding to pronounce such decree as the said district court ought to have given, doth declare the claim of the petitioner to be valid; and doth confirm his title to the tract of land in his petition mentioned, according to the boundaries thereof, as described in the survey made by Antonio Soulard, principal deputy-surveyor of Upper Louisiana, on the 14th day of December 1799, and his certificate of the said survey, dated the 5th of March 1800, and appearing in the record of the proceedings of the cause.

*Auguste Chouteau's Heirs *v.* United States.

Missouri land-claims.

A concession of land was made by the lieutenant-governor of Upper Louisiana, at the time when the power of granting lands was vested in the governors of provinces; this power was, in 1799, after the concession, transferred to the intendant-general; and after this transfer, in January 1800, the order of survey of the land was made by the lieutenant-governor. The validity of the order of survey depends on the authority of the lieutenant-governor to make it; the lieutenant-governor was also a sub-delegate, and as such was empowered to make inchoate grants. The grant was confirmed.

The transfer of the power to make concessions of lands belonging to the royal domain of Spain, from the governor-general to the intendant-general, did not affect the power of the sub-delegate, who made this concession. The order in this case is the foundation of title, and is, according to the act of congress on the subject of confirming titles to lands in Missouri, &c., and the general understanding and usages of Louisiana and Missouri, capable of being perfected into a complete title; it is property, capable of being aliened, of being subjected to debts; and is, as such, to be held as sacred and inviolate as other property.

Appeal from the District Court for the district of Missouri. On the 18th of May 1829, the following petition, with the documents therein referred to, was presented by the appellants to the district court of the United States for the district of Missouri.

"To the Honorable the District Court of the United States for the district of Missouri. The petition of Auguste A. Chouteau, Gabriel Ceré Chouteau, Henry Chouteau, Edward Chouteau, Eulalie Paul and René Paul, husband of said Eulalie, Louise Paul and Gabriel Paul, husband of said Louise, Emilie Smith and Thomas F. Smith, husband of said Emilie, respectfully showeth, that in the year 1799, Auguste A. Chouteau, deceased, late of St. Louis, the father of your petitioners, applied to and obtained permission from the government then existing in Upper Louisiana, to establish a distillery, in or near the town of St. Louis, as will more fully appear by the petition and order thereon, dated the 5th of November 1799, and 3d of January 1800, *which are herewith shown to the court and prayed to be taken as part of this petition, marked No. 1; that on the 5th day of January [*138 1800, said Auguste Chouteau presented his petition of that date to the lieutenant-governor of the province of Upper Louisiana, praying that a tract of land, containing 1281 arpents, superficial measure of Paris, situated near the town of St. Louis, bounded on the north by a tract granted to Doctor John Watkins, on the south and on the west, by the lands of the third line of concessions, should be granted to the said Auguste Chouteau and his heirs, for the purpose of enabling said Auguste Chouteau to obtain a sufficient supply of fire-wood for the distillery aforesaid; that on the same day, to wit, the 5th of January 1800, the said lieutenant-governor made his decree conformably to the prayer of said petition, whereby said lieutenant-governor directed and ordered that the surveyor of the said province, Don Antonio Soulard, should put the said Auguste Chouteau in possession of the said tract of 1281 arpents, in the place indicated and demanded, to the end that said Auguste Chouteau might afterwards obtain the complete title thereto from the governor-general, all which will appear by said petition and decree, now here produced, marked No. 2, and which petition and decree is prayed to be taken as part of this petition; that afterwards, in obedience to said decree, to wit, on the 5th day of March 1801, the said surveyor, Don

Antonio Soulard, delivered the possession of said tract to said Auguste, and executed a survey and plat of survey thereof, as will more fully appear by the said plat and certificate of survey, bearing date the 10th of April 1801, now here produced, marked No. 3, and which said plat and certificate were recorded in book A, p. 43, No. 82, in the office of said surveyor, as by reference to the said certificate, and to said record in the office of the surveyor of this district, will appear; that said decrees, so made by said lieutenant-governor, were made in pursuance of the special instruction given by the governor-general of Louisiana, Don Manuel Gayoso De Lemos, to said lieutenant-governor, to favor and forward the aforesaid undertakings of said Auguste Chouteau, as will appear by the letter of said governor-general, addressed to said Auguste Chouteau, under date the 20th of May 1799, in
*139] answer to an application made by said Auguste *Chouteau to said governor-general, as will appear by reference to said original letter, herewith exhibited, marked No. 4, and prayed to be taken as part of this petition; that by virtue of said decrees, survey and delivery of possession, said Auguste occupied and enjoyed said tract, so granted, as the lawful proprietor thereof, from the date of said delivery of possession, until the decease of said Auguste Chouteau; that said Auguste, during his life, did, in conformity to the acts of congress in that case made and provided, submit his claim to said tract, derived as aforesaid, to the board of commissioners heretofore created for the settlement and adjudication of French and Spanish land-claims in Upper Louisiana; that said board rejected said claim, on the sole ground, that a tract of a league square having been already confirmed to said Auguste Chouteau, the board had not power, under the law, as it then stood, to confirm to said Chouteau any greater quantity; and your petitioners show that said board, for the purpose, as it is supposed, of testifying their sense of the merits of said claim, did cause to be indorsed on the back of a document therein exhibited to them, the words '*bonâ fide*,' as will appear, reference being had to said document No. 2, hereinbefore mentioned; your petitioners further show, that said Auguste Chouteau has departed this life, and that previous to his death, he made his last will and testament, in due form of law, whereby he devised to your petitioners the said tract of 1281 arpents, besides other property, to your petitioners and their heirs, as tenants in common. Wherefore, your petitioners pray that said title may be inquired into, and that the same be confirmed, as the same would have been confirmed, had not the sovereignty of said province been transferred to the United States.

(Translation.) No. 1. "To Mr. Charles Dehault Delassus, lieutenant-colonel, attached to the regiment of Louisiana, and lieutenant-governor of the upper part of the same province, &c. Auguste Chouteau has the honor to expose, that he wishes to establish, in this town, a manufacture proper to distil the several kinds of grains raised in this dependency, (to) supply the wants of the consumption of the place, of which remote
*140] distance to the chief city renders the importation too *expensive to draw from it annually what is necessary for its use. Wherefore, sir, the supplicant, previous to subjecting himself to considerable expenses to form such an establishment, wishes to obtain the honor of your consent, in order that hereafter he may not be subject to any alteration hurtful to his

interests; wherefore, the supplicant will acknowledge your goodness, if you grant his request. AUGUSTE CHOUTEAU."

"St. Louis of Illinois, November 5th, 1799.

"St. Louis of Illinois, January 3d, 1800.

"Considering that the establishment which the supplicant proposes to form will be useful to the public and to commerce, because there does not exist any of this nature, and that he will procure liquors in a greater abundance, and at a less price than those which are imported, and in very little quantity, from New Orleans, we grant the request.

CHARLES DEHAULT DELASSUS. [L. S.]"

(Translation.) No. 2. "To Mr. Charles Dehault Delassus, lieutenant-colonel, attached to the fixed regiment of Louisiana, and lieutenant-governor of the upper part of said province. Auguste Chouteau, merchant, of this town, has the honor to represent, that the lands adjacent to this town being mostly conceded, and timber becoming daily very scarce, he is very much embarrassed in the carrying on of the considerable distillery which you have permitted him to establish, by your decree, dated 5th of November of last year; consequently, he hopes you will be pleased to assist him in his views, and have the goodness to grant him the concession of one thousand two hundred and eighty-one superficial arpents of this land, situated on the fourth concession in depth of the land adjoining this town; bounded north by the land of Dr. John Watkins; south and west, by the lands of the third concession. The supplicant, besides having the intention to establish the said lands, hopes to obtain of your justice the favor which he solicits.

"St. Louis, January 5th, 1800. AUGUSTE CHOUTEAU."

* "St. Louis of Illinois, January 5th, 1800.

"Being satisfied that the supplicant has sufficient means to make [*141 available, in the terms, of the regulation of the governor-general of this province, the lands which he demands, the surveyor of this Upper Louisiana, Mr. Anthony Soulard, will put him in possession of the one thousand two hundred and eighty-one arpents of land, in the place where he asks it; and afterwards, the applicant will have to solicit the formal title of concessions of the intendant-general of these provinces, to whom belongs, by order of his M—, the disposing and conceding every kind of vacant lands of the royal domains. CHARLES DEHAULT DELASSUS."

No. 3. The survey of the land was made by Antonio Soulard, principal deputy-surveyor of Upper Louisiana, on the 5th day of March, and certified on the 10th of April 1801.

(Translation.) No. 4. "New Orleans, May 20th, 1799.

"My dear friend:—Wishing to testify to you my esteem, by every opportunity, I merely assure you of my esteem, promising you to answer your letter by the boat that just arrived, and which will leave here next week. In my instructions to Mr. Delassus, I recommend him particularly to favor all your undertakings, &c. Adieu: I am in such a hurry that I have but the time to tell you that I am your sincere friend and most humble servant, MANUEL GAYOSO DE LEMOS."

The district attorney of the United States filed an answer to the petition, denying the claim of the petitioners, and requiring proof of the same. At the January session of the district court, in the year 1830, a decree was entered against the validity of the title and claim of the petitioners. From this decree, the petitioners prosecuted this appeal.

The case was argued by *White*, for the appellants; and by the *Attorney-General*, for the United States.

*142] *For the appellants, it was contended: 1. That the title presented is a valid Spanish grant, made in conformity to the laws, customs and usages of the Spanish government. 2. That the said title was confirmed by the treaty of cession of Louisiana. 3. That the petitioners are entitled to a decree of confirmation by said treaty, and the proceedings under the same.

White, for the appellants (in this and the following case):—These two cases will be considered together. The one is a grant for a league square, in 1798, before the transfer of the jurisdiction of petitions and claims to land from the military and civil government to the *intendencia;* and the other, subsequent thereto, to the ancestor or the petitioners. They were rejected on the grounds stated in the case of Delassus. There is one additional objection to these claims. It is, that Auguste Chouteau had obtained another concession, which was sold to Daniel Clarke, and confirmed to him. There is nothing in the laws of the Indies, nor in the regulations of O'Reilly, nor the ordinance of 1754 and 1786, which forbids more than one concession to an individual. He was entitled to an concession for a cow-pen, to one for agriculture, and one for any useful invention, as was shown in Clarke's case. Whether Auguste Chouteau was entitled to another concession, however, before or after his sale to Daniel Clarke, was a question exclusively for the Spanish authority. It is proved, that the second concession was made. The fact of its having been made by an agent of the crown, whose duty it was to receive such applications, and to adjudicate such questions without appeal or reversal, whilst the province remained under the dominion of Spain; constituted what we call a *res adjudicata*, so far as the American government is concerned.

The other claim granted to furnish wood for a distillery, was made by the lieutenant-governor, as sub-delegate of the intendant. It is not forbidden by the general laws of Spain, nor by the regulations of Morales. These latter regulations, it has been shown by documents recently received from Spain, were not approved by the crown. They never had the force of law, and were mere regulations of police, promulgated for a guide to commandants of posts; but changed whenever circumstances required. One of these grants is for agriculture, and another for a manufacturing establishment of an article much in demand in the western country. The governor-general, in a letter to be found in the record, testified his great regard for the petitioner, and his desire to serve him, and to promote his objects.

The grants and concessions for services and gratuities, stand upon a different principle; which, although founded upon an authority as certain and unequivocal as these, will not be discussed here, as neither of these are liable to the objections taken to others rejected by the district court of Missouri.

Referred to, Ordinance of 1798, Laws of Indies; Novissima Recopolacion, tit. Prescript.; Partid. tit. Prescription; Depositions in Commissioners' Report; Depositions on South America; Certified Documents from Spain.

Butler, Attorney-general, argued :—1. The decrees of the lieutenant-governors, relied on by the petitioners, were made in contravention of the laws, ordinances and regulations in force at the times when they respectively bear date, and which continued in force until the treaty of cession, and were, therefore, wholly void; and being so, no valid claim under the treaty or the acts of Congress can be founded thereon. 2. The petitioners did not show, in either case, a title by prescription.

MARSHALL, Ch. J., delivered the opinion of the court.—Auguste A. Chouteau and others, devisees of Auguste Chouteau, presented their petition to the court of the United States for the district of Missouri, praying that their title to 1281 arpents of land, near the town of St. Louis, in the state of Missouri, which they claim under the following circumstances, be confirmed.

The late Auguste Chouteau applied to the then existing governor of Upper Louisiana, for permission to establish a distillery in or near the town of St. Louis; which permission was granted on the 3d of January 1800. He then petitioned for a concession for 1281 superficial arpents of land, to furnish firewood for his distillery; which was granted in the following words:

"St. Louis of Illinois, January 5th, 1800.

"Being satisfied that the applicant has sufficient means to make available in the terms, of the regulation of this province *the lands which [*143
he demands, the surveyor of this Upper Louisiana, Mr. Anthony Soulard, will put him in possession of the one thousand two hundred and eighty-one arpents of land, in the place where he asks it; and afterwards, the applicant will have to solicit the formal title of concessions, of the intendant-general of these provinces, to whom belongs by order of his M—, the disposing and conceding every kind of vacant lands of the royal domains.

CHARLES DEHAULT DELASSUS"

The permission of the governor-general to erect the distillery, is alluded to in the following letter from him to Mr. Delassus.

"New Orleans, May 20th, 1799.

"My dear friend :—Wishing to testify to you my esteem by every opportunity, I merely assure you of my esteem, promising to answer your letter by the boat that just arrived; and which will leave here next week. In my instructions to Mr. Delassus, I recommend him particularly to favor all your undertaking, &c. Adieu: I am in such a hurry that I have but the time to tell you, that I am your sincere friend and most humble servant,

MANUEL GAYOSO DE LEMOS."

The order of survey was executed on the 10th of April 1801, and the petitioner put into possession, which he retained till his death, having first

made his last will, in which he devised it to the petitioners, who have taken all the steps required by law, to preserve their claim. The petition prays for a confirmation of the title. The answer of the district-attorney admits nothing, and submits the case to the court on the proof to be made by the petitioners. The erection of the distillery, and the manufacture of spirits to a considerable extent, the apparent motives to the grant, are fully proved.

The distinction between the case of Chouteau and others, and that of Delassus, whose title has been confirmed, consists in this. The concession to Delassus was made by the lieutenant-governor of Upper Louisiana, by direction of the governor-general, at a time when the power of granting
*144] land was vested in *the governors of provinces. This power was transferred to the intendant-general, in 1799, after which transfer, in 1800, the order of survey under which Chouteau claimed, was made by the lieutenant-governor. The validity of the order depends on the authority of the lieutenant-governor to make it. Chouteau alleges, in support of this authority, that the lieutenant-governor was also sub-delegate, in which character, he was empowered to grant incomplete titles.

Several documents have been laid before the court, which satisfy us that the lieutenant-governors were, by virtue of their office, sub-delegates. In the record in *Soulard's Case*, which we understand is to be considered as an exhibit in this, a letter from the lieutenant-governor, Delassus, to the surveyor-general, is introduced, in which he recites a letter of Morales, the intendant-general, to him, dated the 1st of December 1802 ; informing him that in consequence of the death of the assessor, he had closed the tribunal of affairs and causes relating to grants and confirmations of royal lands. The letter adds : "I make this communication, in order that, apprised of this providence, you may not receive, frame or transmit memorials soliciting lands, until further orders." In a letter of the 26th of August 1799, addressed by Morales to Don Carlos Dehault Delassus, in which he notices instructions given by Delassus to Robert McKay, in his character of sub-delegate, he observes, "I must say, that it being contrary to law, that one sub-delegate should transfer his powers to another, the instruction given by you cannot nor ought to have effect ; and the more so, as the sub-delegation of the intendancy is local." In a certificate given by Don Gilberto Leonard, treasurer of the army, and Don Manuel Gonzalez Armirez, ministers of the royal treasury, &c., of the province of Louisiana, they certify, that in pursuance of a decree of the senior intendant-general *ad interim*, the senior colonel, Charles Dehault Delassus, formerly commandant of the port of New Madrid, and lieutenant-governor of St. Louis of the Illinois, with the sub-delegation of the royal treasury in both situations, &c.

In the claims laid before the commissioners, and confirmed, are several which originated with Delassus, after the power of granting lands was trans-
*145] ferred from the governor to the *intendant-general. This very order of survey was executed by the surveyor-general, in 1801. Possession was delivered to Chouteau, which was retained by him during his life ; and appears to have remained with his devisees since his death. On this point, the report made by the recorder and commissioners to congress, under the act of the 9th of July 1832, and the 2d of March 1833, cannot be disregarded.

They speak of the union of the two offices of lieutenant-governor and sub-delegate, as being universally understood and admitted.

Charles Dehault Delassus, lieutenant-governor of Upper Louisiana, whose deposition appears to be annexed to the report of the commissioners, deposes, "that all the lieutenant-governors of Upper Louisiana were, in virtue of their offices as lieutenant-governors, likewise sub-delegates; that the offices of lieutenant-governor and sub-delegate were inseparable." Morales, immediately after the sale of the royal lands had been transferred to his intendancy, assigns as one reason for issuing his regulations, "that the commandants, as sub-delegates of the intendancy, may be informed of what they ought to observe."

If, as we think must be admitted, Delassus was sub-delegate as well as lieutenant-governor, the transfer of the power of granting lands belonging to the royal domain from the governor to the intendant-general, did not affect his power to give the order of survey on which the title of the petitioners depends. That order is the foundation of title, and is, according to the acts of congress and the general understanding and usage of Louisiana and Missouri, capable of being perfected into a complete title. It is property capable of being alienated, of being subjected to debts, and is as such to be held as sacred and inviolate as other property.

The power of Lieutenant-governor Delassus, in his character of sub-delegate, to make this order of survey, being established, all the principles settled in the preceding cases apply to this. No objection to the claim is perceived, and we think it ought to have been declared valid.

The decree of the district court is reversed and annulled; and this court, proceeding to give such decree as the district court ought to have given, doth declare the claim of the petitioners to the tract of land in their petition mentioned to be valid, and doth confirm their title to the same, according to the boundaries *thereof, as described in the survey made by Antonio Soulard, principal deputy-surveyor of Upper Louisiana, on the 5th day of March 1801, a certificate of which appears in the record dated the 10th day of April 1801. [*146

This cause came on to be heard, on the transcript of the record from the district court of the United States for the district of Missouri, and was argued by counsel: On consideration whereof, this court is of opinion, that the claim of the appellants is valid and ought to be confirmed. Whereupon, it is ordered, adjudged and decreed by this court, that the decree of the said district court in this cause be and the same is hereby reversed and annulled; and this court, proceeding to pronounce such decree as the said district court ought to have given, doth declare the claim of the petitioners to be valid, and doth confirm their title to the tract of land in their petition mentioned, according to the boundaries thereof, as described in the survey made by Antonio Soulard, principal deputy-surveyor of Upper Louisiana, on the 5th day of March 1801, a certificate of which appears in the record, dated the 10th day of April 1801.

*Auguste Chouteau's Heirs, Appellants, *v.* United States.

Missouri land-claims.

A concession of one league square of land, in Upper Louisiana, was made by Don Zenon Trudeau, the lieutenant-governor of that province, to Auguste Chouteau, and a decree made by him, directing the surveyor-general of the province to put him in possession of the land, and to survey the same, in order to enable Chouteau to solicit a complete title thereof from the governor-general, who, by the said decree, was informed, that the circumstances of Chouteau were such as entitled him to a grant of the land; the land was surveyed, and the grantee put in full possession of it, on the 20th of December 1803; he retained possession of it until his death. The objection to the validity of the concession was, that the petitioner had not as many tame cattle as the eighth regulation of Governor O'Reilly, governor-general of Louisiana, required; that regulation required, that the applicant for a grant of a league square of land should make it appear, that he is possessed of one hundred head of tame cattle, some horses and sheep, and two slaves to look after them; a proportion which shall always be observed for the grants, &c. In the spirit of the decisions which have been heretofore made by this court, and of the acts of confirmation passed by congress, the fact that the applicant possessed the requisite amount of property to entitle him to the land he solicited, was submitted to the officer who decided on the application, and he is not bound to prove it to the court which passes on the validity of the grant. These incomplete titles were transferrible, and the assignee might not possess the means of proving the exact number of cattle in possession of the petitioner, when the concession was made. The grant was confirmed.

If the court can trust the information received on this subject, neither the governor nor the intendant general has ever refused to perfect an incomplete title granted by a deputy-governor or sub-delegate.

The regulation made by Don O'Reilly, as to the quantity of land to be granted to an individual, is not, that no individual shall receive grants for more than one league square, but that no grant shall exceed a league square; the words of the regulation do not forbid different grants to the same person; and, so far as the court are informed, it has never been so construed.

Appeal from the District Court for the district of Missouri. Under the authority of an act of congress, entitled "an act enabling the claimants of lands within the limits of the state of Missouri, and the territory of Arkansas, to institute proceedings to try the validity of their claims," the appellants, on the 18th of May 1829, filed the following petition and documents.

*148] *"To the Honorable judge of the District Court of the United States for the state of Missouri. Respectfully showeth, your petitioners, Auguste A., Gabriel Ceré, Henry and Edward Chouteau, René Paul and Eulalie his wife, Gabriel Paul and Louise his wife, Thomas F. Smith and Emilie his wife, that Auguste Chouteau, late of the city and county of St. Louis, state of Missouri, deceased, on the 5th day of January, in the year 1798, being then a resident of the province of Upper Louisiana, presented his petition to Don Zenon Trudeau, lieutenant-governor of said province, and of the western part of the Illinois district, whereby he prayed that a tract of land, consisting of 7056 arpents, or a square league, situated on the Mississippi river, about fifty miles, more or less, distant from the town of St. Louis, should be granted to your petitioner, for the purpose of enabling him to establish a grazing and agricultural farm thereon, when his means should permit him so to do. That on the 8th day of January, in the year last aforesaid, the said lieutenant-governor did, in compliance with the prayer of said petitioner, decree and direct that the surveyor of said province, Don Antoine Soulard, should put your petitioner in possession of the land so

prayed for, and should survey the same, and make a plat and certificate thereof, in order that the petitioner might make use of the same to solicit a complete title thereon from the governor-general of the province of Louisiana, who, by said decree, was informed, that the said petitioner's circumstances were such as to entitle him to that favor. That in pursuance of said decree or order of possession and survey, the deputy-surveyor, Don Santiago Rankin, duly thereto authorized by the principal surveyor, the said Antoine Soulard, did, on the 20th day of December, in the year 1803, locate and survey said tract of a league square, on a part of the royal domain, about fifty-seven miles north of St. Louis aforesaid, and about three miles south of the Mississippi boundary; the said 7056 arpents, on the north-west quarter north, by the lands of Don Joseph Brazeau, on the south-east quarter south, north-east quarter east, and south west quarter west, by the royal domain lands; and said Don Santiago Rankin did, then and there, by virtue of the decree and authority aforesaid, deliver possession of said tract of a square league, so bounded and *located, to said Auguste Chouteau; all which [*149
will more fully appear by the following documents here brought into court and ready to be produced, to wit: said original petition and decree, and by the certificate of survey, dated the 9th of December 1803, and duly sigued and sealed by the said surveyor of the province of Upper Louisiana, Don Antoine Soulard, and which said survey is duly recorded in book B, folio 27, No. 26, now in the office of the surveyor-general of this district. And your petitioners aver, that said Auguste Chouteau, at the date of his said petition, and of said order or decree of said lieutenant-governor, and at date of said survey, was possessor of at least one hundred head of tame cattle, from two to three hundred hogs, from thirty to forty horses, about forty sheep, and from fifty to sixty slaves. The said original concession and survey have been submitted to the board of commissioners heretofore established for the adjudication of unconfirmed land-claims, and by it refused to be confirmed. Your petitioners further show, that at the date of said decree of concession and survey, and ever since, until his death, the said Auguste Chouteau has been a resident of the province of Upper Louisiana, or state of Missouri. That said Auguste Chouteau, by virtue of the act of congress in that case made and provided, procured the said tract and survey to be laid down on the general plat in the office of the register of the land-office of this district, and the same has been and is reserved from public sale, until a decision shall be had by the proper authority thereon. That the sectional boundary lines on the general plat are as follows: commencing at the north-west corner of Joseph Brazeau's confirmed claim of 7056 arpents, in the south-east quarter of section No. 35, in township No. 52, north, of range No. 1, east; running thence, N. 30° E. 245 chains, to a point near the line, between sections No. 15 and 22, in township No. 52, north, of range No. 1, east; thence N. 60° E. 245 chains, to a point in section No. 12, in township No. 52, north, of range No. 1, east; thence S. 30° E. 245 chains, to the north-east corner of the survey of Brazeau, before mentioned, in the north-west quarter of section No. 29, in *township No. 52, north, of [*150
range No. 2, east; thence, with Brazeau's line, S. 60° W. 245 chains, to the beginning. Your petitioners further show, that no part of said tract, so laid down and surveyed, is occupied or claimed by any person or persons, adverse to the title of your petitioners. Your petitioners further show, that

Auguste Chouteau has departed this life, and that previous to his decease, he devised to your petitioners the said tract of 7056 arpents, by his will, duly executed, and now ready to be produced. Wherefore, your petitioners pray, that the validity of the claim and title to said square league, as hereinbefore set forth, may be inquired into and decided upon by this honorable court; and that, inasmuch as the same might have been perfected into a complete title, under and in conformity to the laws, usages and customs of the government under which the same originated, had not the sovereignty of the country been transferred to the United States, your petitioners pray, that the said title and claim be confirmed to said tract of land so surveyed, bounded and located as aforesaid; and your petitioners pray, that a citation be directed to the district-attorney of the United States, requiring him, on a day certain, to appear and show cause, if any he can, against the decree prayed for by your petitioners."

The documents referred to in the foregoing petition of the heirs and devisees of Auguste Chouteau, deceased, translations of which were filed in evidence on the hearing of said cause, being truly copied, were as follows, to wit:

"To Mr. Zenon Trudeau, lieutenant-colonel, captain in the first regiment of Louisiana, and lieutenant-governor of the western part of Illinois.

"Auguste Chouteau, merchant, of this town, has the honor to represent to you, that having heard it reported, that there were good lands on the Mississippi river, at about fifty miles of this town, and being possessed of sufficient means to establish a grazing farm, has the honor to request you to have the goodness to grant him, at the place above named, a league square of land, or seven thousand and fifty-six arpents in superficies, a quantity
*151] which never was refused, either in the *lower or upper part of this colony, for similar establishments; the supplicant having also the project to establish on the said land a considerable farm, hopes that you will favor his views, which cannot but be advantageous to the safety of those establishments, and to the internal communication, by keeping away the Indians, who, at divers periods of the year, spread themselves in our neighborhoods to lay waste our farms that are too far apart from each other to lend the necessary assistance in similar cases. Your suppliant, confident in your justice and in the generosity of the government of which you are the representative, hopes that you will grant his request.

"St. Louis of Illinois, January 3d, 1798. AUGUSTE CHOUTEAU."

"St. Louis of Illinois, January 8th, 1798.

"Being satisfied that the land applied for belongs to the king's domains, the surveyor, Antoine Soulard, will put the applicant in possession of the same, and afterwards make a report of his survey, in order that it may serve in soliciting the concession of the governor-general of this province, to whom I give the information that the said applicant is in the circumstances which merit this favor. ZENON TRUDEAU."

A survey of the land was returned by the deputy-surveyor, on the 29th of December 1803.

The district-attorney of the United States filed an answer, denying the

validity of the claim of the petitioner, and by a decree of the district court the petition was dismissed. From this decree, the petitioners appealed.

The case was argued by *White*, for the appellants; and by the *Attorney-General*, for the United States.

Marshall, Ch. J., delivered the opinion of the court.—This is an appeal from a decree of the district court of Missouri, sitting under the act of the 26th of May 1824. The devisees of Auguste Chouteau, a citizen of Missouri, presented their petition to the district court, in which they *state, that their testator, on the 8th day of January 1798, being then a resident of Upper Louisiana, obtained from Don Zenon Trudeau, [*152 lieutenant-governor of that province, a decree directing Don Antonio Soulard, the surveyor-general of the province, to put the said Chouteau in possession of the land prayed for; and to survey the same, and make a plat and a certificate thereof, to enable the said Chouteau to solicit a complete title thereon from the governor-general; who, by the said decree, was informed, that the said petitioner's circumstances were such as to entitle him to that favor. In pursuance of this decree, the survey was executed on the 20th of December 1803, and the said Chouteau put into possession of the tract surveyed, amounting to one league square, which he retained till his death, when he devised it to the petitioners, who have remained in possession ever since. All the steps required by law for the preservation of the title acquired by the decree of the lieutenant-governor, have been taken. The petitioners pray that their right and title to the land they claim may be confirmed. The answer of the district-attorney admits nothing, and refers the claim to the court.

Some testimony was taken, to show that the said Auguste Chouteau was, at the date of his petition, and of the decree of the lieutenant-governor, and at the date of the said survey, possessed of at least one hundred head of tame cattle, from two to three hundred hogs, from one hundred and forty to one hundred and fifty horses, about forty sheep, and from fifty to sixty slaves.

The United States gave in evidence a petition of the said Auguste Chouteau, presented on the 24th day of January 1798, to the lieutenant-governor of Upper Louisiana, praying for a concession of 7056 arpents of lands, situated on the north bank of the Missouri, about 205 miles from its mouth; which petition was granted on the succeeding day. A survey of this tract was executed on the 17th of March 1801; and it appears to have been conveyed by Auguste Chouteau to Daniel Clarke, by deed bearing date the 8th of September 1804. This claim was offered to the board of commissioners, but being "unsupported by actual *inhabitation and cultivation," [*153 was rejected. The board, at the same time, observed, that the said concession is not duly registered.

The only objection which can be made to the validity of this concession is, that the petitioner did not possess as many tame cattle as the regulations of O'Reilly required. The eighth article of those regulations declares, that no grant in the Opelousas, Attacapas and Natchitoches shall exceed one league in front by one league in depth. The ninth is in these words, "to obtain in the Opelousas, Attacapas and Natchitoches, a grant of forty-two arpents in depth, the applicant must make it appear that he is possessed of

one hundred head of tame cattle, some horses and sheep, and two slaves to look after them; a proportion which shall always be observed for the grants to be made of greater extent than that declared in the preceding article."

There is some confusion in these two articles, which would lead to a suspicion that the translation may not be accurate. The eighth declares that no grant shall exceed a league square; and the ninth, if it be understood literally, professes to prescribe the property which the applicant must possess to entitle him to a larger quantity than a league square. It is also observable, that this article is limited to the three districts mentioned, which are not in Upper Louisiana; and that they are peculiarly adapted to a grazing country, and to a grazing country only. There could be no motive for apportioning one hundred head of cattle to two slaves, in an agricultural country. It is probable, that if the regulations of O'Reilly were extended to Upper Louisiana, they were extended with modifications, at least, of the ninth article; so as to adapt the proportions of property required to the country to which the article was extended. This supposition derives great strength from the fact that the lieutenant-governor, who must have understood his orders, certifies to the governor, in his decree, "that the said applicant is in the circumstances that merit this favor." The appellant is proved to have possessed more slaves than was required by the ninth article of O'Reilly's regulations, though not so many tame cattle.

*154] We think also, that in the spirit of the decisions which have *been heretofore made by this court, and of the acts of confirmation passed by congress, the fact that the applicant possessed the requisite amount of property to entitle him to the land he solicited, was submitted to the officer who decided on the application, and that he is not bound to prove it to the court which passes on the validity of the grant. These incomplete titles were transferrible, and the assignee might not possess the means of proving the exact number of cattle in possession of the petitioner, when the concession was made. It is remarkable, that, if we may trust the best information we have on the subject, neither the governor nor intendant-general has ever refused to perfect an incomplete title granted by a deputy-governor or sub-delegate. We cannot allow this objection to prevail.

The objection drawn by the United States from the concession made on the 24th of January 1798, is not, we think, entitled to more weight. The eighth regulation made by O'Reilly, is not, that no individual shall receive grants for more land than one league square, but that no grant shall exceed one league square. The words of the regulation do not forbid different grants to the same person; and so far as our information goes, it has never been so construed. Neither of these grants, so for as we understand the geography of the country, lies in Opelousas, Attacapas or Natchitoches. It does not appear, that the grant made on the 24th of January has been established, and the record shows that it was rejected by the board of commissioners, for reasons on the sufficiency of which we do not now decide. But it is conclusive, that the concession of the 24th of January was subsequent to that of the 8th, and consequently could not affect it.

We are opinion, that the district court erred in declaring the concession made to Auguste Chouteau, on the 8th of January 1798, to be invalid; and that the same ought to be confirmed. The decree of the district court is

reversed and annulled, and this court, proceeding to give such decree as the district court ought to have given, doth declare the claim of the petitioners to the tract of land in their petition mentioned, to be valid, and doth confirm their title to the same, according to the boundaries thereof, as described in the survey made by James Rankin, *deputy-surveyor, and certified by Anthony Soulard, principal deputy-surveyor of [*155 Upper Louisiana, as appears by his certificate of the 29th of December 1803, contained in the record.

This cause came on to be heard, on the transcript of the record from the district court of the United States for the district of Missouri, and was argued by counsel: On consideration whereof, this court is of opinion, that the claim of the appellants is valid, and ought to be confirmed. Whereupon, it is ordered, adjudged and decreed by this court, that the decree of the said district court in this cause be and the same is hereby reversed and annulled; and this court, proceeding to pronounce such decree as the said district court ought to have given, doth declare the claim of the petitioners to the tract of land in their petition mentioned, to be valid, and doth confirm their title to the same, according to the boundaries thereof, as described in the survey made by James Rankin, deputy-surveyor and certified by Antonio Soulard, principal detputy-surveyor of Upper Louis, iana, as appears by his certificate of the 29th December 1803, contained in the record.

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*Sebastian Hiriart, Plaintiff in error, *v.* Jean Gassies Ballon. [*156

Louisiana practice.

The district court of the United States for the eastern district of Louisiana, in conformity with the provisions of the act of congress of the 26th of May 1824, adopted, as a rule of practice in that court, the regulations established by a law of Louisiana, by which, on appeal bonds, when the appellants failed in their appeal, on the coming in of the decree or judgment of the appellate court, a summary judgment, on motion, should be entered against principal and sureties in the appeal bonds.

Under this rule, after the affirmance of a decree of the district court by the supreme court of the United States, and the filing of the mandate of the supreme court, the district court, on a motion for a rule on the surety in an appeal bond to show cause why judgment should not be entered against him, on the first day of the next term, and no cause being shown, entered a judgment against the surety.

The party against whom the judgment was entered, afterwards came into court, and prayed a trial by jury, which was refused; and he prosecuted this writ of error, to reverse the judgment of the district court refusing the said trial.

The rule of the district court of Louisiana follows the analogy of the laws of Louisiana, being modified only so far as is proper to suit the organization of the courts of the United States, and to conform to the laws thereof; the summary judgment is therefore strictly authorized, and the party had no right to a trial by jury. In becoming a surety, he submitted himself to be governed by the fixed rules which regulate the practice of the court.

An appeal was taken in the same case to a decree of the district court dissolving an injunction. Although this appeal was not before the court, the court said, the decree being only interlocutory, and not final, is not the subject of an appeal.

General rules for the government of the United States court in the eastern district of Louisiana in suits in that court. [See note *a*.]

Hiriart v. Ballon.

ERROR to the District Court for the Eastern District of Louisiana.(a)

*157] *This case was submitted to the court by *Benton*, for the appellee, on a printed statement.

(a) The record in this case contained the "General Rules" for the government of the United States court in the eastern district of Louisiana, in civil causes and suits at law, as contradistinguished from admiralty and equity causes and criminal prosecutions, made in pursuance of the 17th section of the judiciary act of 1789, and of the first section of the act of congress of the 26th of May, 1824, entitled "an act to regulate the mode of practice in the courts of the United States for the district of Louisiana." It has been considered useful, by the reporter, to insert these "General Rules" in this volume.

"At a stated session of the court of the United States of America for the eastern district of Louisiana, held at the city of New Orleans, on Monday, the 14th day of December, Anno Domini 1829. Present the Honorable SAMUEL H. HARPER, judge of said court. *Ordered*, that the following rules be adopted by this court; and all other rules for the practice of this court are annulled, from and after this date."

GENERAL RULES.

I. Suits at law shall be commenced by writ or process, under the seal of the court, and signed by the clerk, and be tested in the name of the judge (or if that office shall be vacant, of the clerk), and shall issue in the name of the President of the United States, to the marshal of the district, commanding him to arrest or summon the defendant (as the case may be), and shall be returnable on the first day of each term.

II. A petition, addressed to the court, should accompany the writ; it shall state the nature of the case with sufficient precision of circumstances, time and place; which petition shall be signed by the party or his counsel, and shall contain a prayer adapted to the nature of the case; and whatever documents are referred to in the petition, as making part thereof, shall be filed with it, or if copies thereof are annexed, the defendant or his attorney shall have *oyer* of the original, if he demand it, before he shall be required to file his answer or plea. The writ and petition being filed, a copy thereof shall be made in the French and English languages (in cases where the mother tongue of the defendant is French), and, together with the original writ of process, be delivered to the marshal, who shall serve said copy on the defendant, by delivering the same to him personally, or by leaving it at his usual place of abode, ten days before the day of return mentioned in the writ, allowing one day in addition for every twenty miles the defendant may reside from New Orleans. The writ or process shall run in the words which have hitherto been adopted in this court. The marshal shall, whenever any writ or process shall have been served, indorse on the same the time of service, and its distance from the city, if the same be made out of the limits thereof.

III. The answer or defence of the defendant shall be signed by him or his attorney, and filed with the clerk, in the English and French languages (if the mother tongue of the plaintiff be French), on or before the first day of each term; and if no defence or answer shall be filed, nor time given for answer, the court shall, at the first day of sitting thereafter, on the application of plaintiff, cause judgment by default to be entered against the defendant, which, if not set aside within three days thereafter, the court shall, if required, enter up final judgment against the defendant; if the demand be liquidated by a note, bond, contract or former judgment, and if the sum demanded be uncertain, the court shall proceed to hear testimony, assess the damages, and render final judgment for the sum so assessed.

IV. The answer shall contain nothing impertinent or irrelevant; but the defendant shall be required to plead all such matters of law and fact in the same answer as he may think proper to rely on, conformably to the rules of practice adopted by the first judicial court of the state of Louisiana, prior to the adoption of the "Code of Practice:" and in all cases where matters of law submitted to the court, shall be argued and determined, before the issues of fact shall be submitted to the jury.

Hiriart v. Ballon.

The appellee in this case, who was the plaintiff in the court below, instituted his suit in the district court of the United States for the eastern district of Louisiana, against one Pierre Gassies, and obtained a judgment

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V. The clerk shall keep a docket in which all cases that are at issue shall be entered in the following order: 1. Causes in which both issues to the court and to the country are made up. 2. United States causes of a general nature, and criminal prosecutions. 3. Jury causes, other than those of the United States. 4. Court causes, or suits to be tried by the court alone. 5. All admiralty causes (the United States admiralty causes having precedence on the list). And in setting the causes for trial, they shall be called in the order thus prescribed.

VI. All causes at issue, whether in point of law or fact, shall be called on the second day of each term, at the meeting of the court; and set down for trial, In all cases in which pleas both to the court and country are made, the pleas involving matters of law, or issues submitted to the court alone, shall be first tried; and such of them as may be directed to be tried on the issues of fact, shall be immediately transferred to the jury docket, to be tried on the merits, during the same term, in the discretion of the court. In all cases in which dilatory or declinatory pleas or exceptions to form are made and overruled, the party making such plea or pleas, or exceptions, shall pay to the plaintiff all costs of suit up to the time of their being decided against him; and when a plea is made to the jurisdiction of the court, involving the question of citizenship of a party, it shall be tried by a jury; and if the verdict sustains the jurisdiction, all costs shall be paid to the plaintiff, and the cause shall be immediately tried by the same jury on its merits, at the option of the plaintiff, if, by the pleading, it be a jury cause; if not, it shall be forthwith submitted to the court for decision.

VII. If it be the intention of a party to take an issue on the fact, he must expressly pray for a jury; otherwise, the cause shall be wholly tried by the court (except cases where the law itself requires a jury), and shall be put in the fourth class of cases on the docket.

VIII. When a jury is about to be sworn in a cause, each party may peremptorily set aside three of them, but no more, except for a legal cause.

IX. The clerk shall enter no cause on the docket, until the pleadings are fully made up, nor shall any cause be entered thereon, except by the clerk or his deputy.

X. If any docketed cause shall be called at two courts, and not tried, the plaintiff shall be called, and if he does not immediately go to trial, he shall be nonsuited, unless it shall appear, that it had been continued at defendant's motion, or other satisfactory cause shall be shown to the court, on oath, to prove it was not postponed on account of the plaintiff's neglect, or unless the defendant, at such second calling, shall obtain a further continuance; but nothing in this rule shall be construed to prejudice defendant's right of calling for a nonsuit, at any previous court.

XI. If a cause is at issue, and either party move for a continuance of it, on account of the absence of a witness, such motion must be on oath or affirmation of the party, his agent or attorney, in writing, subscribed by him, stating that some witness, residing within the reach of the process of the court (who shall be named and the place of his residence mentioned), is wanting; that he believes that such witness is a material and competent witness in the cause; and to satisfy the court of his materiality, shall state what fact or facts it is expected or believed the witness will prove on the trial; that all reasonable endeavors have been used to procure his attendance at the term; that he cannot safely go to trial without the benefit of his testimony; and that a continuance is not prayed for the purpose of delay. If an application be made for a continuance, and also for a commission to procure evidence (the other party not consenting thereto), the affidavit must state what fact or facts it is believed will be proven on the trial of the cause, that the testimony sought is competent and material, that he cannot safely go to trial without the benefit of it, that he believes it can be procured in a certain time, which shall be specified, and that the application is not made for

against him in the due course of law, *for the sum of $3100, with interest at the rate of five per cent. from the 1st of December 1829, until paid, and costs of suit; from which judgment an appeal was taken to this court by the said Pierre Gassies, who gave, as surety to the appeal bond,

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delay. If a commission issue, interrogatories must be filed, as directed in the following rule.

XII. The clerk is authorized, in vacation, on the written application of the plaintiff, or his attorney, to enter the discontinuance of a cause, and with consent of counsel, written, signed and put on file, to enter on the minutes, rules and orders, preparatory to trial of causes pending therein, and to issue commissions to take testimony, in all cases, at the instance of either party; and if it be not the intention of the party taking out the commission to take testimony *de bene esse*, under the 30th section of the judiciary act of 1789, he shall file interrogatories and serve a copy thereof on the opposite party or his counsel, who may, if he thinks proper, add cross-interrogatories, and return the whole to the other, within three days, or, in default thereof, the commission may be executed without the cross-interrogatories.

XIII. No amendment shall be made to any petition or answer, unless it be made previous to setting the cause for trial (except as to mere matters of form, which may be made at any time before trial), and no amendment shall be made, at any time, tending wholly to alter the nature of the action or defence.

XIV. In all rules to show cause, the party called upon shall begin and end his case; and on special matters, either springing out of a cause at issue or otherwise, the actor or party submitting a point to the court, shall, in like manner, begin and close; and so shall a defendant who admits the plaintiff's case and takes upon himself the burden of the proof, have the like privilege.

XV. In all cases of affirmance of judgment on writs of error from judgments pronounced in this court, a rule may be taken on the principal and his sureties in the appeal bond, returnable ten days after recording the mandate of the supreme court, to show cause why execution should not issue against them; and, no cause being shown, judgment shall be entered against them and the principal, and execution issue accordingly.

XVI. Upon the return of an award or umpirage, a three-day rule shall be served upon the party or his attorney, against whom the award or umpirage may be; and should the same be confirmed by the court, judgment shall thereupon be entered and execution issue, in the same manner as if judgment had been obtained on verdict.

XVII. Every motion made for any rule or order shall be submitted to the court in writing, by the counsel who makes it, and if granted by the court, shall be delivered to the clerk to be entered on the minutes.

XVIII. Not more than two counsel shall be permitted to argue on the same side of a cause, without leave of the court.

XIX. All applications for new trials shall be made within three days after the verdict of the jury, or judgment of the court (as the case may be;) and, if no such application be made, or being made, shall be overruled, judgment shall be signed, and execution issue, if required.

XX. Counsellors and attorneys licensed by the supreme court of this state, may be admitted as such in this court; but no attorney in fact shall be permitted to appear as an attorney-at-law, to prosecute or defend any suit.

XXI. After the argument of a cause upon matters of law, submitted to the court, a statement in writing of the points relied upon, and a note of the authorities cited, may be required of the counsel on both sides, by the court, before giving judgment thereon.

XXII. In all cases where a sum certain is sworn to be due from defendant to plaintiff, special bail shall be ordered; and in all other cases, affidavit being made of the facts, the judge (or, in his absence, the clerk) shall order the defendant to be

the present appellant, in the penalty of $4500, which appeal was heard in this court, at January term 1832. *(6 Pet. 761.) A judgment confirming the judgment below was rendered; and upon such judgment [*159

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held to bail, in such sum as he may think just; but no attorney-at-law shall be received as special bail.

XXIII. The marshal shall not be bound to serve any *subpœna* on a witness, on the day on which the cause is set for trial, wherein such witness is required, unless specially directed to do so by the court.

XXIV. It shall be the duty of the marshal to summon juries, according to law, to serve at each stated term of the court, and he, or his deputy, shall serve a written summons on each juror, expressing the day, hour and place, at which he is to appear, and also whether he is to serve as a grand or a petit juror.

XXV. To all the writs of *venire*, issued for summoning jurors, the marshal or his deputy shall make a return, upon oath, written at length, before the clerk of the court, and in the said return shall make one class of those who were summoned personally, a second class of those for whom summonses were left at their houses, and a third class of those who could not be found.

XXVI. The clerk shall keep a book, in which shall be entered the names of all persons who shall be summoned as jurors, and on every call of the names, shall note opposite each name, the presence or absence of the juror; or if any juror, once impannelled, shall refuse or neglect to attend punctually every morning, on the call of the pannel, unless previously excused by the court, he shall be cited to show cause why he should not be fined for his default; and if he show no sufficient cause, he shall be fined, or otherwise punished, according to law.

XXVII. All moneys paid into the court of the United States, or received by the officers thereof, in causes pending therein, shall be immediately (that is, the day after that on which they shall be received) deposited in the branch bank of the United States, in the name and to the credit of said court; and at each stated session of the court, the clerk thereof shall present an account to the court of all moneys remaining therein, subject to the order thereof, stating particularly on account of what causes said moneys are deposited; which account, with the vouchers thereof, shall be filed in court.

XXVIII. All notes and obligations, and the gross amount of moneys arising from the sale of property, in pursuance of any order or decree of this court, shall be paid into court by the marshal, to be deposited in the branch bank; and an account of sales of such property, so disposed of, shall be filed in court, at the same time; and in the cases mentioned in this and the preceding rule, the costs and charges of the suit shall be taxed and first paid out of the moneys in court.

XXIX. Money deposited in court, pending a suit, shall not be delivered on bond to any party or person.

GENERAL RULES OF PRACTICE IN ADMIRALTY.

I. The material facts in a libel (except in case of a libel for seamen's wages, or where the United States are libellants) must be sworn to by the libellant, his agent or attorney, before an order for admiralty process shall issue, and every claim must be sworn to in the like manner, before filing the same.

II. When the process is *in rem*, and a party is also personally cited, the citation shall be made returnable at the same time with the warrant, to wit, in fourteen days; and when the proceeding is altogether *in personam*, the process shall likewise be returnable in fourteen days.

III. In all cases of seizure and prosecution of any ship or vessel, goods, wares and merchandise, when the claimant may bond, of right, under the 89th section of the act of 2nd of March 1799, 'to regulate the collection of duties on imports and ton-

and mandate of this court, in due course of proceeding, an execution issued against the property of said Pierre Gassies. After various proceedings had relative thereto, the marshal of the said district made his return in said case,

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nage," and in all other cases where the district-attorney is consenting to such bonding, the same may be done in the manner directed by the said section, the district-attorney naming the appraisers and approving the security.

IV. The clerk, or, in his absence, the deputy-clerk, be and he is hereby appointed a commissioner, before whom appraisers of ships or vessels, or goods, wares and merchandise, seized for breaches of any law of the United States, may be sworn or affirmed.

V. Appraisers, acting under the orders of the court, shall be severally entitled to receive five dollars in each case wherein they may make an appraisement, to be paid by the party at whose instance the appraisement shall be made.

VI. All appraisements and bonds taken in pursuance thereof, shall be copied at length in a book to be kept for that purpose, and the originals filed in court.

VII. No vessel or merchandise, in the custody of the marshal shall be released upon bond, until the costs and charges of the officers of the court (so far as the same may have accrued) shall be paid by the party giving bond.

VIII. When property is in the hands of the marshal, he shall be authorized, from time to time, on motion to that effect, to sell so much of the same at public auction, after notice, as may be necessary to defray the costs and charges incident to the keeping of the same.

IX. Moneys paid into court shall not be paid out, in pursuance of any decree of the same, upon which an appeal may be had, until ten days (exclusive of Sundays) shall have elapsed after such decree shall have been made; and when an appeal shall be entered, the appellant shall, within ten days, exclusive of Sundays, from the time of making the decree, give security for damages and costs; and if security shall not be given within that time, the decree may be executed as if there had no appeal been prayed for.

X. In proceedings touching seamen's wages, when a party is cited to show cause against the issuing of admiralty process, oath must be made of the service of such citation, in case the party cited does not appear, except the citation has been returned. and served by the marshal, or his deputy.

XI. No claim shall be filed, after the expiration of monition, or return-day of the warrant, without the leave of the court, or by consent of the parties libellant, in writing, and put on file.

XII. In all cases in which the United States are libellants, the clerk is authorized to issue admiralty process, without an order from the judge.

ADDITIONAL RULES.

I. No denial of the allegation of citizenship made in a petition, nor any dilatory exception or plea in abatement, involving matters of fact, shall be allowed, unless verified by affidavit filed therewith, by the counsel, agent or party, as to their belief of the truth thereof. 20th March 1830.

II. The testimony of witnesses given at the bar, shall not be reduced to writing by the clerk of the court, or any other person in trials at law, as contradistinguished from admiralty and equity causes.

III. Facts shall not be submitted to a jury, in order to obtain a special verdict in any cause, except by the consent of parties entered on record.

IV. No verbal agreements or arrangements of parties, or their counsel, touching any cause depending in this court, shall be deemed of any validity, or noticed in any way by the court. 14th June 1830.

V. It is ordered, that the twelfth rule of the rules of this court relating to suits at

that the sum of $375.50 *alone had been made from the property and estate of said Pierre Gassies; for which sum a credit was given upon the execution, the 31st of January 1833.

Upon the 13th of April, 1833, a motion was made in the district court, that Sebastian Hiriart, the appellant, show cause, on the first day of the next term, why judgment should not be *entered against him, for the amount of the judgment, damages, interest and costs; and why execution should not issue against him. At the proper time, the said appellant filed his answer; and after argument, &c., judgment was given against the appellant, upon said appeal bond; and the appellant prosecuted this appeal. Execution issued upon this judgment on the first *of July 1833, and was levied upon his property, but the sale of it was stayed by an injunction issued by the judge of said district court, upon the 27th of July 1833. On the 28th of December 1833, the said injunction was dissolved, from which dissolution of the injunction the appellant prayed an appeal to this court. The district judge refused to allow this writ of error, assigning for the same the following reasons: [*161 [*162

*"The act of congress forbids any writ of error or appeal to be taken, except from a final judgment. The supreme court of the United States, in the case of *Weston* v. *City Council of Charleston*, 2 Pet. 449, have given a judicial definition of this word 'final.' It is there said, 'the word *final* must be understood, in the section under consideration, as applying to all judgments and decrees which determine the particular cause.' That is, as I understand it, only such judgments as conclude the rights of the party can be considered final in the sense of the law. *In the case under consideration, the rights of the party complainant, as to his liability to pay this debt (for that was his own stipulation in case the principal did not), were passed upon, at the time the judgment below was affirmed, and at all events, when judgment was given against him on the rule to show cause as above referred to, then perhaps he might have defeated the obligation by the plea '*non est factum*,' or some other; but the dispute now is merely as to the remedy sought to enforce a right already determined by both courts. [*163 [*164

"In the case of *Young v. Grundy*, 6 Cranch 51, it is said, 'an appeal does not lie from an interlocutory decree dissolving an injunction.' And in *Gibbons* v. *Ogden*, 6 Wheat. 448, the court say, 'nor from a decree affirming a decretal order of an inferior court refusing to dissolve an injunction.' I am aware, that the technical expression, 'interlocutory judgment,' is usually applied to incidental orders, made in the progress of a cause, not affecting the main question to be afterwards determined by the court; but all incidental orders are 'interlocutory,' whether they be made pending or

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law, be so amended, as to allow plaintiffs in all cases to take out commissions to examine witnesses after the return of service of process; the plaintiff serving the defendant with a copy of his interrogatories, as heretofore required: and when defendant resides in the country, he shall be allowed, in addition to the time now prescribed, one day for every twenty miles' distance he may reside from the city of New Orleans, to file cross-interrogatories; commissions on the part of defendant shall issue only after issue joined, and in conformity with the previous practice of this court. 28th May 1831.

after the determination of the main question, and these orders may be made so long as the case is within the control of the court, and all cases are within the control of the court until its judgment is fully executed. When an injunction is obtained, suspending an execution, the object is not to bring the judgment itself into review, but to inquire whether an improper attempt is made to enforce it. Injunctions are grantable at chambers. Now, it will not be pretended, that a verbal refusal of a judge to grant an injunction would sustain an appeal; but if he should, through inadvertance, grant it, when no equity appeared on the face of the petition, or on further examination, it should be found to be unfounded, and he should then refuse to perpetuate it, what difference is there in reason, why a refusal to make it operative, after a full investigation of its merits, should give the party any more right to appeal, than his refusal in the first instance?

"It may be said, that when a dispute arises as to the right of a party to appeal, the case ought to be sent up to the appellate court for its determination as to that right. To this there are two answers: 1. Where the law itself has fixed the amount from which an appeal can be taken, and that amount *165] is palpably *below the sum so fixed; or when the appellate court has given a construction to the law embracing the right of a party to appeal, in the given case, as I conceive has been done in cases similar to this, it would be treating the court with disrespect, to send to it a case, of which, according to settled law, it could not take cognisance. 2. However much I am disposed to have my decisions reviewed, yet I am as much bound to guard the rights of one party as the other; and when my judgment is convinced, that the law does not authorize an appeal, and which if granted would operate injuriously to the other party, I feel bound to refuse it. Besides, if this party has a right to appeal, upon the ground stated, his security in the appeal bond, in case of his insolvency, would have the same right, on making a sufficient oath, to obtain an injunction, and so on *ad infinitum*."

After the order to dissolve the injunction, the plaintiff below took out an *alias* execution against the property of Sebastian Hiriart, the prior execution having been returned into court. On the 12th of April 1834, Mr. *Slidell*, counsel for Hiriart, obtained, on motion, an order that the defendant, Jean Gassies Ballon, show cause, on Monday, the 14th instant, at 11 o'clock, A. M., why the execution issued in this case should not be quashed, and all further proceedings on the judgment rendered in this case suspended, on the ground, that the supreme court has accorded a writ of error which had been refused by this court, before the execution issued. And on the 14th of the same month, the following order was made. "The rule taken by the plaintiff on the defendant came on this day before the court, when, no opposition being made by the counsel for the defendant, it is ordered, that the same be made absolute, on condition that the plaintiff enter into bond, with good and sufficient sureties, to respond to the judgment enjoined against by the plaintiff."

The questions submitted to the court, on the part of the defendant in error, were: whether there was error in the proceedings of the district court of Louisiana in the refusal of the writ of error? and whether the judgment and decree of the said court ought not to be confirmed, with damages; the present application being made for delay only?

Hiriart v. Ballon.

*Story, Justice, delivered the opinion of the court. — This is a writ of error to the district court of the eastern district of Louisiana. The plaintiff in error was surety in an appeal bond given upon a writ of error to a judgment of the district court of Louisiana, rendered in 1830, in a suit of Jean Gassies Ballon *v.* Pierre Gassies; which judgment was affirmed in the supreme court of the United States in 1832. Upon the cause coming back to the district court, upon the mandate of the supreme court, execution issued against the judgment debtor, Pierre Gassies, and was returned satisfied in part. Upon motion afterwards made, and due notice to Hiriart, a summary judgment was entered against him upon the appeal bond; in pursuance of a rule of the district court. The rule is in the following words: "In all cases of affirmance of judgment, on writs of error, from judgments pronounced in this court, a rule may be taken on the principal and his sureties in the appeal bond, returnable ten days after recording the mandate of the supreme court, to show cause why execution should not issue against them; and no cause being shown, judgment shall be entered against them and the principal, and execution issue accordingly." Hiriart showed for cause (among other things not necessary to be stated, as they are not cognisable on a writ of error), that the proceeding was irregular, and that, if liable on the bond, his liability must be established by an ordinary action, before a competent tribunal. The district court, notwithstanding, entered the summary judgment; and the writ of error is taken to this judgment.

The principal point relied on seems to be, that the party was entitled to a trial by jury, and that no such summary judgment is authorized by law. Whether this objection is well founded depends upon the act of congress of the 26th of May 1824, for the regulation of the practice of the district court of Louisiana. That act declares, that the mode of proceeding in civil causes, in the courts of the United States in Louisiana, shall be conformable to the laws directing the mode of the practice in the district courts of the states; with a power in the judge, to make rules to adapt such laws of procedure to the organization of the courts of the United States. The laws of Louisiana allow appeals from the district courts of the state, to the supreme court, upon giving an appeal bond with security; *and authorize a summary judgment upon such appeal bond, upon mere motion, in the [*167 court from whence the appeal was taken, in execution of the judgment of the appellate court.(*a*) The rule of the district court of Louisiana, therefore, follows the analogy of the laws of Louisiana, being modified only so far as is proper to suit the organization of the courts of the United States, and to conform to the laws thereof. The summary judgment, therefore, was strictly authorized; and the party appellant had no right to a trial by jury. In becoming a surety, he submitted himself to be governed by the fixed rules which regulate the practice of the court. The judgment is affirmed, with damages at the rate of six per cent., and costs.

It may be added, to prevent misapprehension, that there is also, in the same record, an appeal taken to a decree of the district court, dissolving an injunction to the judgment granted upon a petition in the nature of a bill in equity. This appeal is not before us; and being only an interlocutory and not a final decree, it is not the subject of an appeal.

(*a*) See Code of Procedure of Louisiana, art. 570, 573, 575, 579, 596, 597.

THIS cause came on to be heard, on the transcript of the record from the district court of the United States for the eastern district of Louisiana, and was argued by counsel: On consideration whereof, it is adjudged and ordered by this court, that the judgment of the district court in this cause be and the same is hereby affirmed, with costs and damages at the rate of six per centum per annum.

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*168] *UNITED STATES, Appellants, *v.* GEORGE J. F. CLARKE.

Florida land-claims.

The decree of the supreme court of East Florida, confirming a concession of land to the appellee granted to him by Governor Coppinger, in December 1817, confirmed.

A concession on condition, becomes absolute, when the condition is performed.

The original concession by Governor Coppinger, on the petition of George J. F. Clarke, was made on the 17th December 1817, of 26,000 acres of land, in the places he solicited in his petition, and a complete title was made of 22,000 acres, part of the same, in December 1817; 20,000 acres, part of the whole concession, were sold by the appellee; the other 4000 were surveyed in conformity with the deeree of 17th of December 1817, and a complete title to the same was made by Governor Coppinger, on the 4th of May 1818. The claimant cannot avail himself of the grant of the 4th of May 1818, made after the 24th of January 1818, the time limited by the Florida treaty; he must rest his claim on the concession made on the 17th of December 1817.

The validity of concessions of land by the authorities of Spain, in East Florida, is expressly recognised in the Florida treaty, and in the several acts of congress.

The eighth article allows the owners of land the same time for fulfilling the conditions of their grants, from the date of the treaty, as is allowed in the grant from the date of the instrument; and the act of the 8th of May 1822 requires every person claiming title to lands, under any patent, grant, concession or order of survey, dated previous to the 24th of January 1818, to file his claim before the commissioners, appointed in pursuance of the act. All the subsequent acts on the subject observe the same language; and the titles under these concessions have been uniformly confirmed, when the tract did not exceed a league square.

APPEAL from the Supreme Court of East Florida.

The case was argued by *Call*, for the appellants; and by *Wilde*, for appellee.

MARSHALL, Ch. J., delivered the opinion of the court.—This case is in many respects similar to that which has been decided at this term, between the same parties.(*a*) The appellee *filed his petition before the
*169] district court of East Florida, asserting a title of 26,000 acres of land, granted by Don Jose Coppinger, governor of that territory, while under the dominion of his Catholic Majesty.

The petition presented by Clarke to the Spanish governor, asks, in consideration of services and as a remuneration for losses sustained, all which he states, 26,000 acres of land in the following places: twenty-two thereof, in the Hammocks of Cuscoville and Chachala; and the four remaining, at a vacant place called Tallahassa, on the west of the river St. John. On the 17th of December 1817, the governor passed a decree granting in absolute property to the said Don George Clarke, the 26,000 acres of land in the places he solicits in his petition; and a complete title was made in December

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(*a*) 8 Pet. 436. This case was decided at January term 1834, but the opinion was not received by the reporter, until after the publication of the reports of the term.

1817, 22,000 lying in the Hammocks, known by the names of Cuscoville and Chachala. The petition filed in the district court states, that 20,000 acres, part of this tract, have been surveyed at the place designated, and sold to John De Centralgo. The other 4000 acres were surveyed in conformity with the decree, and a complete title made by Governor Coppinger on the 4th of May 1818.

The court decreed the claim to be valid; and reciting that 20,000 acres, part of the 22,000, had been on the same day confirmed to Moses E. Levy, on his petition for the same; proceeded to decree the remaining 4000 acres to the petitioner. The United States appealed from this decree.

The only question not already decided, which is made in this case, arises from the fact, that the full title for the 4000 acres of land in controversy, was made after the 24th of January 1818. The petitioner, therefore, cannot avail himself of that grant, and must rest his claim on the concession made the 17th of December 1817. That concession is unconditional; but the counsel for the United States contends, that it can give no valid title. The argument is understood to have been applied to concessions made absolutely, as well as to those made on condition; and the court will, therefore, consider it as *applicable to both. A concession on condition, becomes absolute, when the condition is performed. [*170

The validity of concessions is, we think, expressly recognised both in the treaty, and in the several acts of congress. The eight article allows the owners of lands the same time for fulfilling the conditions of their grants, from the date of the treaty, as is allowed in the grant from the date of the instrument; and the act of the 8th of May 1822, requires every person claiming title to lands under any patent, grant, concession or order of survey, dated previous to the 24th day of January 1818, to file his claim before the commissioners appointed in pursuance of that act. All the subsequent acts on the subject observe the same language; and the titles held under these concessions have been uniformly confirmed, where the tract did not exceed a league square. The question is not now open for discussion. The decree is confirmed.

This cause came on to be heard, on the transcript of the record from the superior court for the eastern district of Florida, and was argued by counsel: On consideration whereof, it is ordered, adjudged and decreed by this court, that the decree of the said superior court in this cause, confirming the title of the claimant, be and the same is hereby affirmed in all respects.

*United States, Appellants, *v.* Antonio Huertas.

Florida land-claims.

On the 15th of September 1817, the appellee, on his petition to the governor of East Florida for a grant of land for 15,000 acres, for services performed by him, obtained a decree of the governor for the same; the land was described in the petition particularly, and its location designated; in December 1820, an order of survey was obtained for the lands, and they were surveyed; the certificate of survey omitted to state that the lands lay at the place described in the petition; the surveys were executed in April 1821, and full titles to the land were granted in the same month. The order of survey, and the full title granted for the land surveyed, could convey nothing not comprehended in the decree of the 15th of September 1817; that decree was for 15,000 acres of land, lying at the place described in the petition.

The district court decided that the claim was valid, and confirmed it, according to the surveys. This court concurs with the district court so far as respects the validity of the claim, but disapproves of that part of it which confirms the title to the lands described in the surveys made in April 1821; these surveys do not appear to conform to the concession, under which alone the petitioner can claim.

The decree of the district court was affirmed, so far as it declared the claim of the petitioner was valid, and reversed, so far as it confirmed the title to the land in the surveys; the cause was remanded to the district court, with directions to cause a survey to be made of the lands contained in the concession, according to its terms, and to decree the same to the claimant.

Appeal from the Superior Court of East Florida.(*a*)

This case was argued by *Call*, for the United States; and by *Wilde* and *White*, for the appellee.

Marshall, Ch. J., delivered the opinion of the court.—On the 15th of September 1817, Antonio Huertas, an inhabitant of East Florida, petitioned the governor of that province for 15,000 acres of land; on which the following decree was made. "In attention to what this petitioner represents, and whereas *the services he mentions were well known, I grant to him, in the name of his majesty, and of his royal justice, which I administer, the fifteen thousand acres of land which he solicits, in order that he may possess and enjoy them in absolute ownership; and in testimony, &c."

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The land solicited is described in the petition as lying on a stream running west of St. John's river, and emptying itself into it, at the distance of about twelve miles south of the Lake George, and the survey to begin at about four or five miles west of the river St. John, so that the said stream will divide the tract into two parts. In December 1820, an order was obtained for surveying the land in four tracts; one of 2500 acres, another of 1500, a third of 600, and the fourth of 10,400 acres. These surveys were executed in April 1821, and full titles granted in the same month. These several tracts adjoin each other, and appear to lie on the stream required in the petition, and directed by the decree. But the certificate of the surveyor omits to state that the land lies four or five miles west of the river St. John.

The order of survey, and the full title granted for the land surveyed, could convey nothing not comprehended in the decree of the 15th of Sep-

(*a*) This case was decided at January term 1834, but the opinion of the court was not received by the reporter until after the publication of the volume containing the reports of that term.

tember 1817. That decree was for 15,000 acres of land, lying in the place described in the petition.

The district court decided that the claim was valid, and confirmed it to the claimant, "to the extent, and agreeable to the boundaries, as in the grants for the said land, and the plats for the four surveys thereof made, by Don Andrew Burgevin, and dated the 5th day of April 1821, and filed herein, as set forth." This court concurs with the district court, so far as respects the validity of the claim, but disapproves of that part of it which confirms the title to the lands described in the surveys made in April 1821. Those surveys do not appear to this court to conform to the concession made in 1817, under which alone the petitioner can claim.

The decree of the district court is affirmed, so far as it declares the claim of the petitioner to be valid; and is reversed, so far as it confirms his title to the *lands described in the several plats of surveys referred [*173 to in the decree. And the cause is remanded to the district court, with directions to cause a survey to be made of the lands contained in the said concession, according to the terms thereof, and to decree the same to the claimant, so far as he has retained his title thereto.

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*Benjamin J. Tarver, Appellant, *v.* Samuel B. Tarver, Charlotte Tarver and Patience Gibson. [*174

Will.—Probate.

A bill was filed by the heirs-at-law of R. T., stating, that R. T., being then a citizen of Georgia, in the year 1819, made a *conditional* will, in which he recited, "being about to take a long journey, and knowing the uncertainty of life, deemed it advisable to make a will." The will was set out in the bill, and was executed before three witnesses; and devised all his real and personal estate to his brother, B. T., after making a small provision for his sister and her son. R. T. performed the journey, and returned safe; after the decease, in Alabama, of R. T., his brother, B. T., carried the supposed will to the county court, in Dallas county, Alabama, to which the intestate and his brother had removed, and where they had purchased and held jointly considerable real and personal estate; and upon proof of the handwriting of two of the subscribing witnesses who were dead, the other witness living in the state of Georgia, the will was admitted to probate. The bill alleged the probate to be void, prayed that the will might be cancelled, and the estate distributed according to the laws of Alabama.

Held, that this was not a conditional will; the instrument taking effect as a will, is not made to depend upon the event of the return or not of the testator from his journey; there is, therefore, no color for annulling the will, that it was conditional.[1]

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[1] In determining upon the effect of a conditional will, the question always is, whether the words clearly express a contingency upon which the instrument is to take effect, that is, whether the arrangement of the testator's affairs is intended to be merely provisional; or whether they may be fairly interpreted as indicating the cause or occasion of making the will; in other words, whether it is an absolute condition, or dependent upon any particular motive operating at the time. In the former class of cases, is embraced that of Ward's Goods, 4 Hagg. 179, when the paper propounded was an unattested letter, containing this expression: "I mention these matters thus particularly, to serve as a memorandum to you, in case it should be the Lord's will to call me hence, by any fatal event, in the voyage or journey before us;" this instrument was rejected, the testator having returned from his journey, and made a subsequent attested will. So, in Parsons *v.* Lanoe, 1 Ves. sen. 190, the condition was, "if I die before my return from my journey to Ireland;" the decedent did die before his return; and Lord Hardwicke held, that the will was entirely contingent upon the event specified. So, in Sinclair *v.* Hone, 6 Ves. 608, the contingency expressed in a codicil was, "in case I die before I join my beloved wife," &c.; the testator joined his wife, before his death, and though

In Armstrong *v.* Lear, 12 Wheat. 175, it was said by this court, that no other evidence of there being a will can be received by the court, than such as would be sufficient in all other cases where titles are derived under a will; and nothing but the probate, or letters of administration with the will annexed, are legal evidence, in all questions respecting personalty. But the rule there laid down does not apply to this case; here, the complainant set up the will as the source of his title, and was bound to prove it; which must be done by the probate, which must be set forth in the bill. In this case, the complainant had set forth a copy of the instrument in his bill, alleging it was conditional, and therefore, not valid; the defendant was under no obligation to produce any probate; everything, by the complainant's own showing, was before the court.

An original bill will not be sustained, on the allegation that the probate of the will is void; if any error was committed by the court of Dallas county, in admitting the will to probate, it should have been corrected by an appeal to the next term of the supreme court in chancery, or in the district of Washington, to the superior court of that district, according to the law of Alabama.[2]

Appeal from the District Court for the Southern District of Alabama. The appellees, citizens of the state of Georgia, filed their bill in the district *175] court of the United States for the southern *district of Alabama, against the appellant, Mason Gilliam, and John Gilliam, her son, stating that they and the defendants were the heirs-at-law of Richard Tarver, who died in the year 1827; that the deceased, in 1819, made a will, which they asserted to be a conditional will, and which they exhibited;

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the codicil had been admitted to probate in the ecclesiastical court, it was held by the master of the rolls to be contingent, and to be defeated by a failure of the condition. In Porter's Goods, 2 L. R., P. D., 22, the testator used the following language: "Being obliged to leave England, to join my regiment in China, I leave this paper, containing my wishes—should anything unfortunately happen to me whilst abroad, I wish everything that I may be in possession of, at that time, or anything appertaining to me hereafter, to be divided," &c.; the deceased returned to England from China, and his will was held to be merely conditional, dependent upon his death in China. So, in Robinson's Goods, 2 L. R., P. D., 16, a master mariner, whilst on a voyage, wrote with his own hand a will, commencing, "this is the last will and testament of me, that in case anything should happen to me, during the remainder of the voyage from hence to Sicily and back to London, then I give and bequeath," &c., and it was held, that the dispositions of the will were dependent on the event referred to in the beginning of it, and that it had therefore, only a contingent operation. So, a mariner's will commencing, "instructions to be followed if I die at sea, or abroad," is only conditional. Lindsay *v.* Lindsay, 2 L. R., P. D., 457. And where a person executed his will in England; then went to India, and whilst there, executed a second will, containing this clause: "I write this, as my last will and testament, in case of a sudden or accidental death befalling me in India;" he returned and died in England; and it was held, that the will was contingent on his dying in India, and as that event had not occurred, the instrument was inoperative. Jobson *v.* Ross, 42 L. T., P., 459. So also, where one, in contemplation of a journey, thus began an informal testamentary paper: "my wish, desire and intention *now* is, that if I should not return (which I will, no preventing Providence), what I own shall be divided in follows;" it was held, by the supreme court of Pennsylvania, Gibson, Ch. J., that upon his return and subsequent death, the instrument ought not to be admitted to probate. Instances of cases falling within the other class, where the words may be interpreted, as indicating the cause or occasion of making the will, and not applying to the disposition of the property, may be found in those of Barton *v.* Collingwood, 3 Hagg. 176; Forbes *v.* Gordon, 3 Phillim. 625; Strauss *v.* Schmidt, 3 Moore P. C. 223; Mayd's Goods, 6 L. R., P. D., 17; Ex parte Lindsay, 2 Bradf. 204; Thompson *v.* Connor, 3 Ibid. 366; French *v.* French, 14 W. Va. 458. A conditional will must be admitted to probate, unless the intention be very clear, that it is to be inoperative, in the event which has happened. Ex parte Lindsay, and Thompson *v.* Connor, *ut supra*; Sinclair *v.* Hone, 6 Ves. 607. In such case, the probate is not conclusive. See also, on the subject of conditional wills, Morrell *v.* Dickey, 1 Johns. Ch. 153; Hugo's Goods, 2 L. R., P. D., 73; Graham's Goods, Ibid. 385.

[2] See Ellis *v.* Davis, 109 U. S. 485, 503.

which they also stated, was not considered as a will by Richard Tarver, at the time of his death. That the principal devisee in that will, Benjamin Tarver, one of the defendants, had proved the will in Dallas county, by proving the handwriting of two of the subscribing witnesses, who were dead; the other being out of the state; and that the probate thereof was void; that the said Benjamin had taken possession of all the deceased's lands and effects; and they prayed an account of the real and personal estate of the testator, and the time at which it was acquired; and "that the will may be cancelled, and the property of the deceased be distributed according to the laws of Alabama." The copy of the will and of the probate annexed to the will, were as follows.

Will. "In the name of God, Amen! Being about to travel a considerable distance, and knowing the uncertainty of life, think it advisable to make some disposition of my estate, do make this my last will and testament. It is my will, that my brother, Benjamin J. Tarver, should have all my estate both real and personal, except a competent maintenance for my sister Gilliam and her son John Gilliam, and further, he should give the said John Gilliam a liberal education, and then carry him though the study of law or physic, as he may think best; and at the age of twenty-one, give him, the said John Gilliam, twenty-five hundred dollars in money or property. Given under my hand, this 3d May 1819.

RICHARD TARVER. [L. S.]"

Test:—W. Lyman, William Booker, William H. Carter.
Witnesses: D. C. Patterson, William F. Hay.

Probate of will. "Orphans' court, November term 1827. State of Alabama, Dallas county. Personally appeared before me, James Suffold, judge of the county and orphans' court, in the county aforesaid, Joseph Scott, who being duly sworn, saith, that he knows the handwriting of William Booker *and David C. Patterson, who signed their names as witnesses to the within will, that he has seen them write; that he believes the signatures appearing thereto was their, and each of their, proper acts and signatures; that to his certain knowledge, both Booker and David C. Patterson are now dead. JOSEPH SCOTT. [*176

"Sworn to, and subscribed before me, this 12th day of November 1827.

JAMES SUFFOLD.

"13th November, H. VANDYKE, Clerk, recorded."

The answers of the defendant in the district court, declared, that Richard Tarver made his last will and testament, as stated in the complainant's bill, but denied that there was a condition annexed thereto. The defendant stated, that the testator and himself lived together and employed their capital together, and for their joint benefit, with an express agreement that the survivor should have the whole, which was the joint property of both. At the time the testator executed the will referred to in the bill of the complainant, he executed a will substantially similar in all respects to that executed by Richard Tarver. The answers asserted, that the probate of the will was in full form, and was regular, and that there was no sufficient cause shown in the bill for the exercise of equitable powers by the court.

The district court gave a decree in favor of the complainants, on the

ground, that the will of Richard Tarver had not been admitted to probate by the proper orphans' court; and of course, that it did not appear to the court, that he made a will. And also, that this proceeding was instituted to set aside the will of Richard Tarver, and no title which the respondent might have to the property of Richard Tarver, could be set up in the case, except such as might be derived from the will. The defendants appealed to this court.

The case was argued by *Key*, for the appellants; and by *Gamble* and *Wilde*, for the appellees.

THOMPSON, Justice, delivered the opinion of the court.—This case comes up on appeal from the district court of the United States for the southern
*177] district of Alabama. *The pleadings are very inartificially drawn, and do not, probably, present the case in such a manner as to enable the court to dispose of all the questions intended to be brought under consideration.

The bill sets out that Richard Tarver, late of the county of Dallas, and state of Alabama, departed this life, in that county, in the year 1827, leaving, at the time of his death, a large real and personal estate, and leaving three sisters and the defendant, Benjamin Tarver, his sole heirs-at-law. That the said Richard Tarver, in the year 1819, being a citizen of Georgia, and possessed of a large estate in lands, made a *conditional* will, in which he recites, that being about to take a long journey, and knowing the uncertainty of life, he deemed it advisable to make a will; and thereby declared, that he left all his estate, real and personal, to his brother, Benjamin Tarver. And making some small provision for his sister Mason Gilliam, and her son John, all which will more fully appear by a copy of the supposed will attached to the bill, and which is prayed to be considered as a part thereof. The bill alleges, that the said Richard Tarver performed the journey, and returned safe. Some statements are then made, with respect to the property of the deceased; and the bill alleges, that he and the defendant, Benjamin J. Tarver, lived together, and employed their capital, of every description, jointly. That Benjamin, on the decease of his brother, took possession of all his estate. That the said supposed will purports to be attested by sundry persons as witnesses; the survivor of whom resides in the state of Georgia. That the said Benjamin carried the supposed will before the county court of Dallas county; and upon the proof of the handwriting of two of the subscribing witnessess, who are dead, the other still living in the state of Georgia, the will was admitted to probate, and the bill alleges that such probate is void. The bill then prays, that the will may be cancelled, and the estate distributed according to the laws of Alabama; and that the defendant may set forth the full amount of the property of the said Richard, not only what he had at the time of his death, but what he had at the date of the supposed will, describing the property at each of these times particularly. An amended bill was afterwards filed, stating that the defendant was attempting to set up said will; and charging that it was conditional in
*178] its inception; *and that the condition on which it was to take effect has not happened.

Several answers were filed, in consequence of exceptions taken and allowed by the court. These answers contain much matter not responsive

to the bill, and which was not properly before the court. But it is denied, that there was any condition annexed to the will, other than is shown by the will itself. The defendant admits, that he procured the will to be proved and admitted to record in the orphans' court of Dallas county; and alleges, that the probate of said will remains in full force, not revoked, nor in any manner set aside; and which he is informed and believes, is in all respects legal; and prays the benefit of the answers as a demurrer to the bill. The court decreed a distribution of the estate among the legal representatives of the deceased; and the cause comes here for review.

The questions put in issue by the pleadings, are: 1. Whether Richard Tarver, at his decease, left the will in questions as a valid and operative will? 2. Whether such will was duly admitted to record in Dallas county?

It is a little remarkable, that the final decree in the cause does not touch either of these questions put in issue by the pleadings; but proceeds at once, upon the report of the master, to make distribution of the estate among the heirs-at-law of the deceased. The judge, in his opinion, does notice these questions; but does not decide whether the will was conditional, and had become inoperative, by reason that the contingency on which it was to take effect had not happened; but puts his decision upon the ground, that the defendant was bound to establish the will; and that this could be done in no other way than by the production of a valid probate. He observes, that this proceeding is instituted to set aside the will of Richard Tarver, and no title which the respondent may have to the property of his deceased brother, can be set up in this suit, except such as may be derived from the will. That if the complainants had even admitted the existence of the will of Richard Tarver, yet it would be indispensable to the title set up by the respondents, through that will, to show that it had been duly admitted to probate, by the proper orphans' court. The judge then goes into an examination, whether the will *had been duly admitted to probate, and coming to the conclusion that it had not, he declares, that it does not, [*179 therefore, appear to this court that Richard Tarver made any will. He seems to rest his opinion upon the decision of this court, in the case of *Armstrong* v. *Lear*, 12 Wheat. 175, where it is said, that we cannot receive any other evidence of there being a will, than such as would be sufficient, in all other cases where titles are derived under a will; and nothing but the probate, or letters of administration with the will annexed, are legal evidence of the will, in all questions respecting personalty. But the rule as there laid down, does not apply to this case. There, the complainant set up the will as the source of his title, and was bound to prove it; which must be done, say the court, by the probate, which must be set forth in the bill. But in the present case, the inquiry was, whether the instrument in question was a valid will or not; and the complainant had set out a copy of that instrument, for the purpose of showing that it was not a valid subsisting will, because it appeared upon its face to be conditional, and then to show that such condition or contingency had never happened. The defendant was not the actor, seeking to enforce any right under the will; and he could be under no obligation to produce any probate. The complainant having set out the will, everything, by his own showing, was before the court, that was necessary to present the question which was to be decided. There was no evidence impeaching this will, except what appears on the face of it, and is

rested entirely on the introductory part of it. It begins in this manner: "Being about to travel a considerable distance, and knowing the uncertainty of life, think it advisable to make some disposition of my estate, do make this my last will and testament, &c." And it is contended, that the condition upon which the instrument was to take effect as a will, was his dying on the journey, and not returning home again. But such is a very strained construction of the instrument; and by no means warranted. It is no condition, but only assigning the reason why he made his will at that time; but the instrument's taking effect as a will, is not made at all to depend upon the event of his return or not from his journey. There is no color, therefore, for annulling this will, on the ground that it was conditional.

*180] *And the bill cannot be sustained, on the allegation that the probate is void. An original bill will not lie for this purpose. If any error was committed in admitting the will to probate, it should have been corrected by appeal. This is provided for by the law of Alabama, which makes the county court in each county an orphans' court for taking the probate of wills, &c., and declares, that if any person shall be aggrieved by a definitive sentence or judgment, or final decree of the said orphans' court, he may appeal therefrom to the next term of the supreme court in chancery, or in the district of Washington, to the superior court of that district. The law also provides, that any person interested in such will, may, within five years from the time or the first probate thereof, file a bill in chancery to contest the validity of the same; and the court of chancery may, thereupon, direct an issue or issues in fact, to be tried by a jury, as in other cases. But that after the expiration of five years, the original probate of any will shall be conclusive and binding upon all parties concerned; with the usual savings to infants, *femes covert*, &c. Toulmin's Dig. 887. We think nothing has been shown, to impeach or invalidate this will; and that the bill cannot be sustained, for the purpose of avoiding the probate. That should have been done, if at all, by an appeal, according to the provisions of the law of Alabama.

We do not enter at all into an inquiry as to the operation of this will, with respect to the property that will pass by it, nor touching the right by survivorship, as set up by the defendant in the court below. These questions are not properly before us, upon the pleadings in the cause, nor presented in such a manner as to enable us satisfactorily to dispose of those questions. We think, therefore, that the decree of the court below must be reversed, and the bill dismissed, without prejudice; so as not to preclude the appellees from asserting their right to any part of the property, if any such there be, which does not pass under the will of Richard Tarver. The decree of the district court is accordingly reversed, and the bill dismissed, without prejudice.

*181] This cause came on to be heard, on the transcript of the record from the district court of the United States for the *southern district of Alabama, and was argued by counsel: On consideration whereof, it is ordered and decreed by this court, that the decree of the said district court in this cause be and the same is hereby reversed and annulled, and that this cause be and the same is hereby remanded to the said district court, with directions to that court to dismiss the bill of the complainants, without prejudice.

*Seaman Field and others, Plaintiffs in error, *v.* United States.

Priority of the United States.

L. E. Brown, a debtor to the United States on bond, became insolvent, and under the insolvent laws of Louisiana, made an assignment of his property for the benefit of his creditors; and syndics were appointed, who took possession of his estate, real and personal, and sold the same, part for cash, and part on credit of one, two and three years. The United States instituted suits on the bonds, against L. E. B., and obtained judgments in the district court of the United States for the district of Louisiana; the effects of the insolvent were administered by the syndics, according to the laws of Louisiana; the United States took no part in these proceedings, but a notice of the debts due by B. to the United States, was given to the syndics, before any distribution was made of any of the proceeds of the estate in their hands; and a suit for the amount of the debts of B. to the United States, under the law giving a right to priority of payment, was commenced against them, before the tableau of distribution of the first instalment of the insolvent's estate, was confirmed by the parish court of New Orleans. The whole proceeds of the estate exceeded $40,000; the mortgages were about $27,000; and when all the notes taken by the syndics were paid, there would be sufficient to discharge these mortgages, and all the debts due to the United States; a large amount of the proceeds were not to be received, until after the judgments were obtained in favor of the United States; one moiety of the amount of sales being payable after the suit against the syndics was commenced, and the other, after the judgment against them was rendered.

The court held, that the syndics were not liable to the United States for the debts due to them, unless funds had actually come into their hands; the notes for the sales may all be good; yet as one moiety of them was not paid, at the time of the judgment of the United States against them, it does not judicially appear, that, even at that time, they had funds on which the United States were entitled to judgment; if the remaining moiety of the notes has since been paid, the United States will then have a legal claim thereon for their debts.

The United States were not parties to the proceedings in the parish court, nor were they bound to appear and become parties therein; the local laws of the state could and did not bind them in their rights; they could not create a priority in favor of other creditors, in cases of insolvency, which should supersede that of the United States.

As the cause was not tried by a jury, the exception to the admission of evidence was not properly the subject of a bill of exceptions.

The priority of the United States attached, by the laws of the United States, in virtue of the assignment and notice to the syndics; and it was the duty of the syndics, to have made known these debts, in their tableau of distribution, as having had priority. The mortgages upon particular estates sold, must be first paid out of those estates; but if there be any deficiency in the proceeds of any particular estate, to pay the mortgages *thereon, the mortgagees thereof cannot come in upon the funds and proceeds of the sales of the other estates, except as general creditors. [*183

The bill of exceptions stated, that during the trial of the cause in the district court, the counsel for the marshal stated, that he had made a seizure or given notice that he seized in the hands of the defendants, the syndics, any funds in their hands, to a sufficient amount to satisfy the judgment obtained in the case of the United States *v.* John Brown, sen., and Lewis E. Brown. This testimony was objected to, as being contrary to the statement of facts in the case, in which it was stated, that a return of *nulla bona* had been made by the marshal; and because the act was done in a case to which the defendants were not parties, and because the best evidence was the notice or true and proved copies of it; the return of the marshal in the case of the United States *v.* John Brown, sen., and Lewis E. Brown, was also offered, and was objected to. The evidence was properly admitted, as notice to the syndics of the debts due to the United States.[1]

Error to the District Court for the Eastern District of Louisiana. In the district court, on the 30th of March 1831, the attorney of the district filed a petition of complaint, on behalf of the United States, against Seaman Field, Samuel J. Peters and Thomas Tobey, residing in the city of

[1] See United States *v.* Clark, 1 Paine 629; United States *v.* Duncan, 4 McLean 607.

New Orleans, syndics of L. E. Brown ; stating that one Lewis E. Brown, of the city of New Orleans, on the 27th of October 1829, executed a certain bond to the United States, in the sum of $1366.20 ; and suit having been brought on the said bond, judgment in favor of the United States was obtained on it, on the 22d of December 1830, for the amount thereof, to be satisfied with the payment of $632.10, with interest, &c. That the said Lewis E. Brown failed and became insolvent, and made a voluntary assignment of all his property to his creditors, on or about the 30th of April 1830, under the laws of Louisiana. That Seaman Field, Samuel J. Peters and Thomas Tobey were appointed syndics, or assignees of his creditors; and in that capacity, had received and taken possession of all the property, real and personal, of the insolvent, and had sold and disposed of the same to an amount far exceeding the debts due by him to the United States. That at the time of their receiving and taking possession of the said property as aforesaid, they well knew of the existence of the debts due to the United States by Lewis E. Brown ; and that an amicable demand had been
*184] made of them by the United States, for the amount of the said *judgment and of the costs, but they had neglected or refused to pay the same, or any part thereof. The petition prayed a citation to the defendants, to answer the same ; and that after due proceeding, they be condemned, jointly and severally, to pay the amount due to the United States.

Citations issued to the several defendants, who appeared, respectively, and on the 17th of May 1831, filed separate answers to the petition.

The answers admitted, that the respondents had, in the capacity of syndics, taken possession of the property of L. E. Brown, by him assigned for the benefit of, and distribution among, his creditors; and that they acted in the said capacity, in virtue of certain judicial proceedings in the parish court for the parish and city of New Orleans, to which proceedings the answers referred ; and an exemplification of which proceedings would in due time be exhibited, and which were to be considered as part of the said answer. That in virtue of said proceedings, under the local laws of Louisiana, the said property, so assigned, was sold by said syndics on a credit of one, two and three years ; that out of the proceeds of sale, when the same shall be received, were to be paid certain privileged and mortgaged creditors, who were preferred to the United States. The answers further stated, that the respondents had no funds in their hands belonging to the estate of L. E. Brown ; the property having been so sold, on a credit, for promissory notes not yet due or paid. They denied all other obligations in the petition, or that the respondents, as syndics, had done anything to render them responsible, under the laws of the United States, or liable in any manner to the claim stated in the petition of the United States, and prayed a trial by jury. The answers further stated, that the said syndics sold the household furniture and other movables of the said L. E. Brown, at a credit of six months; out of the proceeds of which, they had paid law-charges, house-rent and other privileged charges upon the estate, preferred to the United States; of which a particular account was annexed to one of the separate answers filed in the case.

*185] On the same 30th of March 1831, the district-attorney filed *a petition in similar terms, stating that on a bond given by the said L. E.

Brown to the United States, for $1394, on the 3d of December 1829, a suit had been brought on the 3d of December 1830, and on the 22d of the same month, a judgment had been obtained for the amount, to be satisfied by the payment of $697, with interest, &c., with the same allegations of responsibilities on the part of the defendants. Another petition was filed at the same time, stating that on a bond given by the said L. E. Brown, on the 28th of October 1829, for the sum of $1264, a judgment had been obtained on the 22d of December 1830, for the said sum, to be satisfied by the payment of $632, with interest, &c., and also stating a claim on the defendants. Another petition was filed at the same time, stating that on the 22d of December 1830, another judgment, on a bond given to the United States by L. E. Brown, was obtained for the sum of $1060.91, to be satisfied by the payment of $530.45, with interest, &c.; and on the same day, another petition was filed, stating that another judgment had been obtained against L. E. Brown, on the 22d of December 1830, on a bond given by him, for the sum of $1396, to be satisfied by the payment of $698, with interest, &c.; both petitions alleging the liabilities of the defendants. Other petitions were filed upon other judgments, on bonds of the same nature, and for different amounts. The whole amount of judgments stated in these several petitions, was $11,264.10; and the real debt, claimed to be due to the United States on the same, amounted to $5647.55, with interest, &c.

On the 2d of June 1831, in pursuance of an order of the district judge, a detailed statement of all the property received by the syndics or assignees of Lewis E. Brown, and the sales and dispositions they had made thereof, was filed in court. The sales of the real estate and slaves were made, the former at one, two and three years', and the latter at twelve months' credit; for which notes were given, which would become due at different periods, amounting to $39,000.63. The tableau of distribution of the first instalment of the estate, established by the parish court, in relation to the *estate of Lewis E. Brown, referred to in the answers, dated on the 3d of December 1831, was also filed, and showed that the balance [*186 of cash in the hands of the syndics, amounting to $9536.70, had been paid as a dividend on $27.055, to the mortgage-creditors of Lewis E. Brown. The amount of the moneys received and disbursed by the syndics, showing the balance of $9536.70 for this distribution, was also filed.

On the 9th of March 1832, on motion of the district-attorney, it was ordered that all these suits be consolidated; and by consent of parties, trial by jury being waived, the cause was submitted to the court, on a statement of facts prepared by the parties.

Statement of facts by the counsel of the United States and the defendants. Lewis E. Brown, at the time of failure and insolvency, to wit, the 26th of May 1830, was surety on certain bonds given to secure duties to the United States by John Brown, senior, viz: A bond dated 27th of October 1829, due 26th of August 1830, amount of duties $632; a bond dated 27th of October 1829, due 26th of June 1830, amount of duties $632.10; a bond dated 27th of October 1829, due 26th of October 1830, amount of duties $632; a bond dated 3d of December 1829, due 2d of October 1830, amount of duties $698; a bond dated 3d of December 1829, due 3d of December 1830, amount of duties $698; a bond dated 3d of December 1829, due 2d of

August 1830, amount of duties $698 ; a bond dated 11th January 1830, due 9th of September 1830, amount of duties $535.45 ; a bond dated 11th of January 1830, due 9th of November 1830, amount of duties $531 ; a bond dated 11th of January 1830, due 9th of January 1831, amount of duties $531 ; On all of which, with the exception of the last mentioned, judgment was rendered against L. E. Brown, on the 22d of December 1830, for the aforesaid amounts, with interest at six per cent., from the falling due of the
*187] bonds, until paid, with costs *of suit; and on the last-mentioned bond a like judgment was rendered on the 22d of February 1831. On these judgments, writs of *fieri facias* have issued against all the parties, on which the marshal has returned *nulla bona*, and nothing has been paid by any of the parties on account of the same.

John Brown, senior, failed and became insolvent, and applied for the benefit of the insolvent law of Louisiana, on the 10th day of June 1830. The sale of Lewis E. Brown's property was made by order of the syndics, at public auction, on the 30th of July 1830. The defendants, as syndics, in addition to the sums stated by them to have been received in the account hereunto annexed, have received from the sale of the property of said Brown, indorsed promissory notes, secured by mortgage on the property sold, amounting to $24,898.60 ; one-half of which fell due on the 31st of July 1832, and the other half on the 31st of July 1833. The note stated in the account of moneys received and disbursed by the syndics of Lewis E. Brown to have been paid to the United States, was indorsed by Charles Armstrong, and was paid at the Bank of the United States, where it was deposited for collection by Martin Gordon, and paid by the syndics. The United States have never, in any manner, appeared in the proceedings had in the parish court, in relation to the insolvency of Lewis E. Brown.

Lewis E. Brown failed and became insolvent, on the 29th of May 1830. On the 15th of July 1829, he mortgaged houses and lots in Canal street to J. H. Field & Co., to secure the payment of $5359.76, with ten per cent. per annum interest from that date till paid. On the 12th of February 1829, Brown executed another mortgage to J. H. Field & Co., for $5000, on the same property, with same interest as above. On the 18th of March 1830, L. E. Brown gave another mortgage to said Field & Co., for $745.16, same property and same rate of interest. The first mortgage was recorded in the recorder of mortgages' office, on the 16th of July 1829 ; the second was recorded on the 13th of February 1829 ; and the third on the 20th of March 1830. On the 10th of March 1830, Lewis E. Brown mortgaged said prop-
*188] erty, and the rest of his real estate, to R. Ball & Co., *for $1000, which was recorded on the 17th of March 1830. On the 4th of February 1830, Brown mortgaged the houses and lots in Canal street, and lots Nos. 3 and 4, in suburb St. Mary, to Ogier Williams, for $3300, which was recorded on the 11th of February 1830. On the 2d of March 1830, Brown mortgaged the houses and lots between Burgundy and Rampart streets, and the lots in Canal street, between Dauphine and Rampart, to Peters & Milliard, for $7000, with ten per centum per annum interest from date till paid ; recorded on the 4th of March 1830. On the 19th of February 1830, this last property was mortgaged to Thompson & Grant for $3000, as all the lots in Canal, between Burgundy and Dauphine streets, and recorded on the 20th of February 1830. There existed on the property of said Brown the following sums due on original purchase-money,

and price of the property surrendered by him to his creditors, and for which said property was mortgaged, and other mortgages were duly recorded, being prior to his insolvency, to wit, the amount of a note in favor of the heirs of Jones, for the price of the lot between Burgundy and Rampart streets, in Canal street, including protests and interest, $1055.97 ; ditto. to William McCawly, price of lots in Canal street, between Dauphine and Burgundy streets, $650, dated in 1829 ; a note due to the United States for $333.33, dated 1829, for a lot on New Levee street. Besides this, the syndics have paid other debts due by the estate of said Brown, as detailed in annexed record making part of this statement. On the 15th of December 1831, the tableau of distribution, including the list of sums paid as aforesaid, was finally confirmed by the parish court for the parish and city of New Orleans, after due proceedings having been previously had thereon."

On the 3d of December 1830, the marshal, acting under writs of *fieri facias*, issued on the several judgments against Lewis E. Brown, seized the funds and property in the possession of the syndics, or assignees of Lewis E. Brown; and gave notice to them, personally, of the seizure of said funds, in amount sufficient to satisfy the three several judgments. *Job Wilson, the syndic of John Brown, sen., had under his control notes [*189 and other assets to an amount exceeding the debt due by John Brown, sen., to the United States. Those notes were not yet due, but were considered good, and would be applicable, when paid, to the satisfaction of the judgments rendered against the said Brown. These notes were deposited with the district-attorney, who was also acting as the attorney of the said syndics, but had no authority to dispose of them to satisfy the United States.

On the 9th of January and 21st of February 1833, the causes came before the court, and were finally disposed of on the latter day. The counsel for the defendants, on the trial, tendered the following bill of exceptions, which was signed by the district judge.

"Be it remembered, that, during the trial of this cause, the counsel for the plaintiffs offered to prove, by the marshal, that he had made a seizure, or given notice that he seized, in the hands of the defendants, any funds in their hands, to a sufficient amount to satisfy the judgment obtained in the case of the United States v. John Brown, sen., and Lewis E. Brown. The counsel for the defendants objected to this testimony, as being contrary to the statement of facts made in this case, where it is stated, that a return of *nulla bona* had been made in said case, and because the act was done in a case to which the defendants were not parties, and because the best evidence was the notice itself, or true and proved copy thereof; because if any such seizure or notice was made or given, that it should appear from the official return of the marshal. The counsel for the plaintiffs then offered the return of the marshal in the said case of the United States v. John Brown, sen., and L. E. Brown. This the defendants' counsel objected to, because the writ which issued in that case was *ex parte*, and these defendants were not parties, directly or indirectly, to the said case of the United States v. John Brown, sen., and L. E. Brown, and that the same was otherwise illegal. These objections were overruled by the court, because the testimony was considered pertinent and legal ; and also, because, previous to the introduction by the district-attorney of the testimony heretofore

referred to, the defendants had been *permitted to amend the statement of facts, by proof of matters not stated therein."

The court gave the following judgment for the United States. "The court having maturely considered these cases, doth now adjudge, order and decree, that judgment be entered up in favor of the United States against Samuel J. Peters, Seaman Field and Thomas Toby, jointly and severally, for the sum of $5661.55, with interest thereon at the rate of six per centum per annum, from the following dates, to wit: on $632.10, from the 26th of June 1830, until paid; on $797, from the 2d of August 1830, until paid; on $632, from the 26th of August 1830, until paid; on $530, from the 9th of September 1830, until paid; on $698, from the 2d of October 1830, until paid; on $632, from the 26th of October 1830, until paid; on $531, from the 9th of November 1830, until paid; on $698, from the 3d of December 1830, until paid; on $531, from the 9th of January 1831, until paid; together with all the costs which have accrued both before and since their consolidation."

The following is the material portion of the opinion of the district judge, read at the time of the rendition of the above final decree, and filed in the clerk's office of the eastern district of Louisiana.

"United States v. The Syndics of L. E. Brown.

"On the 30th of March 1831, the attorney of the United States instituted nine separate suits against S. Field, S. J. Peters and Thomas Toby, the syndics of L. E. Brown, founded on fourteen judgments previously obtained against John Brown and his sureties, of whom Lewis E. Brown was one, on custom-house bonds for duties. The suits against the syndics are instituted under the provisions of the 65th section of the duty act of 1799. The object of these actions is, to make them personally liable out of their own funds, to the United States, for the debt due to the latter by the insolvent, L. E. Brown, for having, as is alleged, improperly paid to others moneys, out of the estate of said Brown, which ought to have been paid to the United States, as a debt having priority. On the 17th of May
*191] 1831, the defendants, by their counsel, *filed separate answers of the syndics to each of the petitions of the United States, all in substance the same, by which they admit that they are the syndics of L. E. Brown, and in that capacity have taken possession of his estate. The answers then state, that the defendants sold, as they had a right to do, under the laws of Louisiana, the property of the insolvent, on a credit of one, two and three years, which, when due, they allege they have a right to pay to certain privileged and mortgage creditors, as being preferred to the United States. They then say, they have no funds belonging to the estate of L. E. Brown; all the property ceded by him having been sold on a credit, and for which the notes taken are not due. They then admit, that they have sold the household furniture, and certain other movables of the estate of said Brown, for an amount not stated, which has been received and paid over in law-charges, house-rent, and other charges privileged upon said estate, and preferred to the United States, as stated in an account annexed. The remainder of the answers is a general denial of the allegations of the plaintiffs' petition, and of their personal liability to them.

"All these suits were consolidated, on the 9th of March 1833, and in

that shape submitted to me for adjudication; which, therefore, I shall treat as one action. The following facts have been stated and agreed upon by the parties: That judgments were obtained against L. E. Brown, on the custom-house bonds, on the 22d of December 1830, with interest thereon, at the rate of six per centum per annum from the date of their falling due; that writs of *fieri facias* were issued against all the parties, on which the marshal has returned *nulla bona*, and nothing has been paid by any of the parties; that John Brown, the principal in these bonds, became insolvent, and applied for the benefit of the insolvent law of Louisiana on the 10th of June 1830; that the sale of Lewis E. Brown's property was made by order of the syndics, these defendants, on the 30th of July 1830; that the defendants, as syndics, in addition to the sums stated by them to have been received in the account-current annexed, have received, from the sale of the property of said Brown, indorsed promissory notes, secured by mortgage on the property sold, amounting to $24,898.60, one-half of which was due on the 31st of July *1832, and the other half will be due on the 31st of July 1833; that the United States have never in any manner [*192 appeared in the proceedings had in the parish court, in relation to the insolvency of L. E. Brown; that L. E. Brown became insolvent on the 29th of May 1830. On the 15th of July 1829, he mortgaged houses and lots in Canal street, to J. H. Field & Co., to secure the payment of the sum of $5359.76; on the 12th of February 1829, he executed another mortgage to J. H. Field & Co., for $5000 on the same property, with interest on both at the rate of ten per centum per annum; on the 15th of March 1830, he gave another mortgage to said Field for $745.16, on the same property, with the same rate of interest; on the 10th of March 1830, he mortgaged said property and the rest of his real estate to R. Ball & Co. for $1000; on the 4th of February 1830, he mortgaged the houses and lots in Canal street, and lots Nos. 3 and 4, in Suburb St. Mary, to Ogier and Williams for $3300; on the 2d of March 1830, he mortgaged the houses and lots between Burgundy and Rampart, and the lots in Canal, between Dauphine and Rampart streets, to Peters & Milliard, for $7000; on the 19th of February 1830, the last property was mortgaged to Thompson & Grant for $3000. There existed on the property of said Brown, surrendered to his creditors, as the original purchase-money and price of the property, and due to individuals, about the sum of $2000, for which his property had been mortgaged long before his insolvency. On the 15th December 1831, the tableau of distribution was finally confirmed by the parish court.

"At the opening of this cause, the court permitted the defendants to add to the statement of facts, that the attorney of the United States, as counsel for the syndics of John Brown, has now in his possession good notes, sufficient to pay the debt of the United States; and the court also permitted the district-attorney to prove by the marshal, that these defendants had due notice of the debt due to the United States by L. E. Brown, before making any payments to his creditors. The tableau of distribution exhibited shows that the syndics did not consider the United States as creditors of L. E. Brown, inasmuch as they are not put down as such upon it.

*"With these facts before me, I am called upon to adjudge, whether or not the defendants are personally liable to pay the debt [*193

due to the United States. Both parties have chiefly relied upon the authority of the case of *Conard* v. *Atlantic Insurance Company*, decided by the supreme court of the United States, and reported in 1 Pet. 386. That case, however, differs materially from this. There, the dispute was, whether the property seized upon by the marshal belonged to the United States or to the insurance company. Here, there is no contest about the estate of Brown having passed to the syndics, and that it was his estate when so passed; but whether his syndics have so managed the trust confided to them as to render themselves individually liable to the United States. The case cited, however, establishes some doctrines applicable to this, and especially, one that is not denied by the attorney of the United States, that *bonâ fide* mortgages of property, executed before the insolvency of a debtor to the United States, divest the mortgagor of his property, and, as it has been decided that the United States must seek their pay out of the estate of the debtor, such property cannot be reached by them. According to this principle, there is apparently on the face of these proceedings a sum of about $27,000 secured to mortgagees, and beyond the reach of the United States.

"But the district-attorney contends, that, as all these are special and not general mortgages, it was incumbent on the defendants to have shown how much each property mortgaged sold for, in order to ascertain whether any thing remained over and above for the United States. That the defendants have no right to add the amount of mortgage-debts together, and then say, the aggregate exceeds the debt due to the government: as, for instance, one man has a mortgage for $15,000, and the property mortgaged sold for only $10,000; another has a mortgage for $10,000, and the property sold for $15,000: on this supposition the aggregate of mortgages would be $25,000, and the total amount of sales would also be $25,000. In such a case, it would appear, that, as the whole of the sales of property was covered by privileged claims, nothing would remain for the United States. But he insists, that the fallacy consists in this, that, in the first case, the mortgagee must submit to a loss of $5000, *his mortgage not reaching any other property; and in the latter case, the mortgagee having his claim satisfied by the payment of $10,000, the remaining sum of $5000 must go to the United States, in preference to those holding special mortgages on other property. This position I take to be impregnable. But were it otherwise, how stand the facts of this case?

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"It appears from the exhibits, that the defendants have sold property to the amount of upwards of $40,000 belonging to the estate of L. E. Brown, and the mortgaged debts they have paid only amount to about $27,000, leaving a balance of $13,000, which is more than double the sum due to the United States, which they have paid to other creditors, on the ground, that these creditors had a privilege on the common fund, in virtue of the laws of this state, and as the decisions go to show that the United States had no lien for their debts, under the 65th section of the duty act, their priority of payment therein mentioned must yield to the privileges given by the laws of the state. It will not, I think, be denied, that acts of congress passed in pursuance of the constitution, when in conflict with state laws, must prevail. It has never been doubted, that the law under consideration is constitutional. Now, it says, 'in all cases of insolvency, or when any estate in the hands of

the executors, administrators or assignees, shall be insufficient to pay all the debts due from the deceased or insolvent, as the case may be, the debt or debts due to the United States, on any such bond or bonds, shall be first satisfied, and any executor, administrator or assignee, or other person, who shall pay any debt due by the person or estate for whom or for which they are acting, previous to the debt or debts due to the United States from such person or estate being first duly satisfied and paid, shall become answerable in their person and estate for the debt or debts due to the United States, &c.' Now, here we have the case of an insolvent, who is unable to pay all of his debts, whose estate has gone into the hands of assignees, and who have not paid the debt due to the United States, but have paid others in preference.

"If the liens established by the laws of Louisiana to attach after insolvency, are to have a preference over the debts due to *the United States, then the state legislature has deprived the general government of nearly all the privileges secured to it by the act of 1799, and may by future legislation deprive it of all of them; and all that may be done by a state which was not a member of the Union until thirteen years after congress so legislated. The doctrine of privilege in Louisiana may be very well, as between her own citizens and other individuals who may choose to come into her tribunals; so far her legislation is valid, but she cannot conclude the general government, nor compel it to submit to the decisions of her courts, in a case like this, in which congress has specified the rights of the United States. The hardship of the case was much and ably insisted on in argument, but I do not view it in that light. Every citizen is bound to know the law of the land, and if state legislatures will pass laws which cannot be enforced as against the United States, and thereby entrap the citizen, he has himself and them to blame, but cannot censure the general government, which had previously told both them and him, that the interests of the whole are paramount to those of the individual, and especially in the collection of the very money which is indispensable to the existence of the general government. [*195

"It was insisted also, that if the charges incident to the surrender of an insolvent's estate have not a first privilege, the officers of the courts would not render their services. Whatever necessary court charges are incurred in such cases, ought to be paid first; and the United States must be postponed to such creditors, on the same principle that, out of the proceeds of a vessel forfeited to the United States, must first be paid seamen's wages and supplies furnished, because, without such aids, nothing probably would be saved to the government. But after an estate has passed into the hands of assignees, any debts they may pay, other than court-charges, and privileges existing antecedently to the failure, to the prejudice of the United States, are payments made in their own wrong. According to this view of the subject, a number of items charged as paid to individuals, in the tableau of distribution, have been wrongfully paid; and, for the reasons assigned in a former part of this opinion, the application of the general fund to the payment of special mortgages was illegal: but it is sufficient, *to entitle the United States to recover in this action, to show that the syndics have, to the prejudice of the government, paid one dollar [*196

wrongfully ; for, by the statute, if such persons pay any debt improperly, they *ipso facto* render themselves liable to the United States for so much.

"If this case had been tried on the issue made by the answer of the defendants, it would have been incumbent on the United States, to have shown how much the syndics had wrongfully paid, previous to the institution of this suit, to enable them to recover that much, for they could not have been made liable in this action for anything done by them after its inception—that would have been the subject of another suit ; but the defendants, by their admission of facts, and by the documents they have voluntarily produced and made part of the pleadings or evidence, have put their whole proceedings, first and last, in issue, and the case is now prosecuted as if all the payments they have made, had been made before suit brought. Now, a bare inspection of the list of debts paid by them is conclusive against them, aided by all the force of the laws of Louisiana, for they have paid claims, to the exclusion of the United States, not recognised as liens, or privileged by these laws ; and they admit in their answer, that, previous to filing it, they had paid to creditors, other than mortgage-creditors, money out of the estate, but do not say how much.

"The defendants have, in no manner, acknowledged the debt of the United States as due from the estate of the insolvent. Knowing of its existence, as it is presumed they did, they ought, at least, to have put them on their tableau, even if they had afterwards disputed their right to priority of payment ; but the fact is, as that document shows, they have claims individually, adverse to the United States, and therefore, it was no part of their policy to admit the rights of the latter in any shape.

"In the course of this opinion, whatever *obiter dicta* I may have expressed *arguendo*, I wish to be explicitly understood, as affirming the law to be, that whatever legal liens may have attached to the property of the debtor of the United States, prior to his insolvency, whether they arise from mortgages, judgments, or from the operation of state laws (if properly set
*197] forth *and pleaded), so far divests the debtor of his property *pro tanto*, as to exempt it from the claim of the United States. It is to the unincumbered estate of the insolvent, divested of any pre-existing lien, that they must look for priority of payment, for having no lien themselves on their debtor's property, while it is under his own control, they cannot reach it in the hands of others, who have an implied right to it, in case of the non-payment of the debt for which it is security, as in the case of mortgage, the mortgagee having the *jus in re*. But all liens incidentally attaching to an insolvent's estate, after his insolvency and surrender of it for the benefit of his creditors, except court-charges, or the expenses necessary to put it into the hands of assignees, must be postponed to the claim of the United States ; for whatever property exists, unincumbered by liens, at the time of insolvency, constitutes the estate of the insolvent, and is that "common fund" spoken of by the supreme court in *Conard* v. *Atlantic Insurance Company*, out of which all the creditors are to be paid, the United States having priority. If it should be thought, that I might have deduced this doctrine with less prolixity of expression, my answer is, that I have been thus tedious on this part of the case, for two reasons : first, because I have never seen any judicial discussion and decision on the main points involved in this case ; and secondly, cases of this kind are likely hereafter to arise, and on that account it is

proper that my construction of the 65th section of the collection act should be known, and the reasons for it.

"The defendants' counsel seemed to attach much importance to the fact, that the district-attorney has in his possession good notes, arising from the sale of John Brown's estate (the principal in the custom-house bonds), more than sufficient to pay the debt due to the United States. The answers to this are: 1. That because the government may have another recourse for payment, it is no reason why she should relinquish any security she may have for her debt: and 2. If, through the diligence and vigilance of the district-attorney, acting in his private capacity, as the attorney of the syndics of John Brown, he has succeeded in wresting from a fraudulent grasp the only means by which these defendants may be ultimately reimbursed the amount of this judgment against them, they *surely have no right to complain; so that, under present circumstances, the question is [*198 virtually one of costs; for as to their liability to pay the debt sued for, little or no doubt can exist; and so deeply impressed with that idea was the defendants' counsel of record, that he labored to convince the court, that although costs usually follow a judgment, yet in this case they might not be taxed against his clients. His complaint is, that the attorney of the United States has unnecessarily multiplied costs, by bringing nine suits, when he ought to have brought but one; and on that point, he relies upon the third section of the act of congress of the 22d of July 1813, which prohibits attorneys from unnecessarily and vexatiously increasing costs, on pain of being made liable themselves for any excess. It is true, if the district-attorney could have foreseen the defence which has been set up in these cases, it would have been his duty to have included all in one action; but these suits were brought on separate judgments, each of which might have admitted of a distinct defence. To one, want of proper service of process on the original debtors, might have been pleaded; to another, that the judgment was erroneously entered on the record; to a third, that, under the rules of court, it had be prematurely signed, and therefore, no judgment; to a fourth, *nul tiel record;* and to the rest, other pleas, such as might have suggested themselves to the minds of ingenious counsel, might have been put in. If it had been the wish of the defendants' counsel to diminish the costs, he ought to have applied to the court to consolidate the suits, before he added to the costs so much himself, by filing twenty-seven answers instead of one, and even when the suits were consolidated, the record shows that it was done on motion of the district-attorney; no doubt, for the sake of more conveniently trying together a number of cases in which the issue in all was the same, and the language of the answers the same, *verbatim et literatim*, with the exception of the names of the defendants.

"On the whole, I can perceive no reason why judgment should not be given against the defendants for both debt and costs, and I shall accordingly direct judgment to be so entered."

The defendants prosecuted a writ of error to this court.

*The case was argued by *Key*, for the plaintiffs in error; and by *Butler*, Attorney-General, for the United States. [*199

Marshall, Ch. J., delivered the opinion of the court.—This is a writ of error from a judgment of the district court of the United States for the

district of Louisiana, rendered on the petition of the United States against Seaman Field and others, the plaintiffs in error, as syndics or assignees of Lewis E. Brown, an insolvent debtor. The petition states, that Lewis E. Brown, being indebted to the United States on a certain bond, on which judgment had been obtained for a sum stated in the petition, became insolvent, on or about the 20th of April 1830, and made a voluntary assignment of all his property to his creditors, under the laws of Louisiana; and that the original defendants were appointed syndics or assignees of the creditors; and had received and taken possession of all the property of Brown, and sold and disposed of the same to an amount far exceeding the debt due to the United States; that the defendants, at the time of receiving and taking possession of the property aforesaid, well knew of the existence of the debt due to the United States; and though the same had been demanded of them, refused to pay it. Several other suits, of a similar nature, were brought for other debts, upon bonds due to the United States by Lewis E. Brown, which were afterwards consolidated with the present suit. Answers were duly put in by the defendants, which admitted the assignment, but denied that the syndics then had funds applicable to the debt. The cause was finally submitted to the court upon a statement of facts (which is in the case) prepared by the parties; the trial by jury being waived by their consent.

From this statement of facts, it appears, that Lewis E. Brown, at the time of his failure and insolvency, on the 26th of May 1830, was surety for one John Brown, on certain custom-house bonds, for duties due at various times between the 26th of August 1830, and the 9th of January 1831; upon all of which bonds judgments were rendered in favor of the United States, before the commencement of the present suit, which was in March 1831. On these judgments, writs of *fieri facias* issued against all the parties, which were re-
*200] turned by the *marshal *nulla bona;* and none of them have as yet been paid. John Brown failed and became insolvent; and applied for the benefit of the insolvent act of Louisiana, on the 10th of June 1830. The defendants made sale of Lewis E. Brown's property, on a credit of one, two and three years; and received promissory notes therefor. A part of these notes were paid before the 3d of December 1831; and the residue was secured by mortgage on the property, and amounted to $24,898.60, one-half of which fell due on the 31st of July 1832, and the other half on the 31st of July 1833. The United States never, in any manner, appeared in the proceedings had in the parish court, under the laws of Louisiana, in relation to the insolvency of Lewis E. Brown. At the time of his failure, there were certain mortgages and privileged debts on his estate. A part of these, as well as some other debts, had been paid by the assignees, and were stated in the tableau of distribution; which was rendered to and confirmed by the parish court, on the 15th of December 1831, upon due proceedings had thereon. On the 30th of December 1830, the marshal, acting under the writs of *fieri facias* on several of the judgments against Lewis E. Brown, seized the funds in the possession of the defendants as syndics, and gave notice to them of the seizure thereof to satisfy these judgments respectively. At the hearing of the cause, the court admitted certain evidence to prove that the marshal made a seizure, and gave notice to the defendants that he had seized any funds in their hands to satisfy the judgment on which the

present petition was founded; and an exception, by a bill of exceptions, was taken to such admission. And upon the final hearing, in February 1833, the court gave judgment for the United States, for the amount of all the bonds and the interest due thereon, and costs.

The claim of the United States to the payment of the debts due to them out of the funds in the hands of the syndics, is founded upon the priority given them by the 65th section of the duty collection act of 1799, ch. 128; which, in cases of a general insolvency and assignment, like the present, provides that the debts of the United States shall be first satisfied out of the funds in the hands of the assignees.

The first objection now taken by the plaintiffs in error, is, *that the order of the parish court, confirming the tableau of distribution, [*201 was the judgment of a court of competent jurisdiction, in favor of each creditor whose debt was therein stated; and that the syndics were obliged to pay the proceeds of the sale to such creditors; and the United States not being named as creditors therein, can have no right to the fund against the other creditors. If, at the time of the confirmation of this tableau of distribution, no debts due to the United States had been known to the syndics, and they had, in ignorance thereof, made a distribution of the whole funds among the other creditors, that might have raised a very different question. But in point of fact, it has not been denied, that the syndics, long before that period, had notice of the existence of the debts due to the United States; and the present suit was commenced against them in the preceding March. The United States were, it is true, not parties to the proceedings in the parish court, nor were they bound to appear and become parties therein. The local laws of the state could not, and did not, bind them in their rights. They could not create a priority in favor of other creditors, in cases of insolvency, which should supersede that of the United States. The priority of the latter attached by the laws of the United States, in virtue of the assignment and notice to the syndics of their debts. And it was the duty of the syndics to have made known those debts in their tableau of distribution as having such priority.

There is no doubt, that the mortgages upon particular estates sold, must be first paid out of the proceeds of the sales of those estates. But if there be any deficiency of the proceeds of any particular estate, to pay the mortgages thereon, the mortgagees thereof cannot come in upon the funds and proceeds of the sales of the other estates, except as general creditors. The district judge was perfectly correct in the views taken by him in his opinion on this subject. It appears from the papers in the record, that the whole amount of the proceeds of all the sales exceeds $40,000, and that the mortgages are about $27,000; and making allowance for other privileged claims, if any, there will remain a balance in the hands of the syndics (when all the notes for the sales are paid) more than sufficient to pay all the debts due to the United States.

But the difficulty is, that the notes for a large amount of their proceeds, viz., $24,898.60, *did not become due until July 1832, and July 1833 (a moiety in each year); the first being after the present suit [*202 was commenced, and the latter, after the present judgment was rendered. Now, the syndics are certainly not liable to the United States for the debts due to them, unless funds have actually come to their hands. The notes for

the sales may all be good, but as one moiety thereof was not paid at the time of the judgment, it does not judicially appear, that, even at that time, they had funds out of which the United States were entitled to judgments. If the remaining moiety of the notes has been since paid, the United States will then have a legal claim thereon for their debts. For this reason, the judgment of the district court must be reversed; and the cause sent back for further proceedings.

In regard to the bill of exceptions, as the cause was, by consent, not tried by a jury, the exception to the admission of evidence was not properly the subject of a bill of exceptions. But if the district court improperly admitted the evidence, the only effect would be, that this court would reject that evidence, and proceed to decide the cause, as if it were not in the record. It would not, however, of itself, constitute any ground for a reversal of the judgment. But we are of opinion, that the evidence was properly admissible as proof positive to the syndics of the debts due to the United States; and if the fact was material, to enable the court to render suitable judgment on the statement of the parties, it is not easy to perceive, why it should have been objectionable. Without this evidence, there seems to be enough in the record, to show that the syndics had full notice of the debts due to the United States. They do not even set up in their answers, any want of notice, as a defence. But in the present state of the case, this matter is the less important, because they now have the most ample notice of the debts due to the United States; and these will, at all events, be payable out of the residue of the sales, when it is received.

With the question of costs, this court has nothing to do; and as the judgment is reversed for another cause, it becomes immaterial to be considered.

This cause came on to be heard, on the transcript of the record *from the district court of the United States for the eastern district of Louisiana, and was argued by counsel: On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said district court in this cause be and the same is hereby reversed, and the cause is remanded to the said district court for further proceedings to be had therein, according to law and justice, and in conformity to the opinion of this court.(a)

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*204] *George King's Heirs, Raphael Semmes and others, Appellants, *v.* Josiah Thompson and Elizabeth his wife.

Fraudulent conveyances.—Equitable lien.

A few days after the marriage of J. Thompson with the daughter of George King, in 1812, the latter, residing in Georgetown, in the district of Columbia, and having a large active capital, and a large real estate there, proposed to grant to J. T. a house and lot in Georgetown, then much out of repair, and untenantable, provided he would repair the same, so as to make it a comfortable residence; and saying, that he intended the property for his daughter; this proposition was accepted by J. T., who repaired the property, expending upwards of $4000 on the same; and he, with his wife, resided on it about four years. Before his removal from it, a correspondence

(a) This case was decided on the 21st of February 1834.

on the subject of the conveyance of the property to J. T., or to J. T. and his wife, took place, which ended in propositions to convey the property, on certain terms, beneficial to J. T. and wife, in pursuance of, and intended to be in execution of, the original offer of G. K. to J. T., made immediately after the marriage; no conveyance was made. J. T. and wife removed from Georgetown, and G. K. collected and paid to J. T. the rents of the property, for sometime after their removal; G. K. died in 1820, insolvent; his debts amounted to $36,000, and his whole estate, both real and personal, when sold, did not pay thirty-nine per cent, of his debts; the property claimed by J. T. and wife, in this case, was sold for $1600, by a trustee, under a decree in chancery, obtained by the creditors of G. K., but the sale had not been ratified.

From the occupancy of the property, and the amount of money expended in improving it, it was certain, that there was an understanding G. K. and J. T., that the property, in some manner, should be possessed and enjoyed by J. T. and his wife; the evidence, however, showed, that G. K. did not intend to vest it absolutely in J. T., but that the value of it, before the improvements, should, in some form, be secured to the wife of J. T. Whatever uncertainty may have existed as to the terms of the contract, J. T. acted under it, in taking possession of the property, and expending a large sum of money on it.

J. T. and wife filed a bill against the heirs of G. K., and the trustee of the creditors of G. K., claiming a conveyance of the property, and for general relief. In no point of view, could such a contract as that in this case be considered voluntary; there was not only a good consideration, that of natural affection, but a valuable one; to constitute a valuable consideration, it is not necessary that money should be paid; but if, as in this case, it be expended on the faith of the contract, it constitutes a valuable consideration

In testing the validity of the transaction of 1812, the subsequent fall of property in Georgetown, or the failure of King, cannot be taken into view; the inquiry must be limited to his circumstances at that time. It is not shown, that the persons for whom he was bound, as indorser, where then *unable to pay the respective sums for which he was responsible; [*205
and it would be improper to consider those sums as debts due by King; he was responsible for their payment, on certain contingencies; but the fact that his credit remained unimpaired, for several years after the contract, shows, that neither his credit, nor the credit of those for whom he was indorser, was considered doubtful. In this state of facts, King was in a condition to dispose of the house and lot, not worth more than $2500, on the terms stated.

The terms of the contract not being sufficiently established by the evidence, the court decreed, that the property should be sold, and the proceeds of the sale should be first applied to the payment of the money expended by Thompson in making improvements on the property; and the balance, if any, paid over for the benefit of the creditors of George King—Thompson not to be charged with rent of the premises, while he occupied them, nor with the rent collected and paid to him, after he removed.

Thompson *v.* King, 3 Cr. C. C. 662, reversed.

Appeal from the Circuit Court of the District of Columbia, and county of Washington. The appellees, Josiah Thompson and wife, on the 14th of June 1826, filed a bill on the equity side of the circuit court, alleging that George King, in October 1812, a few days after the marriage of Josiah Thompson with Elizabeth, the daughter of the said George King, proposed to grant to the said Thompson and wife, a house and lot of ground in Georgetown, if Thompson would repair and make it comfortable for a residence; at the same time, informing Thompson, he intended the property for his daughter Betsey. The bill alleged, that this offer was accepted by Thompson, and that he made repairs to a large amount, and that he occupied the property, after it was repaired, until 1816, when he removed to the western country. At the time of this gift, the bill alleged, that George King was in good credit, and in prosperous circumstances; it being believed, he had a large capital, and that he owned a valuable real estate, which, after the payment of his debts, not large in amount, would enable him to provide handsomely for his children.

In 1816, before Josiah Thompson removed from Georgetown, a cor-

respondence took place between him and George King, which was annexed to the bill; and which was referred to as evidence of the contract, under which Josiah Thompson took possession of and improved the property.

*206] *The first letter was from George King to the complainant, Josiah Thompson, and was dated—

"Georgetown, 17th of April 1816.

"Mr. Josiah Thompson:

"Sir:—I am informed that you are in suspense in regard to the property you now live on, and I think it a duty incumbent on me to let you know the terms I mean to let my daughter Betsey have it. I hold myself ready, and hold myself bound, to give a deed to a trustee, who shall hold it in trust for her and yourself during your lives; and then, after the death of you both, to revert to her lawful heirs, her children, if any she has, if not to my heirs; but you may say I wrong you in this way, by not letting you know before now, that I did not mean to deed to you, instead of keeping it for her, and on that account you have put more improvements than you would have done, had you have been informed before. You may now sell the property, and all you can get over three thousand dollars for it, you can do as you like with; but that sum must be kept sacred for the use of your wife, in the hands of trustees, for her support, in case she might ever need it, the use of which, as the income, will be at your disposal during your own and her life, and then to her heirs as before; and other terms than this it will be useless for you to look for, without you find two just fathers that shall say I ought to do otherways; and, after hearing their reasons on the subject, perhaps, I may alter my opinion. Yours, with due esteem,

GEORGE KING."

In reply to this letter, after remonstrating against making the conveyance of the property in trust, the complainant, under date of the 26th of April 1816, made three proposals to George King.

"1. Let the property be valued as to its worth at the time it was put into my possession, and I will pay the amount over to you, which you may then hold for my wife, or give it to whom you please; for, when I married her, I was not influenced by any pecuniary motive, and as she has never

*207] given *me reason to regret my choice, I surely will not allow a consideration like the present to create the smallest uneasiness. 2. Let the improvements be estimated; pay me the amount, and then I will relinquish all claim, and you will be at liberty to dispose of it as you may deem proper. 3. Execute a deed to your daughter at once in fee-simple, and I will, for her benefit and advantage, cheerfully give in all that I have expended; this will at once be making her the guardian of her own property, and, if it should please God to call me first, will be to her a support. Thus, my dear sir, you will find, that I am not disposed to dispute about the original value of the property; for, though I consider it as certainly the property of my wife from the delivery of it into my possession, as any subsequent act could make it, and from the manner I was allowed and encouraged to go on with the improvements; yet I am willing at any moment to bind myself to abide by either of the above proposals."

To these propositions, George King, on the 29th of April 1816, replied: "I make no hesitation in complying with your first proposal, for it is just

what I proposed in my first to you, and I will do it another way, giving you your choice, viz., I will deed the dwelling-house and all above it to you, and about twenty feet below it; and then all below that I will deed to Betsey, provided she will never deed it, nor otherways dispose of it, during her life, only by will, which she shall always be at liberty to make, when and how she pleases. GEO. KING."

The bill proceeded to state, that the complainant, Josiah Thompson, was satisfied with the proposition contained in the letter of the 29th of April 1816, and that at the removal of the complainant from Georgetown, he rented the property, and constituted George King his agent to collect the rents of the same, which duties he continued to perform, without advancing at any time a claim to the same. On the death of George King, the legal title to the property descended to his heirs, no conveyance having been made of it *to the complainants; and the bill prayed for a decree, that the heirs of George King convey the said legal title to the com- [*208 plainants, in fulfillment of the agreement of George King; and in the event that the same, for any reason, could not be done, that the said property stand charged to the amount of the repairs and improvements put on it by the complainants; and for other and further relief, &c.

After the decease of George King in 1830, largely in debt, to the amount of $36,000, and insolvent, his whole real and personal estate not being sufficient to pay his debts, in fact not more than thirty-nine per cent. of his just debts; his whole real estate was sold by Raphael Semmes, appointed trustee by the court of chancery for that purpose, at the instance of George King's creditors; and among the rest the property now in controversy was sold for $1660 to John W. Baker. John W. Baker deposited $1190.18, part of this purchase-money, in the Mechanics' Bank of Georgetown, in 1826 and 1827, to remain until the termination of this suit; the first deposit was made on the 26th of July 1826, after the filing of this bill.

In the suit instituted by the creditors of George King, to compel a sale of his real estate for the payment of his debts, all the heirs of George King were made parties, and among the rest, the said Thompson and wife. The sale to Baker never was ratified, in consequence of this suit instituted by Thompson and wife. The heirs of George King (his estate being insolvent) feeling no interest in the suit, filed their answers to the bill of Thompson and wife, neither admitting nor denying the facts alleged, submitting themselves to the judgment of the court.

Raphael Semmes, the trustee for George King's creditors, on petition, and by leave of the court, was made a defendant; and allowed to contest the claim set up by Thompson and wife, as was also Charles King, one of the principal creditors. They denied the pretended contract and gift set up in the bill; denied the improvements charged to have been made on the property; averred the indebtedness of George King, at the time of the pretended gift, to a large amount, and the continuance of such indebtedness to the same creditors up to the time of his death; and the unlawfulness and fraud in law of such gift, if any *could be proved; and the insuffi- [*209 ciency of George King's whole estate, real and personal, to pay his just debts; and claimed the proceeds of said house and lot, for said creditors of King.

Charles King, as a creditor, also filed a bill against Josiah Thompson and wife, charging in substance the same facts; to which bill, Thompson and wife responded, re-asserting in substance the matters alleged in the original bill. They admitted, in this answer, that they were married on the 6th of October 1812, and that the alleged gift of the house and lot was made after the marriage.

Evidence was taken by the complainants and the respondents, which is fully stated in the opinion of this court; and on the 5th of April 1832, the circuit court, all the parties having been heard together, pronounced a decree directing a conveyance in fee of the property, claimed in the bill, to Josiah Thompson; from which decree, this appeal was taken.

The case was argued by *Dunlop* and *Key*, for the appellants; and by *Coxe*, for the appellees.

For the appellants, it was contended, that the decree of the circuit court was erroneous, and ought to be reversed:

1. Because the letters of George King do not import any contract, binding him or his heirs to convey the property in fee to Thompson, nor does Thompson's bill pray such conveyance. Because the letters and proof in the cause, show no contract concluded, or ascertained with such certainty, as to warrant a decree for specific execution.

2. If there was a contract of gift, it was made after marriage, without any valuable consideration, was voluntary, and cannot be enforced even against George King's heirs. The said gift was fraudulent and void.

3. Because George King was indebted, at the time of the alleged gift, and so continued up to the time of his death; and his creditors, at the time of the gift, represented by Semmes the trustee, are yet unpaid, and the said King's estate insolvent.

4. The improvements made by Thompson gave him no lien on the property, nor any claim to a conveyance to himself in fee. If made, they con-
*210] stituted a personal claim against George *King, more than set off by the enjoyment and occupation of the house and lot for many years, and by Payne's debt, paid for Thompson by George King's estate.

Dunlop, for the appellants, contended:—1. That there was no contract of gift proved, or none such as Thompson's bill and the decree below enforced. The decree is for a deed, in fee, to Thompson himself. The letters (and they are the only evidence of the alleged gift) do not show any engagement on the part of George King to convey to Thompson. The letters show a resolute determination on the part of King, not to deed to Thompson; but to give, what he meant to give, to Thompson's wife, the daughter of King. The letters show the parties to be still in treaty about the terms. The letter of the 29th of April, 1816, contained an alternative offer; and if Thompson assented, which of the alternatives did he choose? It is clear, that no definite contract was concluded—none so specific, that a court of equity could decree its performance. Moreover, the court has decreed neither of the alternatives, but a thing entirely different, and never in the contemplation of the contracting parties.

But if the contract was sufficiently proved, it was founded on the consideration of love and affection only, was voluntary, and cannot be enforced

even against the other heirs of George King. The other heirs of George King have the legal title, and having equal equity with the complainants, Thompson and wife, no court of equity would disturb them. As between the parties, a court of equity will not interfere to set aside a fair voluntary conveyance. But it is a clearly settled rule, that chancery will not decree a specific performance of a mere voluntary covenant, without consideration, to make a conveyance; and this the court is here asked to do. *Black* v. *Cord*, 2 Har. & Gill 100; 1 Madd. Chan. 414–15; *Osgood* v. *Strode*, 2 P. Wms. 242; Francis's Maxims 14, ch. 15.

It is said, that the contract was ante-nuptial, and that marriage is a valuable consideration. There is no proof of this fact, and the *onus* of proof is on Thompson and wife. But if there was any ante-nuptial promise, it was by parol, and therefore, void. It could not be valid, unless reduced to writing before *marriage. *Reade* v. *Livingston*, 3 Johns. Ch. [*211
488–9; and the cases there cited. The proof, however, is, and so Thompson and wife in their own bill say, that the promise was post-nuptial.

It is also urged, that the improvements and repairs constituted a valuable consideration. In the first place, the repairs were injudicious, extravagant, and not such as George King had authorized. They could, so far as they were lawful and authorized, only amount to a personal claim on George King. At all events, these repairs could be no consideration for the original value of the property, that is to say, for the value of the property before the improvements were put upon it. The repairs did not inure to the use of King; and Thompson and wife have had the benefit of them, in the occupation of the property for many years. The bill itself does not ask for a conveyance on the ground of repairs, but goes solely upon the contract of gift by the father to the daughter. If repairs could give a title, a parent in debt might, on this pretence, and in defiance of creditors, settle all his estate on his children.

2. If there was a gift, and it could be enforced in equity against King's heirs, it is void against creditors. George King was largely indebted, at the time of the pretended gift. Many of those who were creditors at the time continue to be creditors to this day, and are now resisting Thompson's claim. As against them, the contract is absolutely fraudulent and void. Indebtedness at the time is not only a badge of fraud, but as to such creditor, continuing to be a creditor, *per se*, avoids the contract or conveyance. The evidence is clear, that the creditors now before the court were many of them creditors at the time of the gift. *Reade* v. *Livingston*, 3 Johns. Ch. 497; *Sexton* v. *Wheaton*, 8 Wheat. 241–4, *et seq.*; *Lessee of Ridgeway* v. *Underwood*, 4 W. C. C. 129; *Ridgeway* v. *Ogden*, Ibid. 139. If the indebtedness of King was only evidence of fraud, and not conclusive to avoid the deed, the record shows him to have been so much involved, at the time of the gift, as to lead a court of equity to set it aside for fraud. It cannot be said to *have been a fair transaction. He did not leave enough undisposed [*212
of, to pay his creditors at the time. Subsequent creditors, under such circumstances, could impeach it for fraud, and *à fortiori*, creditors at the time. *Hinde* v. *Longworth*, 11 Wheat. 199.

Coxe, for the appellees.—The original bill asks either a conveyance in

fee, in execution of the agreement between George King and Josiah Thompson; or that the value or cost of the improvements shall be decreed to be a lien upon the property on which they were made. The cost of the improvements was larger in amount than the property would now bring, and thus the result of either decision would be the same. The precise form in which the relief sought in the circuit court by Thompson and wife shall be given, is, therefore, altogether immaterial.

The appellants, in their first petition, assert that the letters of George King do not import a contract binding him or his heirs to convey the property in fee to Thompson and wife; nor does the bill ask for such a conveyance. They say, the letters and proof in the case show no contract, concluded or ascertained, with sufficient certainty, to warrant a decree for specific execution. The appellants are not authorized to select parts of the evidence, and allege for error, that they, when taken alone, do not sustain the decree. Whether the conveyance be directed to be made to Thompson, or to him and his wife, is not a matter for the appellants. It is a sufficient answer to their claim, that it can properly be made to either or both. This court is competent to rectify the decree in favor of those entitled.

As to the ground, that no proof is shown for a specific performance; it is answered, that the averments and proof are sufficiently distinct. 1. As to the property embraced in the arrangements. 2. As to the nature of the estate to be created. 3. As to the consideration. The only doubt is as to the respective interests of Thompson and his wife; this, as has been said, is not a matter in which the appellants have any interest. The heirs of George King have not appealed; the pleadings show this.

*213] The appellants' second ground for reversal is, that if there *was a contract or gift, it was after marriage; was without any consideration; and was voluntary, and cannot be enforced against George King's heirs. That the gift was fraudulent and void. This exception is given in a questionable form. It does not assert, that the gift was gratuitous, or that it was purely voluntary. But if it did, there is no rule in equity that such a gift cannot be enforced in equity. To the word "voluntary," different significations are given by courts of equity. This case may not be called a gift. It was a contract executed, in everything but a conveyance, and this equity will enforce. Although it sometimes comprehends all conveyances without any pecuniary consideration, or valuable consideration; yet when it is used to indicate that species of conveyance which equity will not aid or enforce, it means that conveyance which has no meritorious consideration, either good or valuable. Equity is remedial only to those who come in upon an actual consideration. But there are precedents of relief where it is a provision for children. Fonbl. b. 1, c. 5, § 2, p. 348–9; also note to Sugd. on Powers 275–6; *Hardham* v. *Roberts*, 1 Vern. 132; *Thompson* v. *Attfield*, Ibid. 40; *Colman* v. *Sarrell*, 1 Ves. jr. 50; *Minturn* v. *Seymour*, 4 Johns. Ch. 497, 500; *McCall* v. *McCall*, 3 Day 402; *Hinde's Lessee* v. *Longworth*, 11 Wheat. 213.

But the consideration in this case stands on a higher footing than that of being simply meritorious; the contract was mutual and executory. The consideration was actually paid by Thompson; he laid out large sums in valuable improvements, and owing to the depreciation of the property, these sums cannot be reimbursed. To make a consideration valuable, there need

be no pecuniary benefit passing to the vendor. Anything injurious or detrimental to the other party, is equally operative in making the contract binding. Roberts on Frauds 15. Such a contract, on such a consideration, carried into actual execution by Thompson, by the expenditure of his money, by taking possession, and continuing in possession from 1813 to 1835, cannot now be disturbed.

It is assigned as a reason for reversing the decree of the circuit court, that the gift was fraudulent and void. *The meaning of this is, that the gift is void, because it is fraudulent. But in the pleadings there [*214 is no allegation of fraud. This is a necessary averment, and is uniformly required. 6 Har. & Johns. 24. There is no ground assigned upon which the conclusion of fraud can be based. It has been settled by this court, that a deed, though voluntary, is not, in general, void as against subsequent creditors. *Sexton* v. *Wheaton*, 8 Wheat. 229. The only creditor who has intervened, is Charles King, and he was not a creditor at or near the time of this contract. In no part of the record does any ground appear on which he could impeach the validity of the proceeding. The whole proceedings in his suit to enforce payment out of the real estate, were insufficient and informal. No administration account appears to have been settled; no deficiency of real estate has been established. There is no allegation than any other creditors are interested. One creditor cannot, on his own behalf solely, proceed against the real estate of a deceased debtor. 4 Simons 37.

The last point insisted upon by the appellees is, that the expenditures by Thompson constituted no lien on the property. There is no fraud imputed to Thompson and wife. Their conduct is unimpeached and unimpeachable; they acted fairly; their possession was notorious; taxes were charged to them in the assessments of the property, and the money for the repairs was advanced in good faith. This, then, is a far stronger case than that of *Harding* v. *Handy*, 11 Wheat. 103. In that case, the court allowed the property to which a title had been obtained by improper means, to stand as security for the repayment of the expenditures, &c. In this case, the form of the decree, save as to costs and expenses, is immaterial. It is admitted on all hands, that the property cannot reimburse the expenditures for improvements. If the appellants will pay the expenses of a reference to a master and a sale, the appellees are content with a decree to receive merely the debt actually due.

Key, in reply, insisted on the insolvency of George King *at the time of the proposition to Josiah Thompson. The evidence showed [*215 that debts due to the banks in the district of Columbia, and indorsements on notes, existed at the time, which were not paid during his life, and created the great deficiency in his estate, which is not now denied. The proceedings of the plaintiffs in error, were to subject the whole real estate of George King to the payment of his debts; there being a deficiency of personal assets. The first proceeding by the appellees in their original bill, was to obtain from the heirs of George King, a specific performance of an alleged contract. Their bill was not framed on the ground that it was a contract for a valuable consideration.

He denied, that if there were no creditors of George King unpaid, there

was any contract proved which would be sustained by a court of equity, and which was binding on the heirs of George King.

McLean, Justice, delivered the opinion of the court.—This is an appeal from the decree of the circuit court for the district of Columbia. The defendants here, who were the complainants in the circuit court, filed their bill, stating, that in the year 1812, they were married; and that the wife of the complainant is the daughter of George King, who at that time lived in Georgetown, and was extensively engaged in a profitable mercantile business. That his credit was high, and complainants believe he was possessed of a large active capital; and, in addition, had a large real estate, consisting of houses and lots in Georgetown. That it was universally believed, he would have a large surplus property, after paying his debts, which would enable him to provide handsomely for his children. That a few days after the marriage, George King proposed to grant to the complainant, Thompson, a house and lot on Cecil alley, in Georgetown, which was very much out of repair, and almost untenantable, provided he would repair the same so as to make it a comfortable residence; and that the said King at the same time stated, he intended the property for the wife of the complainant. The complainant accepted the property, and expended upwards of $4000 in making repairs of the house, and other *improvements on the lot. That
*216] he occupied it as a residence about four years, and then removed to the western country. Before his removal, a correspondence took place between him and the said King in relation to the title; and the complainant made King his agent to collect the rent, &c. The complainant further states, that the said King died intestate; leaving, in addition to the wife of the complainant, certain children who are made defendants; and a decree for a legal title is prayed, or if that cannot be decreed, that the property may stand charged to the amount of the repairs and improvements.

George King died in the year 1820, insolvent. His debts amounted to $36,000, and his whole estate, both real and personal, when sold, did not pay more than thirty-nine per cent. of his just debts. The property claimed by the complainant was sold for $1660, by a trustee, under a decree of chancery, obtained by the creditors of George King, but the sale has not been ratified. Raphael Semmes, the trustee of George King's creditors, and Charles King, one of the principal creditors, filed their answers to the bill of the complainant, in which they deny that the improvements were made on the property, as set forth in the bill, and insist, that George King, at the time of the pretended gift, was embarrassed and unable to pay his debts; and they insist, that the right set up by the complainants is fraudulent and void as against creditors. There are some irregularities in the record which it is not material to notice, as these statements show the points to which the evidence applies.

The first inquiry is, whether a contract was made between the complainant and George King for the property in question? It is insisted, by the complainant's counsel, that the correspondence between the parties, which is contained in the record, establishes the contract. The first is a letter from George King to the complainant, dated 17th April 1816. In this letter, King says, "that in order to remove any suspense in regard to the property on which the complainant then lived, that he held himself bound

to give a deed to a trustee, who shall hold it in trust for the complainant and his wife, during their lives," &c. *This letter is answered by the complainant, 26th April 1816, in which he declines the terms proposed, [*217 and suggests the following: 1. Let the property be valued at the time it was put into his possession, and that he would pay the amount over to King, &c. 2. That the improvements should be estimated, and King, on paying the amount, should receive a relinquishment of all the right of the complainant. 3. That a deed should be executed for the property to the wife of the complainant. On the 29th of April 1816, King replies, "I make no hesitation in complying with your first proposal, for it is just what I proposed in my first to you, and I will do it another way, giving you your choice, viz., I will deed the dwelling-house and all above it to you, and about twenty feet below it; and then all below that I will deed to Betsey," the wife of the complainant, "provided she will never deed it, or dispose of it, except by will, which she shall always be at liberty to make, when and how she pleases." On the 14th of August 1819, King writes to the complainant, "Mr. Kennedy has left your house, since the first of July last, and I have not been able to get a tenant since. Houses are very dull here now; rents have fallen very much," &c. And on the 23d of March 1831, George King, son it is presumed of George King, deceased, writes to complainant, "I am sorry to inform you that Mr. Jacob Payne has laid an attachment on your property in Georgetown," &c., referring to the property in controversy.

This is all the evidence to show a contract, except what might be presumed from the occupancy and improvement of the house and lot. Specific propositions were made by each party, in regard to the title of the property but it does not satisfactorily appear, that either was finally accepted. The complainant, in the first place, objects to the conveyance of the property to a trustee, for the benefit of his wife; and he proposes to pay to King the value of the property at the time it was put into his possession, which sum, at the pleasure of the donor, might be invested for the benefit of complainant's wife. To this, King replies, that he *has no hesitation in [*218 accepting the proposal, but he accompanies this acceptance with a proposition to deed the dwelling-house, with a certain part of the lot, to the complainant, and the residue of the lot to his wife. Whether this last proposition, or the one made by the complainant, and assented to by King, formed the contract, is uncertain, or indeed, whether any definite agreement was finally made. From the occupancy of the property and the amount of money expended in improving it, there can be no doubt, that there was an understanding between the parties, that the property, in some manner, should be possessed and owned by the complainant. The evidence, however, shows, that King did not intend to vest the property absolutely in the complainant; but that the value of it, before the improvements, should, in some form, be secured to the complainant's wife.

This court are now called on to decree a specific execution of this contract; and what are its terms? Shall the title be vested in fee in the complainant, without condition? or shall a part of the property be vested in trust for the benefit of his wife? or, shall the title be vested in the complainant, on his paying into the hands of trustees, for the benefit of his wife, the value of the property when he first received it? The evidence does not afford a satisfactory answer to any one of these inquiries. It is

impossible, therefore, for the court to decree a title as prayed for in the bill, as the evidence fails to establish the specific terms of the contract.

But it is insisted, that this arrangement or contract, if proved, was void as against the heirs of King, and especially, as against his creditors; on account of the indebtedness of King at the time, and his subsequent insolvency. Although a contract is not proved with sufficient certainty, as to its conditions, to authorize a specific execution of it, yet there can be no doubt, there was an agreement between the parties, which induced the complainant to enter into the possession of the property, and to expend large sums of money upon it, as if it were his own; and when he left it and removed to the western country, it was rented as his property, and George King acted as the agent of the complainant. And *the property seems to have been considered as belonging to the complainant, by the heirs of George King. Whatever uncertainty may exist, as to the terms of the contract, there can be no question, that the complainant acted under it, in taking possession of the property, and expending a large sum of money in its improvement. In no point of view, could such a contract be considered voluntary. There was not only a good consideration, that of natural affection; but a valuable one. To constitute a valuable consideration, it is not necessary that money should be paid: but if, as in this case, it be expended on the property, on the faith of the contract, it constitutes a valuable consideration.

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The debts of George King for the years 1812, 1813 and 1814, amounted to about $13,000 or $14,000, of which $11,000 were due to the Bank of Columbia. And the average amount of his debts, from 1812, until his death, was about the sum of $13,000. In 1812, and for some years afterwards, George King was supposed to be rich. For his house on High street, he refused $12,800. The whole amount of his property was estimated at $60,000 or more. He was indorser on accommodation notes for about $20,000, at the above period. At this time, the property claimed by the complainant was not worth more than $2000 or $2500. Its value was increased three or four times this sum by the improvements. In 1827, it appears, by an exhibit of the debts due by the estate of George King, including interest, that they amounted to the sum of $36,418.10. But many of these debts seem to have been contracted subsequent to the time that the property in question was placed in the possession of the complainant. It appears also, the property of which King died possessed, did not pay forty per cent. of the debts due by the estate. And that he retained the greater part, if not the whole of his real estate, except the lot claimed by the complainant, until his decease. But it seems, from the prices fixed upon this property in 1813, and those for which it was sold, that there must have been a great deterioration in the value of it. Under the above circumstances, it is insisted by the appellants, that the contract with the complainant, by George King, for the above property, was fraudulent.

*It has already been observed, that the money expended in the improvement of this property, constituted a valuable consideration. The contract, therefore, if proved, so as to entitle the complainant to a decree for a specific execution, could not be avoided, on the ground that there was no consideration. At the time this property was received by the complainant, King was supposed to be rich. His property was esti-

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mated at $60,000; his debts did not exceed $13,000 or $14,000, and his indorsements were about $20,000. That his credit stood high, is shown by his indorsements, and the standing accommodation given to him in the banks. So high did he stand as a man of property and business, that it was deemed a valuable object to obtain his services as director in one of the Georgetown banks. There seems to have been no diminution of his credit or means, for several years after the transaction with the complainant. In testing the validity of that transaction, the subsequent fall of property or failure of King, cannot be taken into view. The inquiry must be limited to his circumstances at the time. Was King, when this property was received by the complainant, in a failing or embarrassed condition?

It is not shown, that, at this time, the persons for whom he was bound as indorser, were unable to pay the respective sums for which he was responsible; and it would be improper to consider these sums as debts due by King. He was responsible for their payment, on certain contingencies; but the fact that his credit remained unimpaired for several years after the contract with the complainant, shows that neither his credit nor the credit those for whom he was indorser, was considered doubtful. In this state of facts, King surely was in a condition to dispose of a house and lot, not worth more than $2500, on the terms stated in the bill.

There appears to have been no fraudulent intent in the case; no disposition to defeat the claims of present creditors, or to cover the property from future demands. It seems to have been a *bonâ fide* transaction; and one which neither a court of law nor of equity could refuse to sanction. And if the terms of the contract were established, so that this court could decree a specific execution of it, they would pronounce such a decree. *But as a specific performance cannot be decreed, the inquiry remains, [*221 whether the complainant has a lien on the property for the money he expended in improving it.

The counsel for the appellant do not controvert the right of the complainant to a just remuneration for the valuable improvements he made; but they insist, that he must exhibit his claim as a general creditor of the estate of George King; and that from such claim there should be deducted a reasonable rent for the time the property was in his possession. This claim for improvements by the complainant, is founded upon the most equitable considerations. At the instance of George King, his father-in-law, the complainant entered into the possession of this property; and under a full belief that it would be secured to him as his own, he was induced to expend a large sum of money in making permanent and valuable improvements. These improvements, some of the witnesses say, have increased the value of this property to three times the amount which it was worth before they were made. From this, it appears, the money was not injudiciously expended; and the question arises, whether this expenditure, under the circumstances of this case, does not create a lien upon the property.

If King were living, he could not object to this lien. Can his creditors object to it? By enforcing it, can their interests be injuriously affected? It may be said, that the deterioration of property in Georgetown, has been such as to reduce the value of this property to a less sum than was expended in making the improvements. This cannot change the principle that must govern the case. If the money has been judiciously expended, under such

circumstances as to entitle the complainant to a lien, the court must give effect to it. It is an equitable mortgage, and in a court of chancery, is as binding on the parties as if a mortgage in form, had been duly executed.

Suppose, George King, for the purpose of improving this property, had borrowed from the complainant $4000, and had executed a mortgage on the same property, to secure the payment of the money. Could the creditors of King complain of the lien of the mortgage? It is clear, they could not.

*222] And is it not equally clear that they have no ground to complain *of the equitable mortgage? If there be any difference in the force of the liens thus created, it must be in favor of the equitable lien. In the first case supposed, the money was loaned at a fixed rate of interest, and the property was looked to as securing the payment. But in the second case, the money was expended under a belief that the property belonged to the individual, and that the amount expended increased so much the value of his estate; and in many cases, a failure to obtain the property under such circumstances, would cause an injury which a return of the money expended would not repair. It would be most unjust, to leave the complainant, as a creditor, to receive a dividend on the distribution of the estate of King.

Ought the complainant be held accountable for rents, while he occupied the premises; or which he may have subsequently received from his tenants? The rents received by the complainant, after his removal to the west, independent of other facts in the case, go to show that he was not considered as the tenant of King. Indeed, there can be no doubt, that the complainant considered the property as his own; and it was so treated by George King, for he collected the rents as the agent of the complainant, and accounted to him for them. It would, therefore, be unjust now to compel him to pay rents which, with the concurrence of all parties, were paid to him at the time they accrued, as his own. And, in addition to this, the interest on the money expended, would, perhaps, be equal to the whole amount of the rents.

As the circuit court decreed a conveyance of this property to the complainant, that decree must be reversed; and the cause remanded to that court, with instructions to cause the property to be sold, after due notice, on such terms as they shall deem most advantageous to the estate of George King; and the proceeds of the sale, first to be applied to the payment of the money expended by the complainant in making improvements on the property, and the balance, if any, to be paid over for the benefit of the creditors of the estate of King.

This cause came on to be heard, on the transcript of the record

*223] *from the circuit court of the United States for the district of Columbia, holden in and for the county of Washington, and was argued by counsel: On consideration whereof, it is ordered and decreed by this court, that the decree 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 for further proceedings to be had therein, according to law and justice, and in conformity to the opinion of this court.

*The MAYOR, ALDERMEN and INHABITANTS of the CITY OF NEW ORLEANS, Plaintiffs in error, *v.* CHRISTOVAL G. DE ARMAS and MANUEL SIMON CUCULLU.

Federal jurisdiction.

A lot of ground, situated in the city of New Orleans, which was occupied, under an incomplete title, for some time, by permission of the Spanish government, granted before the acquisition of Louisiana by the United States, was confirmed to the claimants, under the laws of the United States, and a patent was issued for the same, on the 17th of February 1821. The city of New Orleans claiming this lot as being part of a quay dedicated to the use of the city, in the original plan of the town, and therefore, not grantable to the King of Spain, enlarged the levee, in front of New Orleans, so as to include it. The patentees from the United States brought a suit in the district court of the state of Louisiana for the lot, which pronounced judgment in their favor, and that judgment was affirmed by the supreme court of the state; the judgment was removed to this court, under the 25th section of the judiciary act; a motion was made to dismiss the writ of error for want of jurisdiction. The merits of this controversy cannot be revised in this tribunal; the only inquiry here is, whether the record shows that the constitution, or a treaty, or a law of the United States has been violated by the decision of that court.

The 25th section of the judiciary act is limited by the constitution, and must be construed so as to be confined within these limits; but to construe this section so that a case can arise under the constitution or a treaty, only when a right is created by the constltution or treaty, would defeat the obvious purpose of the constitution, as well as the act of congress; the language of both instruments extends the jurisdiction of this court to rights protected by the constitution, treaties or laws of the United States, from whatever source these rights may spring.[1]

To sustain the jurisdiction of this court in this case, it must be shown, that the title set up by the city of New Orleans, is protected by the treaty ceding Louisiana to the United States, or by some act of congress applicable to that title.

The third article of the treaty of Louisiana stipulates for the admission of Louisiana into the Union, and it obviously contemplates two objects; one, that stated; and the other that, until that admission, the inhabitants of the ceded territory shall be protected in the enjoyment of their liberty, property and religion; had any of these rights been violated, while the stipulation continued in force, the individual supposing himself to be injured, might have brought his case into this court, under the 25th section of the judiciary act.

But this stipulation ceased to operate, when Louisiana became a member of the Union, and its inhabitants were "admitted to the enjoyment of all the rights, advantages and immunities of citizens of the United States." The right to bring questions of title decided in a state court before this tribunal, *is not classed among those immunities; the inhabitants of Louisiana enjoy all the advantages of American citizens, in common with their brethren in [*225
their sister states, when their titles are decided by the tribunals of the state.

The act of congress admitting Louisiana into the Union, carries into execution the third article of the treaty of cession; and cannot be construed to give appellate jurisdiction to the court over all questions of title between the citizens of Louisiana.

The patent granted to the claimants of the land did not profess to destroy any previous existing

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[1] See Crowell *v.* Randell, 10 Pet. 368, for a review of the cases arising under the 25th section of the judiciary act. It was there decided, that to bring a case within that section, it must appear upon the face of the record: 1. That some one of the questions stated in that section did arise in the state court. 2. That the question was decided in the state conrt, as required in the same section. 3. That it is not necessary that the question should appear on the record to have been raised, and the decision made, in direct and positive terms; *ipsissimis verbis*; but that it is sufficient, if it appears by clear and necessary intendment, that the question must have been raised, and must have been decided, to have induced the judgment. 4. That it is not sufficient to show, that a question might have arisen, or been applicable to the case; unless it is further shown, on the record, that it did arise, and was applied by the state court to the case. (p. 398.) These points have been re-affirmed in numerous subsequent cases, and have never been departed from.

title, nor could it so operate; the patent was issued under the act of May 1820, entitled "an act supplementary to the several acts for the adjustment of land titles in the state of Louisiana; that act confirms the titles to which it applies, "against any claim on the part of the United States;" the title of the city of New Orleans could not be affected by this confirmation. It is a principle applicable to every grant, and it cannot affect pre-existing titles. United States *v.* Arredondo, 6 Pet. 733, cited.

ERROR to the Supreme Court of Louisiana. The defendants in error commenced a petitory action, by filing a petition in the first district court in and for the first judicial district for the state of Louisiana, claiming to be the owners of a lot of ground, in the city of New Orleans, eighty feet front, and close to the foot of the Old Levee, between St. Philip's and Maria streets; and stating that the lot had formerly been built upon, and had been possessed by a certain Thomas Beltran, or Bertrand, with the knowledge, permission and authorization of the Spanish government, from March 1788, to 1803, and by his widow, who afterwards demolished the buildings, and removed to another part of the city. The widow, acting for herself and the minors, took all the legal steps to have the title confirmed by the United States; and the commissioners of the land-office reported on the title, that "it would be more an act of justice than of generosity, if the government should confirm it." The commissioners under the act of congress of 11th May 1820, entitled "an act supplementary to the several acts for the adjustment of land-claims in the state of Louisiana," confirmed the title against any claim of the United States; and a patent for the same was granted to the widow and heirs of Bertrand. After the death of the widow, the petitioners became the owners of the property by purchase from her heirs—they being also the heirs of Bertrand.

*226] The petition proceeded to state, that prior to the cession of Louisiana by France, the lot of ground belonged to the King of France; and by the laws of Spain, which were introduced into the colony of Louisiana, after the said cession, the King of Spain, by his officers, had the full right of disposing of the same. By the retrocession of the colony to France by Spain, the right to the lot of ground became vested in France, if it was not the property of Bertrand; and the same right was not divested by any act done by the King of Spain, except in favor of Bertrand. That, by the treaty of cession of Louisiana to the United States by France, the United States clearly acquired every lot of ground, land, squares (*emplacemens terrains*), buildings, fortifications and edifices therein, which were not private property; and that the grant made by the afore-mentioned letters-patent, therefore, justly and lawfully vested in the said widow of Bertrand, with all the rights of ownership and possession, which all the different governments who had possessed Louisiana, had or could have to the said lot of ground. The petition alleged, that the corporation of New Orleans, under the pretence that the lot claimed by the petitioners was a part of certain quays marked on a plan of the city, had enlarged the levee in front of the city, so as to include the same, and pretended that they had just title to this lot; and prayed process, &c., and that it might be adjudged and decreed, that the petitioners were the only true and lawful owners and proprietors of the above-described property; and that the said mayor, aldermen and inhabitants had no right whatever in, to or upon the same.

The answer of the corporation of New Orleans denied that there had

been an absolute grant of the lot in question by the Spanish government to Bertrand, but only a permission to build a temporary cabin thereon; and asserted, that the patent of the United States could not be a good title thereto. They insisted, that it had been determined in 1812 or 1813, in a suit brought by the corporation against the widow and heirs of Bertrand, that the latter had no title to the lot, and was compelled to take down the buildings thereon. The answer proceeds as follows: "And the said defendants further say, that even supposing, which they do deny, that the Spanish government would have, at any time, made an absolute grant of the said parcel of land *to the said Beltran or Bertrand; the said grant should [*227 be null and void, because the said parcel of land made a part of the quays of this city; that is, one of those public things which even the sovereign himself had no authority to dispose of, to the prejudice of the public, without a flagrant abuse of his powers. And these defendants further say, that at the time of the foundation of the city of New Orleans, under the French government; said government left between the bank of the river Mississippi and the first row of houses fronting said river, a large space, emptied and unoccupied, under the name of quays, and intended to serve and to be reserved as such for the use of the inhabitants of this city, as they exist in the several cities of France, and in her colonies; and as it is proved by the ancient plans of the city of New Orleans, which have been preserved in the office of the marine charts, maps and plans, which existed at Versailles, in France."

After proceeding to take the evidence of witnesses, and on the exhibition of their testimony, with the documentary evidence of the parties; the district court, on the 12th of March 1832, gave a judgment in favor of the petitioners in the following terms:

"The plaintiffs allege, that the widow Gonzales, from whom they derive title, obtained a grant from the United States of the lot in question, and that the defendants have extended the levee so as to embrace said lot, and conclude with the payer, that they may be decreed to be the lawful owners, and the defendants enjoined from disturbing them in the free enjoyment of their rights as owners of said lot. The defendants oppose this claim upon several grounds; but the only one which can be relied upon with any hope of success is, that the space between the front buildings of the city and the river was, at the time the city was laid off, under the government of France, intended to be kept open for public use, designated as a quay, and which could not be the subject of a grant. If the facts, as stated in the answer, were true, the conclusion drawn from them would be undeniable. The sovereign could not cede what had been already granted, unless there be retrocession or forfeiture. The only evidence in support of the defendant's claim is a fac-simile of a plan made by Charlevoix, and by him *stated [*228 to be copied from a plan deposited in the marine office, made by N. B., Ing. de la M., 1744, and on which is marked on the space between the front of the city and the river, the word 'quay.' Names do not change the nature of things; a quay is an artificial work, and may belong to an individual as well as a corporation; but to belong to either, it must not only exist and have a defined extent, but must be shown to have been granted. It is self-evident to every one who has seen this space of ground, that it is not a quay. The defendants have shown no other title which can be validly

opposed to the grant under which the plaintiffs claim; there is no material difference between this and the case of *Metzinger* and the defendants; that was a grant under the King of Spain; this a grant under the United States, who have succeeded to the same rights. Had the defendants sheltered themselves under their charter, and shown that the public safety required that the base of the levee should be extended, to prevent inundation, or that it was necessary for a public way, the case might have presented a different aspect. It is ordered and decreed, that the defendants be enjoined not to disturb the plaintiffs in the possession and free exercise of their rights, in and to the lot mentioned and described in their petition, and that the defendants pay costs."

From this decision, the corporation of New Orleans appealed to the supreme court of the state of Louisiana. In February 1833, the supreme court affirmed the judgment of the inferior court, and the case was finally disposed of, by a judgment in favor of the original petitioners—a rehearing having been refused, on the 27th of March, in the same year. The mayor, aldermen and inhabitants prosecuted this writ of error; and the following errors in the judgment of the supreme court of Louisiana, were assigned by the plaintiffs in error, and came up with the record.

"The judgment of the supreme court of the eastern district of the state of Louisiana, affirming the judgment of the court of the first district of said state, is erroneous, and ought to be reversed, and judgment ought to be rendered in favor of the plaintiffs in error, with costs; for the following reasons, and such others as may appear on the record.

*229] *1. The spot of ground in controversy makes part of an open space in front of the city of New Orleans, called a pay, which by the ancient plans of the city was constituted a quay, or public place, and dedicated to public use, as well by its designation on said plans, as by the sovereign authority, and by its use and occupation for public purposes.

2. The right of the former sovereigns of Louisiana over this place was a matter of prerogative, varying according to the institutions of the different governments which have held Louisiana, but always inseparable from the sovereignty.

3. The right of use of this place by the public is a vested right; is a species of property in which the inhabitants of Louisiana are protected under the third article of the treaty of cession.

4. By the treaty of cession, Louisiana was ceded in full sovereignty to the United States.

5. The United States held this sovereign power, during the time they held the sovereignty of Louisiana; but by the admission of Louisiana into the Union, this branch of sovereignty was vested in the state of Louisiana, and under the constitution, could not exist in the United States.

6. The power of regulating the use or of appropriating or changing the destination of public places belongs to the sovereign power alone.

7. Since the admission of Louisiana into the Union on a footing with the original states, the United States had no power to interfere with the property or use of any public place in Louisiana.

8. The plaintiffs in error, who are, under the laws of Louisiana, the proper parties to vindicate the public rights, held the place in controversy, by permission of, and by the authority of, the state of Louisiana, as will

appear by the charter of the city of New Orleans and the laws of the state, and claimed the undisturbed use thereof, by virtue of the treaty of cession, and under the act of congress, passed on the 8th of April 1812, for the admission of Louisiana into the Union; and the decision of the supreme court of the eastern district of Louisiana is against the title, rights and privileges thus claimed by the plaintiffs in error, and this is contrary to the provisions of the treaty and law of the United States; and ought, therefore, to be reversed.

*Clay and *Porter*, for the defendants in error, moved to dismiss the writ or error for want of jurisdiction. [*230

The jurisdiction will be attempted to be sustained, on the allegation that the questions in the cause depend on the treaty by which Louisiana was ceded to the United States. It was understood, that in some cases the court had permitted a cause to be argued on the merits, before the question of jurisdiction was decided: but this was when the whole of the matters in the cause were so intermixed as not to permit the point of jurisdiction to be separately examined. Such is not the fact in this case; the question of jurisdiction stood forth from the merits. If the jurisdiction can be supported, it will rest on the first, second and third articles of the Louisiana treaty, and principally on the third article, which declares that Louisiana shall be incorporated into the Union, and in the meantime that the inhabitants should be protected in their property. The execution of the provision of the treaty to incorporate Louisiana, as a state of the Union, was looked to, in thus securing the property of the inhabitants. It was not necessary to provide for the rights of property afterwards. From the time of the incorporation, property in the state was held under the guarantee of the constitution of the United States, as the property of the citizens of other states is held. After the admission of Louisiana into the Union, as a state, the treaty ceased to operate. From that time, the rights of property depend upon, and are to be decided by the laws and by the courts of the state.

But if these are not the effects of the admission of Louisiana into the federal family, this is not a case arising under the treaty. The purpose of the 25th section of the judiciary law, under which the jurisdiction in this case is claimed to exist, is to enable this court to carry the constitution, treaties and laws of the United States into execution. *Owings* v. *Norwood's Lessee*, 5 Cranch 344. The case must arise out of—spring out of, a treaty; be created by the treaty, or the right claimed be given by the treaty, and which requires the courts of the United States to give force to the treaty.

The title of the defendants in error originated during the existence of the right of the Spanish crown to Louisiana; and *was afterwards confirmed by patent from the United States. The plaintiffs in error [*231 claim the lot in controversy as a part of a quay which belonged to the inhabitants of New Orleans, and so designated in a map; it having, as they allege, been appropriated for public use, before the cession of the territory. Thus, both the parties claim under the Spanish crown, and assert their rights as having existed prior to the treaty; and neither claims under the treaty. The treaty has nothing to do with the title of either; and in the state courts, nothing was said of it. The property was granted, before the treaty, to

Bertrand; and is now in the grantees of his heirs, under the Spanish grant; or, at the time of the cession, it was vacant, and has since been granted by a patent, and is held under that patent.

Again, it is not a case arising under the treaty, in which the decision has been against the treaty; the decision is in favor of the treaty. Both the corporation of New Orleans, and the defendants in error, were intended to be secured by the treaty. The decision of the supreme court of Louisiana is in favor of a right under the treaty, and under a patent granted by a law of the United States. There is, thus, a perfect neutrality in the parties as to the treaty.

It is now contended, that the plaintiffs in error claim under the act of congress of 1812, by which Louisiana was admitted into the Union, as a state. It has not been before asserted, that the city of New Orleans claimed under that law. The question in the courts of Louisiana was, whether the King of Spain had granted, and whether he had authority to grant, the lot in controversy; it having been previously dedicated to public uses. The city of New Orleans claimed under a dedication in 1788. The act of 1812 did not interfere with or affect either of these asserted rights. It did not authorize the state of Louisiana, thus made a sovereign state, to interfere with the rights of the city of New Orleans. The property never belonged to the state of Louisiana. If, at the time of the admission of the state into the Union, this property passed to or belonged to the state, the state might interfere in the question between the parties to this case, which has not yet taken place. But if such right existed, or does exist, it may yet be presented, as it could not be affected by the decision in this case. Louisiana, as a state, *has no other right to come into this court, than have the other states of the Union.

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Webster, against the motion.—It has not been the practice of the court to discuss questions of jurisdiction, when so intimately blended with the facts and merits of the case, as are these in the cause now before them. If they find the question so connected, they postpone a decision until the whole argument is heard; and this is desired by the plaintiffs in error.

It early became a question, in what manner the questions in a case, which had been before a state court, should be made to appear, so that jurisdiction of them could be taken in this court. It became afterwards settled, that if, in the whole proceeding, it was manifest, that a party set up, under a law or treaty, or the constitution, a right, and a decision was against that right, this court could intervene and exercise its revising power over the case. The only question in this case is, therefore, whether a right of this kind was claimed by either of the parties now before the court.

The question of jurisdiction is identical with the main question between the parties. The claim of the plaintiffs below was founded on a patent from the United States; and the state court held it valid. Thus, their whole title depends upon the validity of the patent. The claims of the city of New Orleans are under the treaty, by which the property of those claiming under the governments which had held Louisiana, was assured to them. The corporation of New Orleans claim under the treaty, asserting that the property was dedicated to public uses, and belonged to the city of New Orleans. The principles on which their right rests, were settled in this court, in the Cin-

cinnati and Pittsburgh cases. *Barclay* v. *Howell*, 6 Pet. 498; *City of Cincinnati* v. *White*, Ibid. 431. It the property in dispute was in the inhabitants of New Orleans, at the time of the treaty; it was out of the power of the United States to grant it to those under whom the defendants in error claim. The decision was against the treaty, which secured the property to the plaintiffs in error; and in favor of a patent which was given in violation of the treaty. The question is, whether the act of 1812 operates in the *case? The treaty is part of the title which was completed by that act. The creation of Louisiana into a state, made this state the [*233 guardian and trustee of all the property which had, before that event, become vested in the inhabitants of that part of the territory of Louisiana. The rights thus guarantied by the creation of the state of Louisiana by the act of 1812, have been disregarded by the supreme court in their decision in favor of a patent issued after that act.

The assignment of errors shows that the protection of the treaty was claimed by the plaintiffs in error in the state court; and the opinion of Judge Martin, one of the judges of the supreme court of Louisiana, is also evidence of this position. The application of the act of 1812 to the case, was in that court overruled; and the plaintiffs in error say, that in so doing, the court misconstrued the act. The plaintffs in error contend, that the lot in question was appropriated land in 1788; and by the act of 1812, it passed as such into the jurisdiction of the state of Louisiana, as the other property of citizens or inhabitants of the state, and could not afterwards be interfered with or granted by the United States. The effect of the act of 1812, was, to transfer the property to the state for the use of the inhabitants.

There are many rights which are in the state, which, if violated, may be brought before this court. Thus, rivers and highways, if interfered with, are such rights. Could not Louisiana, in cases of this kind, come into this court, under the act of 1812?

Marshall, Ch. J., delivered the opinion of the court.—The appellees claim title to a lot of ground in the city of New Orleans, as purchasers from the heirs of Catharine Gonzales, the widow of Thomas Beltran, *alias* Bertrand, who had been in possession of the lot, for several years, by permission of the Spanish government. This incomplete title was regularly confirmed under the laws of the United States, and a patent was issued for the premises to Catharine Gonzales, on the 17th of February 1821. The city of New Orleans, claiming this lot as being part of a quay, dedicated to the use of the city in the original plan of *the town, and therefore, not grantable by the king, has enlarged the levee so as to embrace it. The [*234 appellees brought their petitory action in the district court of the state of Louisiana, praying to be confirmed in their rights to the said lot of ground, and that the corporation might be enjoined from disturbing them in the exercise thereof. The district court pronounced its judgment in favor of the petitioners, which, on appeal, was affirmed by the supreme court of the state. This judgment of affirmance has been removed into this court, under the 25th section of the judiciary act.

The merits of the controversy cannot be revised in this tribunal. We can inquire only whether the record shows that the constitution, or a treaty, or a law of the United States, has been violated by the decision of the state

court. The appellees move to dismiss the writ of error, because no such violation appears. In support of this motion, the counsel has, we think, in his argument, prescribed too narrow a principle for the action of this court. He says, very truly, that the 25th section of the judiciary act is limited by the constitution, and must be construed so as to be confined within those limits; but he adds, that a case can arise under the constitution or a treaty, only when the right is created by the constitution or by a treaty. We think differently. This construction would defeat the obvious purpose of the constitution, as well as of the act of congress. The language of both instruments extends the jurisdiction of this court to rights protected by the constitution, treaty or law of the United States, from whatever source those rights may spring.

To sustain the jurisdiction of the court in the case now under consideration, it must be shown, that the title set up by the city of New Orleans, is protected by the treaty ceding Louisiana to the United States, or by some act of congress applicable to that title. The counsel in support of the motion contends, and we think correctly, that the treaty does not embrace the case. The first article makes the cession, and the second describes its extent, as comprehending every right vested in France. The third is expressed in these words, "the inhabitants of the *ceded territory shall be incor-
*235] porated in the union of the United States, and admitted, as soon as possible, according to the principles of the federal constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States; and in the meantime, they shall be maintained and protected in the free enjoyment of their liberty, property and the religion which they profess." No other article of the treaty is supposed to contain any stipulation for the rights of individuals. This article obviously contemplates two objects: one, that Louisiana shall be admitted into the Union, as soon as possible, upon an equal footing with the other states; and the other, that, until such admission, the inhabitants of the ceded territory shall be protected in the free enjoyment of their liberty, property and religion. Had any one of these rights been violated, while this stipulation continued in force, the individual supposing himself to be injured, might have brought his case into this court, under the 25th section of the judiciary act. But this stipulation ceased to operate, when Louisiana became a member of the Union, and its inhabitants were "admitted to the enjoyment of all the rights, advantages and immunities of citizens of the United States." The right to bring questions of title decided in a state court, before this tribunal, is not classed among these immunities. The inhabitants of Louisiana enjoy all the advantages of American citizens, in common with their brethren in their sister states, when their titles are decided by the tribunals of the state.

The counsel for the appellant scarcely hopes to maintain the jurisdiction of the court under the treaty, but seems to rely on the act of congress for admitting the state of Louisiana into the Union. The section of that act which is supposed to apply, is in these words, "be it enacted, &c., that the said state shall be one, and is hereby declared to be one, of the United States of America, and admitted into the Union, on an equal footing with the original states, in all respects whatever, by the name and title of the state of Louisiana." This simply carries into execution the third article of the treaty of cession; and cannot, as has already been observed, be con-

strued to give appellate jurisdiction to this court over all questions of title between the citizens of Louisiana. If, in any case, such jurisdiction could be supposed to be given, it might *be, where an act of congress attempted to divest a title which was vested under the pre-existing [*236 government. Therefore, the counsel opposing the motion contends, that the jurisdiction of the court is involved in the merits of the controversy, and cannot be separated from them. We do not think so. The controversy in the state court was between two titles : the one, originating under the French, the other, under the Spanish government. It is true, the successful party had obtained a patent from the United States, acknowledging the validity of his previous incomplete title under the King of Spain. But this patent did not profess to destroy any previously existing title ; nor could it so operate, nor was it understood so to operate by the state court. It appears from the petition filed in the district court, that the patent was issued in pursuance of the act of the 11th of May 1820, entitled, "an act supplementary to the several acts for the adjustment of land-claims in the state of Louisiana." That act confirms the titles to which it applies, "against any claim on the part of the United States." The title of the city of New Orleans could not be affected by this confirmation. But, independently of this act, it is a principle applicable to every grant, that it cannot affect pre-existing titles. *United States* v. *Arredondo*, 6 Pet. 738.

The judgment of the state court appears on the record to have depended on, and certainly ought to have depended on, the opinion entertained by that court, of the legal rights of the parties under the crowns of France and Spain. The case involves no principle on which this court could take jurisdiction, which would not apply to all the controversies respecting titles originating before the cession of Louisiana to the United States. It would also comprehend all controversies concerning titles in any of the new states, since they are admitted into the Union by laws expressed in similar language. The writ of error is dismissed, this court having no jurisdiction of the cause.

On consideration of the motion made in this cause, on a prior day of the present term of this court, to wit, on Saturday, the 24th of January past, and of the arguments of counsel thereupon had, as well for the plaintiffs in error as for the *defendants in error : It is now here ordered and adjudged by this court, that this writ of error to the supreme [*237 court of the state of Louisiana for the eastern district, be and the same is hereby dismissed, for the want of jurisdiction.

*United States v. John Bailey.

Criminal law.—Perjury.

Indictment for false swearing, under the third section of the act of congress of March 1st, 1823, which declares that "any person who shall swear or affirm falsely, touching the expenditure of public money, or in support of any claim against the United States, shall suffer as for wilful and corrupt perjury." The indictment charged the false swearing to be an affidavit made before a justice of the peace of Kentucky, in support of a claim against the United States, under the act of congress of July 1832, to provide for liquidating and paying certain claims of the state of Virginia.

There is no statute of the United States which expressly authorizes any justice of the peace of a state, or any officer of the national government, judicial or otherwise, to administer an oath in support of any claim against the United States, under the act of 1823. The secretary of the treasury, in order to carry into effect the authority given to him to liquidate and pay the claims referred to in the act of 1832, had established a regulation, authorizing affidavits made before any justice of the peace of a state, to be received and considered in proof of claims under the act. By implication, he possessed the power to make such a regulation; and to allow such affidavits in proof of claims under the act of 1832; it was incident to his duty and authority in settling claims under that act. When the oath is taken before a state or national magistrate, authorized to administer oaths, in pursuance of any regulations prescribed by the treasury department, or in conformity with the practice and usage of the treasury department, so that the affidavit would be admissible evidence at the department, in support of any claim against the United States, and the party swears falsely, the case is within the provision of the act of 1823, ch. 165.

If a state magistrate shall administer an oath, under an act of congress expressly giving him the power to do so, it would be a lawful oath, by one having competent authority; and as much so as if he had been specially appointed a commissioner, under the law of the United States for that purpose; and such an oath, administered under such circumstances, would be within the purview of the act of 1823.

The act of 1823 does not create or punish the crime of perjury, technically considered; but it creates a new and substantial offence of false swearing, and punishes it in the same manner as perjury. The oath, therefore, need not be administered in a judicial proceeding, or in a case of which the state magistrate, under the state laws, had jurisdiction, so as to make the false swearing perjury; it would be sufficient, that it might be lawfully administered by the magistrate, and was not in violation of his official duty.

The language of the act of 1823 should be construed with reference to the usages of the treasury department; the false swearing and false affirmation referred to in the act, ought to be construed to include all cases of swearing and affirmation required by the practice of the department, in regard to the expenditure of public money, or in support of any claims against the United States. The language of the act is sufficiently broad to *include all such cases; and there is no reason for excepting them from the words, as they are within the policy of the act, and the mischief to be remedied.

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The act does no more than change a common-law offence into a statutory offence.

Certificate of Division from the Circuit Court for the district of Kentucky. At the November term 1834, of the circuit court of the United States for the Kentucky district, an indictment was found against John Bailey, for perjury and false swearing; under the third section of the act of congress of March 1st, 1823 (3 U. S. Stat. 771), and the 13th section of the act of March 3d, 1825. (4 Ibid. 118.)

The third section of the act of March 1st, 1823, entitled "an act in addition to the act entitled an act for the prompt settlement of public accounts, and for the punishment of the crime of perjury," is in these words: "that if any person shall swear or affirm falsely, touching the expenditure of public money, or in support of any claim against the United States, he or she shall, upon conviction thereof, suffer as for wilful and corrupt perjury." The 13th section of the act of March 3d, 1825, entitled "an act more effect-

ually to provide for the punishment of certain crimes against the United States, and for other purposes," declares, "that if any person in any case, matter, hearing or other proceeding, where an oath or affirmation shall be required to be taken or administered, under or by any law of the United States, shall, upon the taking of such oath or affirmation, knowingly and willingly swear or affirm falsely, every person so offending shall be deemed guilty of perjury, and shall, on conviction thereof, be punished," &c.

The indictment charged the defendant, John Bailey, with perjury and false swearing, upon the following affidavit, made by him before a justice of the peace of the commonwealth of Kentucky.

"The Commonwealth of Kentucky, county of Bath, to wit: The affidavit of John Bailey, one of the executors of Captain John Bailey, deceased, states, that he is not interested in said estate; that Warren Bailey, jun., and James C. Bailey, who have joined with him in a power of attorney to the Honorable Richard M. Johnson, to draw any moneys that may be *due them, from the government of the United States, are the residuary legatees, and solely interested; that he is ——— years of age, [*240 and the son of said John Bailey, deceased, who, from his earliest recollection, was reputed a captain in the revolutionary army, and in the Illinois regiment; that he has seen his father's commission, and thinks there were two; of that fact, he will not be certain, but it is his strongest impression, and is perfectly confident, that the commissions, if two, both were signed by Thomas Jefferson; that his father's papers fell into his hands, as executor, and he has made many fruitless searches for them, and can in no wise account for their loss, unless they were given to General Thomas Fletcher, deceased, while a member of congress, to see if he could get anything, as affiant knows that his father applied to said Fletcher to do something for him, and understood afterwards, the law had made no provision for cases situated like said John Bailey's. As witness my hand and seal, this ——— of November 1832. JOHN BAILEY." [SEAL.]

The record of the circuit court contained the following statement of the facts and proceedings of the case, and of the division of opinion by the judges of the court.

"The attorney for the United States read in evidence the papers set out in the indictment, purporting to be the affidavit of the prisoner, with the certificates of the said Josiah Reed and William Suddeth, and gave evidence to the jury, conducing to prove, that the prisoner did, at the time and place charged in the indictment, take oath as charged, and subscribe the paper set out in the indictment, as his affidavit, before the said Reed, and that the said Reed was, then and there, a justice of the peace of the commonwealth of Kentucky, in and for the said county of Bath, duly commissioned, qualified and acting as such; and also gave evidence, conducing to prove, that, immediately after the passage of the said act of congress of the 5th day of July 1832, entitled 'an act for liquidating and paying certain claims of the state of Virginia,' the secretary of the treasury did establish, as a regulation for the government of the department and its officers, in their action upon the claims in the said act mentioned, that affidavits made and subscribed before any justice of the peace of any states of the United *States, would be received and considered, to prove the persons [*241

making claims under said act, or the deceased whom they represented, were the persons entitled under the provisions thereof, and that the said regulations had been ever since acted under at the department, and numerous claims heard, allowed and paid on such affidavits; and also gave evidence, conducing to prove, that the prisoner, acting as the executor of his father, John Bailey, had, before the time of making and subscribing said affidavit, asserted the claim therein mentioned, and employed Thomas Triplett to prosecute the same, and receive the money thereon; that the said Triplett did afterwards present the said affidavit and certificates, in support of said claim, at the said department, on which, together with other affidavits, the same was allowed and the money paid, and a part thereof paid to the prisoner. The above being all the evidence conducing to prove the authority or jurisdiction of the said Josiah Reed, to administer said oath and take said affidavit, the counsel for the prisoner moved the court to instruct the jury, that the said Josiah Reed had no authority or jurisdiction to administer said oath, or take said affidavit, and that whatever other facts they might find on the evidence, the prisoner could not have committed the crime of perjury, denounced by the 13th section of the act of congress, more effectually to provide for the punishment of certain crimes against the United States, and for other purposes, 'approved on the 3d of March 1825,' nor of false swearing denounced by the third section of the act 'in addition to the act' entitled 'an act for the prompt settlement of public accounts and for the punishment of the crime of perjury,' approved on the 1st of March 1823, and their verdict ought to be for the prisoner; which motion, the attorney for the United States opposed. On this question, the judges were divided and opposed in opinion, whereupon, on the motion of the attorney of the United States, the said question and disagreement are stated, and ordered to be certified to the supreme court."

The case was argued by the *Attorney-General*, and *Loughborough*, for the United States. No counsel appeared for the defendant.

*242] *For the United States, the following points were made. 1. That the act of the 5th of July 1832, is *in pari materia* with the other acts of congress upon the subject of claims for revolutionary services; and that evidence under it may legally be taken, as in cases of claims under those other laws. (4 U. S. Stat. 563.) 2. That the secretary of the treasury pursued the intent of the act of 1832, in requiring the affidavit in this case; and that the oath falls within the 13th section of the crimes act of 1825. 3. That the act of 1823 embraces all oaths that, by the usage of the government, are received as evidence in support of claims against the United States. 4. That the justice of the peace had jurisdiction to administer this oath, under the said act. 5. That the act embraces every case of swearing, in which a false oath is actually taken, and the affidavit is used fraudulently in support of a claim against the United States. 6. That this construction of the act creates no new offence; the evidence against the prisoner showing an offence which would be punishable if the circuit court had a common-law jurisdiction of crimes. 1 Hawk. 430; Noy 100; Moore 627; Hob. 62; 8 East 364. 7. That in a prosecution upon the act of 1823, it is not necessary to a conviction to show the requisites of technical perjury.

Loughborough, for the United States.—The indictment is founded upon the 13th section of the crimes act of 1825 (4 U. S. Stat. 118), and the third section of an act of 1823. (3 Ibid. 771.) Two counts of the indictment charge the offence of perjury under the first-named law; and two, the offence of false swearing denounced by the act of 1823. The oath was made before a justice of the peace of the commonwealth of Kentucky, in support of a claim by the prisoner against the United States, as the executor of his father, John Bailey; falsely alleged to have been a captain in the Illinois regiment, in the army of the revolution, for the amount of half-pay due to such captain, in virtue of the provisions of an act of congress of July 5th, 1832, entitled "an act to provide for *liquidating and paying certain claims of the state of Virginia." [*243

The objections to the prosecution, in the court below, took a wide range. It was urged on behalf of the prisoner, that the oath upon which perjury or false swearing is assigned, must be a legal oath; that is, an oath taken before an officer having a jurisdiction to administer it; that congress could not confer upon the justice jurisdiction to administer this oath; that such jurisdiction had not in fact been confirmed by congress; that the practice of the government, and the regulations of the treasury, could not give the jurisdiction; that the United States could not punish the swearing falsely, in an oath taken before a state officer. The point certified for the opinion of this court regards the jurisdiction of the justice; the difficulty in the mind of one of the judges below existing, on the ground, that the oath in the case had not been authorized by act of congress, to be taken before the justice.

As to so much of the objections to the prosecution as rest upon assumed constitutional grounds, little need be said. It is not supposed, they would be seriously urged in this tribunal. A glance at the statute books of the United States will show what has been the sense of congress upon the subject. The first act of congress, after the adoption of the present constitution, authorized oaths to be administered by state officers. Oaths of custom-house officers may be taken before state justices. (1 U. S. Stat. 24.) Depositions in courts of the United States may be made before state judges (Ibid. 88); and perjury in them is punishable by the United States. By an act of March 3d, 1819, oaths therein directed may be made before state officers, and false swearing is expressly made perjury. (3 Ibid. 508.) False swearing before state officers, in support of claims for pensions, under the acts of 1818 and 1820, is expressly made punishable as perjury. Instances might be multiplied, to show that congress frequently avails itself of the agency of state officers in executing *its laws, and supposes its power [*244 competent to the punishment of offences committed by, or before them. To deny these powers in the federal government, would be to create a necessity for a great multiplication of federal officers to discharge duties now well performed by state functionaries. That congress might avail itself of the agency of state officers, was admitted, at the period of its adoption. See Federalist 82, and as late as the case of *Houston* v. *Moore*, 3 Wheat. 423. It is not a question whether congress can compel a state officer to perform a duty, or make an obligatory enlargement of his jurisdiction. Here, the justice has exercised the jurisdiction.

Acts upon the same subject, should receive the like construction. This

is one of the soundest rules. The act of July 5th, 1832, under which this oath was taken, is *in pari materia* with the other acts for the payment of claims for revolutionary services, as pensions and half-pay. These acts constitute a system of legislation. How may other claims for pensions and half-pay be obtained? Previous to 1818, evidence for pensions was to be made before federal officers. See acts of 1793, 1803, 1806. (1 U. S. Stat. 324; 2 Ibid. 242, 376.) But by the act of 1816 (3 Ibid. 286), the president and secretary of war were authorized to prescribe forms of evidence in cases under that act, for five years' half-pay pensions. By the act of 1818 (Ibid. 410), and the following other acts, oaths for pensions may be made before state officers: act of 1819 (Ibid. 514); act of 1820 (Ibid. 569); act of 1823 (Ibid. 782). The act of May 15th, 1828, directs pensions to be granted to those who shall produce to the secretary of the treasury, "satisfactory evidence" that they are entitled. This act places upon the pension roll, a distinct class of persons not before entitled. The act of June 7th, 1832, is supplementary to that of 1828. It places also upon the roll, a new class of persons, who shall produce "satisfactory evidence" that they are entitled. Under these last two acts, a very large number of pensions have been granted; and five-sixths of them upon oaths made before state officers. Are these oaths illegal and unauthorized? Have the pensions been improperly granted? Shall they now *be arrested? Neither of the
*245] acts authorizes state officers to administer the oaths which were received as evidences by the department. These acts merely required that the evidence should be "satisfactory" to the secretary. By receiving under them evidences made in the manner expressly authorized by congress in similar cases, under laws relating to the same general subject, did the department pass beyond the line of its duty?

The certificate shows, that the affidavit in this case was made pursuant to a regulation of the secretary of the treasury, to carry into effect the act of July 5th, 1832. That act devolved upon him the performance of a certain duty. To perform this duty, it was essential, he should inform himself in every case arising under the act, of certain facts. Who are the identical officers entitled to half-pay; whether living or dead, and if dead, who their representatives are: these are things of which it is manifest the secretary of the treasury could, as such, have no intuitive knowledge. The act of congress gave him no knowledge upon these points. It is general—to the officers or their representatives, he shall pay the money. The act does not prescribe the mode in which he shall be informed. It was essential, then, that it should be prescribed by himself. As *he* is to be satisfied of certain facts, it is for *him* to say to claimants, how they shall proceed to effect that object. He has prescribed the mode of procedure; and in doing so, must be supposed to have exercised a power vested in him by necessary implication. Was it illegal or improper for him to make a regulation, when, without a regulation, the law must have remained a dead letter?

Then, as to the nature of the regulation made by the secretary. It is, to receive as evidence, an oath before a state justice of the peace—a mode of evidence expressly prescribed by congress in similar cases of claims against the United States, under laws *in pari materia* with that which he was executing. Not only, then, has the secretary adopted no novel or improper mode of proof, but he has only availed himself of an instrument, placed

under his control in like cases; and which, when the uniform practice of the government is considered, congress must have supposed at his disposition, in a case in which no other direction is made by it.

*It has been the uniform practice, it is believed, of the government, to receive in support of claims against the United States, evidence such as the present. In the various accounting offices of the treasury, depositions and affidavits before state officers are, and have been, taken as competent proofs in support of claims and accounts. Congress, and its various committees, have also been in the constant practice of receiving these affidavits as competent evidence in support of claims. In the judiciary department of the government, also, it has been, and is yet, the practice to receive as affidavits papers sworn to before state magistracy. It will be strange, if it shall now, for the first time, be discovered, that these oaths are not such legal oaths as that they who falsely take them may be punished —strange, that congress and every other department of the government, should have remained in darkness till the present day—and that a practice coeval with the government, shall have now to be set aside as erroneous. If such be the case, then it will result, that things may be oaths for some purposes and not for others; that a paper may be an affidavit for the purpose of effecting a fraud, and yet not one for the purpose of judicial examination. [*246

The 13th section of the crimes act of 1825, makes it perjury to swear falsely in any case, matter, hearing or other proceeding whenever an oath shall be required to be taken, under any act of congress. Such was the oath in the present case. This was a proceeding by claim on the part of the prisoner against the United States, and the oath was required to be taken by the secretary of the treasury, under the act of July 5th, 1832. It has been attempted to be shown that the secretary of the treasury holds the power to require this oath. If this be so, it results that the justice had jurisdiction to administer it. He had such a jurisdiction as the secretary of the treasury deemed competent. And as he has exercised it, and the paper has been used as an affidavit or sworn paper by the party, the objection of the want of jurisdiction will not lie.

It is not necessary, at common law, in a prosecution for perjury, to show that the oath was expressly directed by an act of parliament. Perjury may be committed in false swearing in a court of equity, ecclesiastical, military, or maritime. 1 Hawk. P. C. 430. So also, false oaths taken before *commissioners appointed by the king to examine witnesses in relation to any matters concerning his honor or interest, are perjuries (Ibid. 430); or before commissioners to inquire of the forfeiture of his tenants' estates. Noy 100; Moore 627; Hob. 62. In Connecticut, it has been settled, that wherever the administration of an oath is lawful, that is, not forbidden, false swearing is perjury at common law. 2 Conn. 30. Here, the justice is as the commissioners appointed by the crown to examine a witness concerning its interest. At common law, and in England, then, the offence in this case would be a perjury; and the construction of the act of 1825, which makes it embrace this case, creates no new offence; nor any offence which the court below would not have power to punish, if it possessed a common-law jurisdiction of crimes. [*247

If, however, the case does not fall within the act of 1825, it is respectfully contended, that it is embraced by the act of 1823, for the punishment

of the offence of false swearing in support of claims against the United States.

Previous to a discussion of this statute, we will examine the doctrines of the common law as to false oaths. That law does not content itself with the punishment of the crime of perjury only. As all false swearing is not, technically, perjury, the common law would be very defective, if it visited with punishment the one species only of this class of offences. Accordingly, it will be found, that the law is not thus deficient. It is held, that false swearing in fraud of another's right, or to the stoppage or hindrance of justice, is a misdemeanor, punishable by fine, imprisonment, and corporal pain. Where an act of parliament requires an oath to be taken, false swearing is not perjury, unless the statute so declares. 4 Bl. Com. 137, Christian's note. Will it be said, however, that such false swearing is no offence? That it is no misdemeanor, because it is no felony? In the case of *O'Mealy* v. *Newell*, 8 East 364, a false affidavit, made in France, was produced and used in the king's bench. Lord ELLENBOROUGH held it an offence punishable at common law as a misdemeanor. In that case, a prosecution in England for perjury could not be sustained, because the swearing was out of the kingdom. The court could not take cognisance of any fraud committed out
*248] of its jurisdiction. In *this case, supposing the court below to have possessed a common-law jurisdiction of crimes, can it be doubted, that the certificate shows a misdemeanor on the part of the prisoner? a false oath actually made within the jurisdiction of the court, and used as a competent and true affidavit in the successful perpetration of a fraud? The general principle of the common law, and the case in East, irresistibly lead to this conclusion.

In prosecuting Bailey, therefore, for false swearing in support of a claim against the government, nothing was done which the common law would not sanction. But as it is not contended, that the circuit court derives from the common law any power to punish offences, it remains to show, that the indictment and the case shown in the certificate, fall within the statute upon which the prosecution was based. In doing this, it will appear, that the act of 1823 creates no new offence. It only prescribes a punishment for, and gives the courts of the Union jurisdiction to try, an offence before known to the common law. It simply converts a common-law misdemeanor into the special statutory offence of "false swearing." As a statutory offence only, it is a new one. In a prosecution founded upon the act of 1823, it is not necessary to show the requisites of technical perjury. It is necessary merely that the case be brought within the words of the statute. This is all that is ever required upon indictments concluding against the form of a statute.

The words of the act are, that "if any person shall swear falsely in support of a claim against the United States, he shall suffer," &c. It does not say how, or before whom, the false oath punished by it shall be taken. Why was the act made thus general? The answer is that the law-makers were aware of the practice of the government, in every department, to receive oaths before state officers, in support of claims. The inconvenience of abolishing this practice, and requiring claimants to go in all cases before federal judges, was obvious. Congress, therefore, left the practice undisturbed, as it had always existed; but affixed to falsehood in these oaths the punishment of perjury. Indeed, considering the uniform practice of the

departments and of congress itself, to receive these oaths as evidence, and the presumption that it must have been *in the minds of the legislators, at the time of the adoption of the act of 1823, the conclusion [*249 cannot well be resisted, that the generality of the language of that act was of purpose to embrace oaths such as this.

Thus regarding the subject, it is contended, that the justice had a jurisdiction to administer this oath, under the act of 1823. But it is submitted, whether, upon a true construction of that act, and the application of it to the facts of this case, a difficulty as to the want of jurisdiction in the justice, can be resisted by one who has actually taken a false oath, and successfully used it, in support of a fraudulent claim against the United States? Without any particular inquiry as to jurisdiction, does not the act of 1823 extend to every case in which a false oath is actually taken in support of a claim? Does it not embrace every case in which the oath is, by the admitted practice of the departments, received as evidence in support of claims? It is contended, that it does.

Justices of the peace have, by common law, a power to administer oaths in some cases. Burn's Justice, "Oaths." In Kentucky, justices have a criminal and a civil jurisdiction in matters of tort and contract; and their proceedings are, by law, records. 2 Dig. Ky. Laws 701. The justice of the peace was, by the laws of Kentucky, as competent to take this affidavit as the highest judge of the state, or as any other court of record. The Kentucky statute against perjury (2 Dig. Ky. Laws, 994), punishes false swearing, in certain cases, before justices of the peace. By the nature of his office, therefore, the justice had a general jurisdiction to administer oaths. It was in contemplation of such a jurisdiction, that the secretary of the treasury made the regulation found in this case; and that the prisoner took the oath. Suppose, this oath had been made before the United States district judge; would not the objection of the want of jurisdiction then lie as well as now? No law of congress has expressly authorized him to administer the oath. And he has no more general right to administer oaths than the Kentucky justice of the peace.

It is unnecessary to dwell upon the consequences to flow *from a decision of this case against the prosecution. They are obvious. [*250 They may be summed up as constituting much public inconvenience and mischief, and great private wrong, not to speak of the impunity with which frauds, in cases of revolutionary claims, will have been perpetrated. Truly, there is nothing in these results to attract the court.

Butler, Attorney-General, declined going at large into an argument of the case, after it had been so fully discussed by Mr. Loughborough; but would give the court some references to provisions of the laws of the United States. The third and fourth counts in the indictment are on the act of 1823, and charge the defendant with "false swearing." The first count charges perjury, and is not founded on that act. If the act of 1823 created a new offence, one not before known, that of false swearing to support claims on the United States, the three counts in the indictment can be supported. The case admits the false swearing, and this brings the defendant within the provisions of that law. The affidavit made by the defendant before a magistrate was false; why is he not within the law? The doubt

is, whether the magistrate had authority to administer such an oath. This is the point the court must decide.

The act of 1823 does not prescribe what magistrates shall administer the oath or affirmation. If there is any doubt of the false swearing being a crime under the statute, it must rest on the assertion, that congress meant to make it an offence only where the affidavit was taken before a judicial officer of the United States, or an officer of a state specially authorized to administer the oath. The counsel who has argued the case has shown acts of congress *in pari materia*. The act of 1823, he rightly says, was passed by the legislature, adverting to former acts, and to the practice under them.

It has always been the practice of congress, to give power to state magistrates to administer oaths in cases of this kind, or in cases calling for affidavits. The first act passed by congress (1 U. S. Stat. 23), was such a case. The inducement to authorize this practice, in addition to the convenience it afforded, was the indisposition to create a *great number of officers of the United States, having authority to administer oaths, and answerable only to the United States. The allowance of this power to state officers, was within the principle which operated upon those who formed the government, and who desired that it should not be exposed to consolidation. Statutes in which such powers are given to state officers, will also be found in 1 Story's Laws 17, 69, 73, 130, 214, 224, 225, 226, 801, and in many other places in the statute books. To show that congress have recognised the power of the secretary of the treasury to make regulations in relation to claims on the United States, he cited, 1 Story, § 7. Many of the operations of the treasury are conducted under regulations established by the secretary of the treasury.

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In legislating on the claims which the law declared should be paid by the secretary of the treasury, congress adverted to the established custom of the department, by which the secretary was to satisfy himself, that claimants were entitled to the benefit of this law.

Story, Justice, delivered the opinion of the court.—This is a criminal case, certified from the circuit court of the district of Kentucky, upon a division of opinion of the judges of that court. The defendant, John Bailey, was indicted for false swearing, under the third section of the act of congress of the 1st March 1823, ch. 165, which provides, "that if any person shall swear or affirm falsely, touching the expenditure of public money, or in support of any claim against the United States, he or she shall, upon conviction thereof, suffer as for wilful and corrupt perjury." The indictment charges the false swearing to be in an affidavit made by the defendant, before a justice of the peace of the commonwealth of Kentucky, in support of a claim against the United States, under the act of congress of the 5th July 1832, ch. 173, to provide for liquidating and paying certain claims of the state of Virginia; and there are various counts in the indictment, stating the charge in different manners.

It appears from the record, that at the trial, "the attorney for the United States read in evidence the papers set out in the indictment, purporting to be the affidavit of the prisoner, with the certificates of the said Josiah Reed and *William Suddeth, and gave evidence to the jury,

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conducing to prove, that the prisoner did, at the time and place charged in the indictment, take oath as charged, and subscribe the paper set out in the indictment as his affidavit, before the said Reed; and that the said Reed was then and there a justice of the peace of the commonwealth of Kentucky, in and for the said county of Bath, duly commissioned, qualified and acting as such; and also gave evidence, conducing to prove, that immediately after the passage of the said act of congress of the 5th July 1832, entitled "an act for liquidating and paying certain claims of the state of Virginia," the secretary of the treasury did establish, as a regulation for the government of the department and its officers, in their action upon the claims in said act mentioned, that affidavits made and subscribed before any justice of the peace, of any of the states of the United States, would be received and considered, to prove the persons making claims under said act, or the deceased whom they represented, were the persons entitled under the provisions thereof, and that the said regulations had been ever since acted under at the department, and numerous claims heard, allowed and paid, on such affidavits; and also gave evidence, conducing to prove, that the prisoner, acting as the executor of his father, John Bailey, had, before the time of making and subscribing said affidavit, asserted the clain therein mentioned, and employed Thomas Triplett to prosecute the same, and receive the money thereon; that the said Triplett did afterwards present the said affidavit and certificates, in support or said claim, at the said department, on which, together with other affidavits, the name was allowed and the money paid, and a part thereof paid to the prisoner.

The above being all the evidence conducing to prove the authority or jurisdiction of the said Josiah Reed, to administer said oath and take said affidavit, the counsel for the prisoner moved the court to instruct the jury that the said Josiah Reed had no authority or jurisdiction to administer said oath, or take said affidavit; and that whatever other facts they might find on the evidence, the prisoner could not have committed the crime of perjury, denounced by the 13th section of the act of congress, more effectually to provide for the punishment of certain crimes against the United States and for other purposes, "approved on the 3d of March 1825," nor of false swearing *denounced by the third section of the act "in addition to the act" entitled "an act for the prompt settlement of public accounts, [*253 and for the punishment of the crime of perjury," approved on the 1st of March 1823, and their verdict ought to be for the prisoner; which motion the attorney for the United States opposed. On this question, the judges were divided and opposed in opinion, whereupon, on the motion of the attorney of the United States, the said question and disagreement were stated, and ordered to be certified to the supreme court.

It is admitted, that there is no statute of the United States which expressly authorizes any justice of the peace of a state, or indeed, any officer of the national government, judicial or otherwise, to administer an oath in support of any claim against the United States, under the act of 1832, ch. 173. And the question is, whether, under these circumstances, the oath actually administered in this case was an oath upon which there would be a false swearing, within the true intent and meaning of the act of 1823, ch. 165?

It is unnecessary to consider, in this case, whether an oath taken before

a mere private or unofficial person, not authorized to administer an oath generally, or in special cases, or not specially authorized, recognised or allowed by the regulations or practice of the treasury department, as competent to administer an oath, in support of any claim against the United States, would, though the claim should be admitted or acted upon in the treasury department, under such a supposed sanction, be within the provision of the act of 1823, ch. 165. These questions may well be reserved for consideration, until they shall arise directly in judgment. In the present case, the oath was administered by a state magistrate, having an admitted authority, under the state laws, to administer oaths, *virtute officii*, in many cases, if not in the present case; and it is further found in the case, that there was evidence at the trial, conducing to prove (and for the purposes of the present argument, it must be taken as proved), that the secretary of the treasury did establish a regulation, authorizing affidavits made before any justice of the peace of a state, to be received and considered in proof of claims under the act of 1832. So that the solution of the question, now
*254] before us, depends upon this: whether the oath, so *administered under the sanction of the treasury department, is within the true intent and meaning of the act of 1823?

Admitting, for the sake of argument, that it is true (on which, however, we express no opinion), that a state magistrate is not compellable to administer an oath, *virtute officii*, under a law of the United States, which expressly confers power on him for that purpose; still, if he should choose to administer an oath, under such a law, there can be no doubt, that it would be a lawful oath, by one having competent authority; and as much so, as if he had been specially appointed a commissioner, under a law of the United States, for that purpose. And we think that such an oath, administered under such circumstances, would clearly be within the provision of the act of 1823. That act does not create or punish the crime of perjury, technically considered; but it creates a new and substantive offence of false swearing, and punishes it in the same manner as perjury. The oath, therefore, need not be administered in a judicial proceeding, or in a case of which the state magistrate, under the state laws, had judicial jurisdiction, so as to make the false swearing perjury. It would be sufficient, that it might be lawfully administered by the magistate, and was not in violation of his official duty.

There being no express authority given by any law of the United States, to any state magistrate, to administer an oath in the present case, the next inquiry naturally presented is, whether the secretary of the treasury had an implied power to require, authorize, allow or admit any affidavits sworn before state magistrates, in proof or in support of any claim under the act of 1832? for if he had, it would be very difficult to show, that such an affidavit is not within the true intent and meaning of the act of 1823, as it certainly is within the very words of the enactment. The policy of the act clearly extends to such a case; and the public mischief to be remedied is precisely the same, as if the affidavit had been taken under the express and direct authority of a statute of the United States.

And we are of opinion, that the secretary of the treasury did, by implication, possess the power to make such a regulation, and to allow such affidavits in proof of claims, under the act of 1832. It was incident to his

duty and authority, in settling claims, under that act. The third section provides "that the *secretary of the treasury be and he is hereby directed and required, to adjust and settle those claims for half-pay [*255 of the officers of the aforesaid regiment and corps, which have not been paid, &c.; which several sums of money herein directed to be settled or paid, shall be paid out of any money in the treasury not otherwise appropriated by law." It is a general principle of law, in the construction of all powers of this sort, that where the end is required, the appropriate means are given It is the duty of the secretary, to adjust and settle these claims, and in order to do so, he must have authority to require suitable vouchers and evidence of the facts, which are to establish the claim. No one can well doubt the propriety of requiring the facts, which are to support a claim, and rest on testimony, to be established under the sanction of an oath; and especially in cases of the nature of those, which are referred to in the act, where the facts are so remote in point of time, and must be so various in point of force and bearing. It cannot be presumed, that congress were insensible of these considerations, or intended to deprive the secretary of the trearury of the fullest use of the best means to accomplish the end, viz., to suppress frauds, and to ascertain and allow just claims. It is certain, that the laws of the United States have, in various cases of a similar nature, from the earliest existence of the government down to the present time, required the proof of claims against the government to be by affidavit. In some of these laws, authority has been given to judicial officers of the United States to administer the oaths for this purpose; and at least as early as 1818, a similar authority was confided to state magistrates. The citations from the laws, made at the argument, are direct to this point, and establish in the clearest manner a habit of legislation to this effect. (*a*) It may be added, that it has been stated by the attorney-general, and is of public notoriety, that there has been a constant practice and usage in the treasury department, in claims against the United States, and especially of a nature like the present, to require evidence by affidavits, in support of the claim, whether the same has been expressly *required by statute or not; and that, [*256 occasionally, general regulations have been adopted in the treasury department for this purpose. Congress must be presumed to have legistated under this known state of the laws and usage of the treasury department. The very circumstance, that the treasury department had, for a long period, required solemn verifications of claims against the United States, under oath, as an appropriate means to secure the government against frauds, without objection, is decisive to show that it was not deemed a usurpation of authority.

The language of the act of 1823 should, then, be construed with reference to this usage. The false swearing and false affirmation, referred to in the act, ought to be construed to include all cases of swearing and affirmation required by the practice of the department, in regard to the expenditure of public money, or in support of any claims against the United States. The language of the act is sufficiently broad to include all such cases;

(*a*) Act of 28th of February 1793, ch. 61; Act of 3d March 1803, ch. 90; Act of 10th of April 1806, ch. 25; Act of 18th of March 1818, ch. 18; Act of 1st of May 1820, ch. 51; Act of 3d of March 1823, ch. 187.

and we can perceive no reason for excepting them from the words, as they are within the policy of the act, and the mischief to be remedied. The act does no more than change a common-law offence into a statute offence.

There is nothing new in this doctrine. It is clear, by the common law, that the taking of a false oath, with a view to cheat the government, or to defeat the administration of public justice, though not taken within the realm, or wholly dependent upon usage and practice, is punishable as a misdemeanor. The case of *O'Mealy* v. *Newell*, 8 East 364, affords an illustration of this doctrine. In that case, it was held, that a person making, or knowingly using, a false affidavit of debt, sworn before a foreign magistrate, in a foreign country, for the purpose of holding a party to bail in England, although such affidavit was not authorized by any statute, but was solely dependent upon the practice and usage of the courts of England, was punishable as a misdemeanor, at the common law, as an attempt to pervert public justice. Upon this occasion, Lord ELLENBOROUGH, after alluding to the practice of receiving such affidavits made in Ireland and Scotland, as well as in foreign countries, said, the practice in both cases must be equally warranted or unwarranted. In none of these cases, *can the party *257] making a false affidavit be indicted specifically for the crime of perjury, in the courts of this country. But in all of them, so far as he is punishable at all, he is punishable for a misdemeanor, in procuring the court to make an order to hold to bail, by means and upon the credit of a false and fraudulent voucher of a fact, produced and published by him for that purpose. And the court held the practice perfectly justifiable.

Upon the whole, we are of opinion, that where the oath is taken before a state or national magistrate, authorized to administer oaths, in pursuance of any regulations prescribed by the treasury department, or in conformity with the practice and usage of the treasury department, so that the affidavit would be admissible evidence at the department, in support of any claim against the United States, and the party swears falsely, the case is within the purview of the act of 1823, ch. 165. It will be accordingly certified to the circuit court, that the said Josiah Reed, named in the certificate of division of the judges of the circuit court, being a justice of the peace of the commonwealth of Kentucky, authorized by the laws of that state to administer oaths, had authority and jurisdiction to administer the oath, and take the affidavit in the said certificate of division mentioned; and that if the facts stated therein were falsely sworn to, the case is within the act of congress of the 1st March 1823, referred to in the same certificate.

McLEAN, Justice. (*Dissenting.*)—The question involved in this case is important, as it regards the construction of a highly penal law of the Union; and of still greater importance, as it respects the powers of state officers under an act of congress which confers on them no special authority. In the third section of the act of congress of the 1st of March 1823, it is provided, that "if any person shall swear or affirm falsely, touching the expenditure of public money, or in support of any claim against the United States, he or she shall, upon conviction thereof, suffer as for wilful and corrupt perjury." And in the 13th section of the act of the 3d of March 1825, it is declared, that "if any person, in any case, matter, hearing or *other *258] proceeding, when an oath or affirmation shall be required to be taken

or administered under or by any law or laws of the United States, shall, upon taking such oath or affirmation, knowingly and willingly swear or affirm falsely, every person so offending shall be deemed guilty of perjury, &c."

These are the acts under which the offence of false swearing is charged against the defendant. The oath was administered by Josiah Reed, a justice of the peace for Bath county, in the state of Kentucky, with a view of obtaining money from the government. It does not appear, that in this law or any other, the claim asserted was required to be substantiated by oath; but it was proved, that such requirement was made by the secretary of the treasury, whose duty it was to decide on the merits of the claim. Nor does it appear, that any authority has been given by any act of congress to a justice of the peace to administer an oath in such a case; and the question arises, whether, admitting the affidavit of Bailey to be false, Justice Reed had power to administer such an oath? If it shall be found that no such power existed, the false swearing, though highly immoral, is not an offence under either of the acts of congress which have been cited.

The statutes of 1823 and 1825 above cited, have extended the crime of perjury, or the punishment annexed to it, to a false swearing; which neither by the common law nor the previous acts of congress, constituted perjury. Beyond this, these acts do not go. They do not dispense with any of the essential requisites, beyond what is expressed, to constitute the crime of perjury.

The definition of perjury at common law as given by Hawkins, is, "a wilful, false oath, &c., in any procedure in a course of justice." This offence may be committed in depositions, affidavits, &c., taken out of a court of justice. By the act of congress of 1790, it is provided, that "if any person shall, wilfully and corruptly, commit perjury, on his or her oath or affirmation, in any suit, controversy, matter or cause depending in any of the courts of the United States, or in any deposition taken pursuant to the laws of the United States, every person so offending shall suffer," &c. In 4 Bl. Com. 136, it is stated, "the law takes no notice of any perjury but such as is committed in some court of justice having power *to administer an [*259
oath, or before some magistrate or proper officer invested with a similar authority." And Lord Coke, in 3 Inst. 165, says, "that no old oath can be altered or new oath raised, without an act of parliament; or any oath administered by any that hath not allowance by the common law, or by act of parliament." No one can doubt, that an oath administered by a person without authority, is a void act. It imposes no legal obligation on the person swearing to state the truth, nor is he punishable under any law, for swearing falsely in such a case.[1]

The prosecution in this case is attempted to be sustained on two grounds. 1. From the general language of the law defining the offence of false swearing. 2. From the usage of the treasury department.

And first, as to the language of the act under which this prosecution was commenced. The act is general in its language, against "any person who shall swear falsely;" but it gives no authority, either general or special,

[1] United States *v.* Babcock, 4 McLean 113.

to administer an oath. This power must be sought in other acts of congress, or in a judicial office to which the power is incident.

The federal government is one of limited and specific powers. In the discharge of its functions, except in certain specified cases, its acts are as distinct from those of a state government as if they were foreign to each other. The officers of the one government, as such, can do no official acts under the other; the sources of their authority are different, as well as their duties and responsibilities. When a law for the punishment of offences is passed by either the federal or a state government, it can only operate within the proper jurisdiction. The officers of the federal government can take no cognisance of the penal laws of a state; nor can the judiciary of a state, in my opinion, carry into effect the criminal laws of the Union. If this could be done, it would consolidate the jurisdictions of the respective governments, and introduce into our judicial proceedings the utmost confusion. It is not in the power of congress to transfer any part of the jurisdiction which the constitution has vested in the federal government. If this can be done by congress, to any extent, it may be done without limitation; and in this way the powers *of the federal government might be lessened or utterly destroyed. A federal judicial officer, either by act of congress, or as an incident to his office, has the power to administer oaths. This power, however, can only be exercised within the jurisdiction of the federal government, and in cases where an oath is required or sanctioned by the laws of that government. And so of the judicial officers of a state. If either officer act beyond the sphere of his appropriate jurisdiction, his act is a nullity. In this view of the case, there is no difference in principle between administering an oath, and any other act which belongs to the judicial character of the officer.

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By an act of congress, depositions may be taken before certain state officers, in any cause pending in the court of the United States. Among these officers, a justice of the peace is not named, unless he be a judge of a county court; and it has been often decided, that a deposition taken before a justice of the peace, who is not a member of a county court, or before any other state officer than those named in the act, cannot be read in evidence. Under the state jurisdiction, the justice may have power to administer oaths, but he is not recognised as having a right to exercise this power under the act of congress. And would any one contend, that a deposition taken before a justice, under such circumstances, could lay the foundation of a prosecution for perjury? The state officers named in the act, as having the power to take depositions, do not act, in taking them, under their general power to administer oaths as state officers, but under the special authority of the act of congress. Any other persons designated by their official characters, might as well have been named in the act of congress, though they had no power under any law of the state, to administer oaths. The officers named in the act are referred to, as descriptive of persons who may exercise the authority given, and for no other purpose.

In the argument of this case for the prosecution, a great number of acts of congress were read, granting pensions and for other purposes, in which state officers were especially authorized to administer oaths. This I take to be a conclusive *exposition by congress against the powers of state officers to administer oaths for federal purposes. Would a special

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authority have been vested in them for this purpose, if, in the opinion of congress, they possessed a general authority under the state laws? But one answer can be made to this inquiry. Congress knew well that state officers could exercise, under their general authority, no such power, and it was expressly conferred on them by an act of federal legislation.

If this power to administer an oath by a judicial officer of a state, in matters of a civil nature which relate to the federal jurisdiction, cannot be recognised as legal; much less should it be sanctioned, as laying the foundation of a prosecution for perjury. The false swearing with which the defendant stands charged, though not technically perjury, is punished as such. Under a general law of a state, which defines the offence and provides for the punishment of the perjury, would a false oath taken before a federal judicial officer be punishable? Would it not be essential, in such a case, to show that the person administering the oath, acted under the authority of the state? Could the state tribunals recognise any other authority than that which belongs to their own jurisdiction? If no state law authorizes an oath to be administered by a federal officer, can he administer it for state purposes? Could the acknowledgment of a deed or other instrument be made before a federal judge, under a general statute of a state requiring such instrument to be acknowledged before a judge of the court? All these questions must be answered in the negative.

To say, that the federal officer has a right to administer oaths by an act of congress, or as an incident of his office, does not remove the objection. Can a judge of the federal court exercise his functions in a state tribunal? Such a pretension would be too absurd to merit serious consideration. And, yet, is there any difference in principle between a federal judicial officer discharging his function in a state tribunal, and administering an oath for state purposes? Does he not, in both cases, exercise the functions of his office under the jurisdiction of the state.

It is admitted, that the legislature of a state, as well as congress, may authorize any persons, by name, or by their official designations, to administer oaths in all cases required, under *the laws of their respective governments; but I am examining the case of the defendant, where no [*262 statutory power to administer the oath is pretended to have been given by congress. Any official act of a federal officer, under the jurisdiction of a state which has not authorized such act by him, is extra-judicial, and in no point of view legal. Nor can an oath administered on such circumstances, however false, be punishable under a general statute of the state against false swearing. The act of administering the oath, being done without authority, is void. It subjects the false swearer to no greater penalty than if it had been administered by a private citizen, without any pretence of power. The law, it may be said, denounces the punishment for false swearing generally. And can there be a false swearing, within the meaning of the act, before a person who has no authority to administer an oath? From these considerations it would seem, that no punishment could be inflicted by a state tribunal, under an act against false swearing, where the oath had been administered by a federal officer, whose act was not sanctioned by any law of the state.

And if this be the case, under the jurisdiction of a state, it is not equally clear, that the same principle applies to the federal jurisdiction? If a state

tribunal cannot punish for false swearing, where the oath is administered by a federal officer, without any sanction by the laws of the state, can a federal tribunal punish for false swearing, where the oath is administered by a state officer, without any sanction by the laws of the Union?

The act of congress against false swearing is general, and no reference is made to the authority under which the oath shall be administered; but does it not follow as a consequence, that the oath must be administered under the same jurisdiction which enacted the law? Did congress intend to punish an offence committed before a state tribunal? They had the power to punish false swearing, before any individual whom they authorized to administer the oath; but in this law they have not so provided, nor in any other law which relates to the case under consideration. It, therefore, follows, in this view, that Justice Reed, in administering the oath to the *263] *defendant, acted without authority, and the affiant cannot be subjected to the penalty for false swearing.

If this offence may be perpetrated before a state officer, because the law denouncing it is general; on the same ground, may not a state tribunal inflict the penalties of this law?

But it is insisted, that under the rule of the treasury department which required the oath to substantiate the claim, the justice was authorized to administer the oath. Can this position be sustained? It has been shown, that Justice Reed, in administering the oath, did not act under the authority of the state, or of any law of congress; and the question is fairly presented, whether the secretary of the treasury has the power to invest any individual with a competent authority to administer oaths, in matters which relate to the treasury department.

That the secretary of the treasury, who, in the discharge of his duties, is required to investigate and decide annually, numerous and various claims on the treasury, may require certain claims to be substantiated by oath, is not controverted. But this admission goes no length in sustaining the prosecution; for it does not follow, if the secretary require an oath in proof of a claim, that he can invest any individual with the power to administer such oath. In the first place, there is no necessity for the exercise of the power, by the secretary; because there are officers of the United States who are duly authorized to administer oaths. But there is no power in any executive officer to clothe any individual with the important authority of administering oaths. It is a power which belongs to the legislative department, and can nowhere else be exercised. In certain cases, courts may issue commissions to take depositions, and these give authority to administer oaths in the cases stated; but this is done under the express sanction of law. Can the secretary himself administer an oath which shall lay the foundation of a prosecution for perjury?

But it is said, that it has been the usage of the department, to act on oaths administered by state officers. That such has been the usage, I can entertain no doubt; but there is no proof before this court, nor was there *264] any before the circuit court, that such usage exists *in cases where congress have given no authority to administer the oath. But suppose, the usage did extend to cases where no authority had been given by congress to a state officer to administer an oath; could usage constitute the law in such a case? The usage of the department may not only fix the rule

of decision, but, in many cases, the ground and extent of a claim against the government. But this usage cannot extend beyond the action of the department. The secretary of the treasury requires oaths to be administered by state officers, in proof of certain claims, to guard the public interest; but does that legalize such a procedure? It may prove salutary for the purpose intended; but does it follow, that the oaths administered by any one, if false, are within the act of congress against false swearing? This act is a highly penal one. A conviction under it destroys the character of the individual, and deprives him of his liberty. Like all other criminal acts, it should receive a strict construction, and no person should be subjected to its penalties, who has not clearly violated its letter and spirit.

In one sense, it may be said, that the defendant, Bailey, is within the law, because the law punishes false swearing; and he has sworn falsely before a justice of the peace. But the question recurs, had this justice the power to administer the oath? If he had not, Bailey has not incurred the penalties of the law. A decision from 8 East 364, has been read, as applicable to the case now under consideration. That was a case in which the court of king's bench decided, that an affidavit taken in a foreign country was sufficient, under the practice of the court, to hold a defendant to bail. But Lord ELLENBOROUGH says, that "in none of these cases, can the party making a false affidavit be indicted, specifically, for the crime of perjury, in the courts of this country; but in all of them, so far as the party is punishable at all, is punishable for a misdemeanor, in procuring the court to make an order to hold to bail, by means, and upon the credit of a false and fraudulent voucher of a fact, produced and published by him for that purpose." It appears, from this opinion, that the false swearing in a foreign affidavit could not lay the foundation of a criminal *prosecution; but the *use* which was made of such affidavit, and the effect produced by it—these [*265 constitute the gist of the prosecution. A false affidavit, to hold to bail, if made in England, and before a person competent to administer an oath, would be perjury. But Lord ELLENBOROUGH says, in substance, if the oath be administered in a foreign country, or in Ireland or Scotland, though false, does not subject the affiant to a prosecution for perjury, nor for any criminal prosecution founded exclusively upon the false swearing. If, by the practice of the court, a mere statement by the plaintiff were sufficient to hold to bail, and such statement were made falsely, it would subject the plaintiff to punishment by the common law; for, in the language of the judge, "procuring the court to make an order to hold to bail, by means and upon the credit of a false and fraudulent voucher of a fact produced and published by him for that purpose." This opinion, it appears to me, does not conflict with the view I have taken of this case.

But it is insisted, that the law against false swearing was passed with a knowledge by congress of the usage of the department to require oaths before state officers; and that it must be presumed, they intended to sanction such usage. Is such a presumption admissible in a criminal case? The effect of the law must be limited in its penalties, to the jurisdiction under which it was enacted; and it should not be construed to embrace cases which do not come legitimately within its purview. A court, in giving a construction to a highly penal law, will look at its letter and spirit, and cannot

extend its provisions by construction, from motives of policy which may be supposed to have influenced the legislature.

If state and federal officers, as such, may exercise their functions within the jurisdiction of either government, to any extent, I see no principle by which their powers shall be limited. Such a course would blend the jurisdictions of the federal and state governments, and be likely to lead to the most serious collisions. I consider this question as one of great importance, and differing, as I do, from the opinion of the court, I have felt bound to give the reasons for my opinion.

*266] 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 Kentucky; and on the point on which the judges of the said circuit court were opposed in opinion, and which was certified to this court for its opinion, agreeable to the act of congress in such case made and provided; and was argued by counsel: On consideration whereof, it is ordered and adjudged by this court, that it be certified to the said circuit court, as the opinion of this court, that the said Josiah Reed, named in the certificate of division, being a justice of the peace of the commonwealth of Kentucky, authorized by the laws of that state to administer oaths, had authority and jurisdiction to administer the oath and take the affidavit in the said certificate of division mentioned, and that if the facts stated therein were falsely sworn to, the case is within the act of congress of the 1st day of March 1823, referred to in the same certificate.

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*267] *United States *v.* John Bailey.

Criminal law.—Certificate of division.

Indictment upon the act of congress of March 3d, 1823, for the punishment of frauds committed against the government of the United States. After the whole case had been laid before the circuit court, by the United States, the counsel for the prisoner moved the court to instruct the jury, that the evidence did not conduce to prove the offence charged under the act of congress; which was opposed by the United States; and on this question the judges were divided, and their opinions opposed; the question and disagreement were stated, and ordered to be certified to the supreme court.

The language of the sixth section of the act to amend the judicial system of the United States, which provides for the removal of cases from the circuit court to the supreme court, when the judges of the circuit court are opposed in opinion, shows conclusively, that congress intended to provide for a division of opinion on single points, which frequently occur in the trial of a cause; not to enable a circuit court to transfer an entire cause into the supreme court, before a final judgment. A construction which would authorize such transfer, would counteract the policy which forbids writs of error or appeals, until the judgment or decree be final.

The certificate of the judges leaves no doubt, that the whole cause was submitted to the circuit court by the motion of the counsel of the prisoner. It has been repeatedly decided, that the whole cause cannot be adjourned, on a division of the judges; and this is a case of that description.[1]

Certificate of Division from the Circuit Court of Kentucky. The defendant was indicted under the act of March 3d, 1823, entitled "an act

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[1] Nor can the whole case be broken up into points, and separately certified. White *v.* Turk, 12 Pet. 238; Nesmith *v.* Sheldon, 6 How. 41, Luther *v.* Borden, 7 Id. 1; Webster *v.* Cooper, 10 Id. 54.

for the punishment of frauds committed on the government of the United States." The act provides, "that if any person or persons shall falsely make, alter, forge or counterfeit, or cause or procure to be falsely made, altered, forged or counterfeited, or willingly aid or assist in the false making, altering, forging or counterfeiting, any deed, power of attorney, order, certificate, receipt or other writing, for the purpose of obtaining or receiving, or of enabling any other person or persons, either directly or indirectly, to obtain or receive, from the United States, or of any of their officers or agents, any sum or sums of money; or shall alter or publish as true, or cause to be altered or published as true, any such false, forged, altered or counterfeited deed, power of attorney, order, certificate, receipt or other writing as aforesaid, with *intent to defraud the United States, knowing the some to be [*268
false, altered, forged or counterfeited; or shall transmit to, or present at, or cause or procure to be presented at, any office or offices of the government of the United States, any deed, power of attorney, order, or certificate, receipt or other writing, in support of, or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged or counterfeited: every such person shall be decreed and adjudged guilty of felony."

On the 5th of July 1832, an act was passed, entitled "an act to provide for liquidating and paying certain claims of the state of Virginia. The third section of the act directs and requires the secretary of the treasury to adjust and settle the claims, the payment of which the United States thus assumed; and among them certain claims to half-pay of the officers of the Virginia line; and to pay the same out of the treasury.

The defendant and his brothers presented a claim under this act, asserting themselves to be the representatives of John Bailey, deceased, a captain in the regiment commanded by Colonel Clerk; and received by their attorney, under powers delegated to him, a large sum of money from the United States, as and for the half-pay of John Bailey.

The paper presented at the treasury in support of the claim, was in the following words and figures:

"The Commonwealth of Kentucky, county of Bath, to wit: The affidavit of John Bailey, one of the executors of Captain John Bailey, deceased, states, that he is not interested in said estate; that Warren Bailey, Jun., and James C. Bailey, who have joined with him in a power of attorney, to the Honorable Richard M. Johnson, to draw any moneys that may be due them, from the government of the United States, are the residuary legatees, and solely interested; that he is——years of age, and the son of said John Bailey, deceased, who, from his earliest recollection, was reputed a captain in the revolutionary army, and in the Illinois regiment; that he has seen his father's commission, and thinks there were two; of that fact, he will not be certain, but it is his strongest impression, and is perfectly confident, that the commissions, if two, both *were signed by Thomas Jefferson; that [*269
his father's papers fell into his hands, as executor, and he has made many fruitless searches for them, and can in no wise account for their loss, unless they were given to General Thomas Fletcher, deceased, while a member of congress, to see if he could get anything, as affiant knows that his father applied to said Fletcher to do something for him, and understood after-

wards, the law had made no provision for cases situated like said John Bailey's. As witness my hand and seal, this —— day of November 1832.
JOHN BAILEY." [SEAL.]

"State of Kentucky, Bath county, to wit: The foregoing affidavit was signed and sworn to, before me, by John Bailey, Jun., and I further certify that said John Bailey, Jun., is a man of truth and respectability, and to be strictly relied on when on oath. Given under my hand and seal, as a justice of the peace for Bath county, and commonwealth aforesaid, this 25th day of November 1832. J. REED, J. P., B. C." [SEAL.]

"State of Kentucky, Bath county, to wit: I, William M. Suddeth, clerk of the Bath county court, do certify, that the aforesaid Josiah Reed, whose name is subscribed to the foregoing certificate, is a justice of the peace in and for the county aforesaid, duly commissioned and sworn, and the handwriting is genuine and well known to the aforesaid William M. Suddeth as witness my hand and seal of office this 26th November, 1832.
W. M. SUDDETH." [SEAL.]

The indictment which set forth this writing, contained four counts, charging respectively the false making of the said writing, purporting to be an affidavit, and feloniously causing the *jurat* of the justice of the peace to be annexed to it; the uttering as true the whole paper; the causing it to be transmitted to the treasury department; and causing it to be presented at the department, in support of the claim.

*270] In the record, the following case was stated, and the division *of the judges of the court on the same, in the circuit court.

The attorney of the United States read in evidence to the jury the paper set out in the indictment, purporting to be the affidavit of the prisoner and the certificates of Josiah Reed and William Suddeth thereto attached, and proved that the signature of John Bailey, to the writing purporting to be his affidavit, was in the handwriting of him, the prisoner; that the signature to the certificate of Josiah Reed was in his handwriting, and that he was a justice of the peace of Kentucky, for the county of Bath, at the date thereof; that the certificate of William Suddeth was made and signed by him, and that he was clerk of the county court of Bath, as he certifies, and then gave satisfactory evidence that John Bailey, the father and testator of the prisoner, was not the John Bailey who was a captain in the Illinois regiment, as represented, and gave evidence conducing to prove that the prisoner had signed the paper purporting to be his affidavit, and aided in procuring the said Reed to sign his certificate, without he, the prisoner, ever having been sworn by the said Reed; that said Bailey fraudulently signed the said paper, and aided in procuring the certificate of Reed, and caused the said paper to be transmitted and presented at the treasury department of the United States, and there used in support of the claim, fraudulently made by the prisoner, as executor of his father, for the half-pay due to John Bailey, as a captain in the Illinois regiment, under the act of congress of the 5th of July 1832; that on this paper presented and received at the treasury, as the affidavit of the prisoner, and other documents, the claim was allowed, and the money paid to the attorney of the prisoner, and a part thereof paid over to him; this being all the evidence given on the part of the prosecution, the counsel for the prisoner moved the court to instruct the jury, that

the evidence did not conduce to establish the offence denounced by the first section of the act of congress of the 3d of March 1823, entitled "an act for the punishment of frauds committed on the government of the United States," nor any other act of congress under which the indictment was framed, which motion the attorney of the United States opposed, and on this question the judges were decided, and their opinions opposed. Whereupon, on motion *of the attorney of the United States, the said question and agreement are stated and ordered to be certified to the supreme court. [*271

The case was argued by the *Attorney-General*, and *Loughborough*, for the United States; no counsel appeared for the defendant.

For the United States, it was contended:—

1. That the writing set forth in the indictment is within the act of congress of 1823, for the punishment of frauds. 3 Inst. 169, 171; 2 East P. C. 920; *King* v. *Lyon*, 1 Russ. & Ry. 255; Dyer 302.

2. That the evidence shows a fraud committed on the government by the prisoner.

3. That the act of 1823 is not against forgeries only, but is an act for the punishment of frauds. It should be construed so as to effectuate the intention of the legislature, as expressed, not only in the title of the act, but by its words, taken in their ordinary sense; and cases should not be excluded which, thus construed, the act embraces. *United States* v. *Wiltberger*, 5 Wheat. 95; 1 Bl. Com. 59, 60, 89.

4. That the first count in the indictment is sustained, the writing having been "falsely made," in the sense in which these words in the act should be taken. 3 Inst. 169; *Taverner's Case*, Dyer 322; 3 Leon. 108; Moore 655; Hawk. P. C. ch. 70; 2 East 920; 13 Vin. Abr. 464; *King* v. *Maddox*, 2 Russ. on Crimes 458.

5. That the subsequent counts, founded upon the use of the paper, were sustained by the proof; and the writing which the prisoner fraudulently uttered, and caused to be transmitted and presented at the treasury, was such a false writing and certificate, as is meant by the act of congress. *Elsworth's Case*, 2 East P. C. 986, 988; 2 Russ. on Crimes 1513.

6. That the construction of the act contended for, will create no new offence, the acts shown against the prisoner amounting to an offence at common law, which would be punishable in the circuit court, if it had a common-law criminal jurisdiction. 2 Russ. on Crimes 1361, 1366, 1373; 4 East 171; 2 *Chitty's Bl. Com. 158, note; Hawk. P. C. 323; 2 Str. 1144; 7 Mod. 379. [*272

7. That if the act of 1823 be regarded as an act against forging and counterfeiting only, still an offence is shown against the prisoner, because: 1st. A writing may be falsely made, *i. e.*, forged, in the party's own name. Hawk. P. C. ch. 70; *Lewis's Case*, Forster 117; *Case of Parks and Brown*, 2 East P. C. 963; 6 Cow. 72. 2d. The writing, though in the prisoner's own name, was made as in a character which he did not bear, and without the assumption of which the fraud could not have been perpetuated. Cases, *supra*; 1 Leach 110. 3d. The writing purports to be, and was used as, an affidavit or writing sworn to, not being so in fact. The credit which was given to it, was that which was due to a sworn paper

only ; a paper not sworn to being, in the particular case, unavailing as an instrument of fraud. There was, therefore, given to the writing the false appearance of that, without which, it could not have imposed upon the secretary of the treasury ; wherefore, it is a counterfeit. *United States* v. *Turner*, 7 Pet. 132.

MARSHALL, Ch. J., delivered the opinion of the court.—This is a case certified to this court from the circuit court of the United States, for the seventh circuit and district of Kentucky, on which the judges of that court were divided in opinion.

An indictment had been found against John Bailey, upon the act of March 3d, 1823, for the punishment of frauds committed against the United States. After the attorney for the prosecution had laid his whole case before the court and jury, the counsel for the prisoner moved the court to instruct the jury, that the evidence did not conduce to establish the offence denounced by the first section of the act of congress of the 3d of March 1823, entitled "an act for the punishment of frauds committed on the government of the United States," nor any other act of congress under which the indictment was framed ; which motion the attorney for the United States opposed, and on this question the judges were divided and their opinions opposed.

*273] Whereupon, *on motion of the attorney for the United States, the said question and disagreement were stated and ordered to be certified to the supreme court.

The sixth section of the act "to amend the judicial system of the United States," enacts, "that whenever any question shall occur before a circuit court, upon which the opinions of the judges shall be opposed, the point upon which the disagreement shall happen, shall, during the same term, upon the request of either party or their counsel, be stated, under the direction of the judges, and certified, under the seal of the court, to the supreme court, at their next session, to be held thereafter ; and shall by the said court be finally decided." The act also contains a provision, that, "nothing herein contained shall prevent the cause from proceeding ; if, in the opinion of the court, farther proceedings can be had without prejudice to the merits." (2 U. S. Stat. 159.)

The language of the section shows, we think, conclusively, that congress intended to provide for a division of opinion on single points, which frequently occur in the trial of a cause ; not to enable a circuit court to transfer an entire cause into this court, before a final judgment. A construction which would authorize such transfer, would counteract the policy which forbids writs of error or appeal, until the judgment or decree be final. If an interlocutory judgment or decree could be brought into this court, the same case might again be brought up after a final decision ; and all the delays and expense incident to a repeated revision of the same cause, be incurred. So, if the whole cause, instead of an insulated point, could be adjourned, the judgment or decree which would be finally given by the circuit court, might be brought up by writ of error or appeal, and the whole subject be re-examined. Congress did not intend to expose suitors to this inconvenience ; and the language of the provision does not, we think, admit of this construction. A division on a point, in the progress of a cause, on which the judges may be divided in opinion—not the whole cause—is to be certified to this court.

The certificate of the judges leaves no doubt that the whole cause was submitted to the circuit court, by the motion of the counsel for the prisoner. The whole testimony in support of the prosecution had been submitted to the court, and *upon this whole testimony, the counsel for the prisoner moved the court to instruct the jury, that the evidence did not [*274 conduce to establish the offence denounced by any act of congress, under which the indictment was framed. This instruction necessarily embraced the whole cause. Had it been given, the prisoner must have been acquitted. Had the court declared, that the testimony did not support the indictment, the whole law of the case would have been decided against the prisoner; and the jury must have convicted him, or have disregarded the instruction of the court. It has been repeatedly decided, that the whole cause cannot be adjourned on a division of the judges; and as this is, we think, a case of that description, we cannot decide it in its present form. The case is remanded to the circuit court; this court not having jurisdiction over the question as stated.

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 Kentucky, and was argued by counsel: On consideration whereof, it is the opinion of this court, that the whole case has been certified to this court; and as it has been repeatedly decided by this court, that the whole case cannot be adjourned on a division of the judges, the court cannot decide this case in its present form. Whereupon, it is ordered and adjudged by this court, that this case be and the same is hereby remanded to the said circuit court, for further proceedings to be had therein, according to law and justice, this court not having jurisdiction over the question as stated.

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*James Boyce's Executors, Appellants, *v.* Felix Grundy. [*275

Rescission of contract.—Interest on affirmance.

On the hearing of the case of Boyce's Executors *v.* Grundy, at January term 1830, on an appeal from the decree of the circuit court of West Tennessee (3 Pet. 210), the decree of the circuit court was affirmed; by which, after decreeing a rescission of a contract made between Felix Grundy and James Boyce, the intestate, for the purchase, by the former from the latter, of a tract of land lying in the state of Mississippi; the court also decreed, that Robert Boyce, the administrator of James Boyce, of the goods, &c., of James Boyce, deceased, do pay the sum of $2065.21, to be levied on the goods of the said James Boyce, in his hands to be administered: and execution issue therefor as at law; in this decree, nothing was said as to any allowance of damages or interest. A mandate was issued in the usual form, to the circuit court, to carry the same into effect; on filing the mandate in the circuit court, in 1830, the cause was referred to the clerk, as master, to take an account of the assets of James Boyce, in the hands of the administrator; who reported, that no assets appeared in the hands of the administrator, but that Robert Boyce had, under an agreement with the appellee, received for rents of the land in Mississippi, before the 1st of January 1824, $2100, which, with interest thereon, $1120, to the 1st of September 1830, would amount to $3220; and that the land in Mississippi was devised by James Boyce, the intestate, to his son Robert Boyce. The report was confirmed, except as to the $1120 interest; the circuit court decreed, that the plaintiff recover of Robert Boyce, $2100, with interest from the decree; to be levied on his proper goods and chattels; and for the balance due the plaintiff, $496.46, with interest, in case the same was not paid by him; the plaintiff had for the whole amount of the decree, a lien on the lands in the state of Mississippi; and that the same should be sold to satisfy the same, by the clerk of the court, acting as a commissioner.

Boyce v. Grundy.

Held, that if the sum of $2100, the rents of the lands in Mississippi, came into the hands of Robert Boyce, as assets of the estate of James Boyce, no decree could be had against him in his individual capacity, in this case; the rents, under the agreement, upon the rescission of the contract for the sale of the land, became virtually the money of James Boyce, the intestate, and were assets in the hands of his administrator; the decree should have been rendered against the defendant in the circuit court, as administrator, and not individually. *Held*, also, that no lien upon the land in Mississippi existed, under the decree of the circuit court of Tennessee, and that court had no jurisdiction to decree a sale to be made of land lying in another state. *Held*, also, that the decree was erroneous, in allowing interest on the original sum decreed in the circuit court, viz, $2065.21, in 1816 (understood to be the sum of 496.46), to the affirmance of that decree in the supreme court in 1830.

It is solely for the decision of the supreme court, whether any damages, or interest (as a part thereof), are to be allowed or not, in cases of affirmance; *if, upon affirmance, no allowance of interest or damages is made, it is equivalent to a denial of any interest or damages.

*276]

Appeal from the Circuit Court for the District of West Tennessee. At January term 1830, this case was before the court on an appeal by the same appellants, and a decree was rendered in favor of the appellee. (3 Pet. 210.)

The appellee in that case had filed in the circuit court, a bill for the rescission of a contract entered into by him with the appellant's testator, James Boyce, for the purchase of a quantity of land in the state of Mississippi; and upon which contract, the two first instalments, payable by the same, being due and unpaid, a suit had been instituted, and a judgment for the amount obtained. The bill also prayed an injunction against the judgment. The circuit court decreed that the contract should be rescinded, and ordered a perpetual injunction of proceedings on the judgment: and the following mandate was issued from this court, on the affirmance of the decree of the circuit court.

"The President of the United States of America, to the honorable the judges of the circuit court of the United States for the district of West Tennessee, greeting: Whereas, lately, in the circuit court of the United States for the district of West Tennessee, before you, or some of you, in a cause wherein Felix Grundy was complainant, and Robert Boyce and Richard Boyce, executors of James Boyce, deceased, were defendants, in chancery, the decree of the said circuit court was in the following words, viz: 'His honor does order, adjudge and decree, that said contract or agreement between James Boyce, now deceased, and complainant, be in all things rescinded and annulled; and because it appears from the evidence, that complainant has never received any part of the rents for the plantation, but that an arrangement between him and Robert Boyce, authorized him (R. Boyce) to sue Reed, the complainant's tenant, in complainant's name, for Boyce's benefit, for the rents of 1819, 1820, 1821, 1822 and 1823, that he did so, and recovered therefor, and got the same, and that complainant did, by his agent, Harry L. Douglas, Esq., notify defendants to take possession of said land and *plantation, as he would not retain the same, on account of the fraud aforesaid; it also appearing, from the records of this court, that this bill was filed on the —— day of ——— 1823; that at the June term of this court, 1824, complainant was ready and pressed for a trial, and that the defendants were not ready for trial, at that or any subsequent term, but continued the same on their affidavit; and it appearing to the court, that complainant did pay said James Boyce the sum of $1250, on

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the 5th day of July 1818, and on that day executed to him his note for $750, in part payment for said land, and that James Boyce had a counterpart of the agreement: It is further ordered, adjudged and decreed, that defendant, Robert, administrator of the goods, &c., of James Boyce, deceased, do pay to complainant the said sum of $1250, with legal interest thereon, at the rate of eight per centum per annum; which appears to be the legal rate of interest in said Mississippi state; from the said 5th day of July 1818, until this day, making the sum of $2065.28, to be levied of the goods, &c., of said James, in his hands to be administered, and execution issued therefor as at law; and that defendants do surrender to the clerk and master of this court, said note for $750, and said counterpart, within three calendar months after final decree in this cause, which, together with the agreement exhibited in the bill, shall be by him cancelled, and that defendant be perpetually enjoined from executing said judgment on the law side of this court. It is further decreed, that defendants pay the costs of this suit, and the costs of said suit at law, and that execution issue therefor as at law:'—as by the inspection of the transcript of the record of the said circuit court, which was brought into the supreme court of the United States by virtue of an appeal, agreeable to the act of congress in such case made and provided, fully and at large appears. And whereas, in the present term of January, in the year of our Lord 1830, the said cause came on to be heard before the said supreme court, on the said transcript of the record, and was argued by counsel; on consideration whereof, it is ordered and decreed by the court, that the decree of the said circuit *court in this cause be and the same is hereby affirmed, with costs, February 2d, 1830: You, therefore, are hereby commanded, that such execution and proceedings be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding." [*278

In the circuit court, the proceedings on the mandate were the following:

"September 13th, 1830. This cause came on this day, and on a former day of this term, to be heard, before the Honorable John McLean and John McNairy, judges, in presence of counsel on both sides, upon the *mandamus* from the supreme court, affirming the decree formerly rendered in this court; and in obedience to said mandate, it is ordered, adjudged and decreed, that the defendants pay the costs of the supreme court of the United States, and the costs of appeal, to be taxed by the clerk and master; and upon motion and petition of complainant, the cause is set down for further directions; and it ordered, that the clerk and master take an account of the assets of James Boyce, deceased, in the hands of the defendant, Robert Boyce, to be administered, and make report, during this term, until the coming of which report other matters are reserved.

"And at the same term, to wit, 1830. This cause came on for further directions, this 28th of September 1830; and upon the exceptions filed by the counsel for defendants to the report of the clerk and master, which report was made in pursuance of a decree rendered at a former day of this term, and is in the words and figures following, to wit: 'In obedience to the interlocutory order made in this cause, at the present term, the clerk and master reports, that it does not appear, that any personal assets of James Boyce, deceased, came to the hands of said defendants, as his executors; but it does appear, from the agreement between complainant and Robert Boyce,

admitted to have been dated the 23d of May 1823, and from the depositions of Thomas B. Reed, Isaac Caldwell and James E. Gillespie, that Robert Boyce has received from rents, previous to the 1st day of January 1824, the sum of $2100. That interest on this sum, from the 1st day of January 1824, till the 1st of September 1830 (at the rate of eight per centum per annum, *279] the transaction having taken *place in the state of Mississppi, where, by the pleadings in this cause, that is admitted to be the legal rate of interest), will amount to $1120 ; amounting in all to $3220. The above depositions of Reed, Gillespie and Caldwell, and said agreement are herewith produced as a part of this report. It appears from the answers of defendants, that the land in controversy was devised by James Boyce, deceased, to one Richard Boyce, one of the defendants in this cause. All of which is respectfully submitted.'

"And exceptions to said report being argued by counsel, and fully understood by the court here ; it is ordered, adjudged and decreed, that the exceptions to said report be overruled, and that the report be confirmed, except so far as relates to the interest on the sum of $2100. It is further ordered, adjudged and decreed, that the complainant recover of Robert Boyce the said sum of $2100, with interest from this day, to be levied of his own proper goods and chattels, lands and tenements ; and that for the balance due the complainant, amounting to $496.46, with interest from this time, and also the afore-mentioned sum of $2100, in case the same is not paid by the said Robert Boyce, on or before the first Monday in March next, and the costs of this suit, that the complainant has a lien on the tract of land in the state of Mississippi, in the pleadings mentioned ; and is entitled to have the same sold to satisfy the above-mentioned sums of money. It is further ordered, adjudged and decreed, that in case the said sums of money and costs of suit, or any part thereof, be unpaid on the 1st day of March next, that in that case, the said tract of land and appurtenances be exposed for sale at Natchez, in the state of Mississippi, by commissioners to be appointed by the clerk and master of this court, on such credit as he may direct, forty days' notice of the time and place of sale being given, in some public newspaper printed in Natchez. And it is further ordered, adjudged and decreed, in case of said sale, that the defendants, Robert Boyce, as executor and administrator with the will annexed, and Richard Boyce, join in a deed or deeds to the purchaser or purchasers, under the direction of the clerk and master of this court. And it is further ordered, that the clerk and master of this court make report of his proceedings to the next term of this court."

*280] *The exceptions filed to the report of the clerk and master, were in the words following, to wit : "Defendants, by their counsel, except in manner following to the report of the clerk and master of this court in this cause. 1. It is not the fact, as stated by the said clerk and master, that the agreement between R. Boyce and F. Grundy, of date the 23d of May 1823, admits, either on its face, or by implication, that the said Robert Boyce had then, or has now, assets in his hands, as executor of the last will and testament of James Boyce, deceased. 2. Defendants except to said report, if by it, it is intended to render Robert Boyce liable, as executor of James, on the ground that he had assets in May 1823 ; because the same may have been long since paid away in discharge of debts due by the testator in his lifetime. 3. Defendant excepts to said report, because it should have been

stated, that the agreement between R. Boyce and F. Grundy, of May 23d, 1823, was an agreement with said Boyce, not as executor, but in his own individual capacity, and that said Boyce was acting merely as attorney in fact for said Grundy, and is responsible, if at all, in his individual capacity —the collections to be made by said Boyce, if the contract between James Boyce and said Grundy was rescinded, to be, stand and remain subject to future arrangements between said parties. For these and many other reasons to be assigned on argument, defendant's counsel pray that said report be recommitted to said clerk and master."

The defendants appealed to this court.

The case was argued by *Loughborough*, for the appellants; and by *Key*, for the appellee.

Loughborough, for the appellants.—This cause was once before in this court; when, in 1830, the decree of the court below, of 1826, rescinding the contract for land between Grundy and Boyce, was affirmed. (3 Pet. 210.) By the decree of 1826, it was, amongst other things, directed *that Robert [*281
Boyce, administrator of James Boyce, should pay to Grundy $1250 purchase-money, received by James Boyce, and $815 for interest at eight per cent., making $2065, to be levied of the goods of the intestate.

At the first term of the circuit court, after the affirmance of this decree, the mandate of this court was entered; and on the same day, the clerk and master was ordered to take and report an account of assets in the hands of Robert Boyce. On the 28th September, during the same term, the master reported, that no assets had come to the hands of the defendants, but that Robert Boyce had received $2100 for rents, under an agreement with Grundy. This report was excepted to; but sustained, except as to the interest; and a decree entered against Robert Boyce, in his own right, for $2100, and interest from the date of the decree. Also there was decreed to Grundy, $496.46, and interest, making the sum of $2596.46, with interest; for the whole of which the decree recognised a lien upon the land in Mississippi, and directed the same to be sold, unless the whole amount of principal, interest and costs should be paid by the 1st day of March, succeeding.

The proceedings in the court below, subsequent to the decree of 1826, are improper. That decree was final, and concluded the whole cause. It settled the sum, with interest, due to the plaintiff, gave him execution for it, and for the costs. It has every characteristic of a final decree. Nothing is reserved. It is a reservation of further directions in a decree that enables the court to give the plaintiff any subsequent incidental relief. 2 Madd. Ch. 456; 2 Atk. 284. The order for an account before the master was erroneous; such an order is in its nature interlocutory; it should precede, not follow a decree. After a final decree, an order for the defendant to account before the master, so as to vary the relief sought by the bill, cannot be granted on motion. *Hendricks* v. *Robinson*, 2 Johns. Ch. 484. There is no regular way to call an executor to account but by bill. 1 Ball & Beatty 75.

Though it be generally true, that when a cause comes up to this court a second time, the court will not look behind its mandate, yet the prior proceedings will be examined, so far as *it is necessary to an investigation [*282
of new points of controversy, between the parties, not disposed of by the first decree. *The Santa Maria*, 10 Wheat. 431. The decree now

appealed from subjects Boyce in his own right ; yet the bill of Mr. Grundy does not charge a *devastavit.* It was not framed with a view to charge Boyce personally. It does not pray a discovery and an account of assets. It contains no allegations proper to found proceedings upon against the goods and chattels of Robert Boyce. The facts, the proof of which was necessary to subject R. Boyce in his own right, were not put in issue by the plaintiff's pleadings. The reference to the master, therefore, was not proper in this suit ; and the last decree is not sustained by the pleadings. *Carneal* v. *Banks*, 10 Wheat. 181.

Neither do the proofs sustain the last decree. In fact, no additional proof was taken after the first decree, either in court or before the master. The report of the master was a form only. It was wholly founded upon evidence in the cause, previous to the first decree. Can the circuit court, after a decree *de bonis testatoris*, which reserves nothing ; upon motion merely, and without further pleading or proof, make it a decree *de bonis propriis?* Can a final decree, affirmed by this court, be afterwards changed in a substantial matter by the court below ? The proceedings in the circuit court, after receiving the mandate of this court, show an amendment made at the instance of one party, the other objecting, in the body of the first decree. If the last decree is proper, then the first, which was affirmed by this court, is wrong. The answer of Boyce does not admit assets. It responds to the matter of the contract only. But if it had admitted assets, the admission was waived by proceeding to an account before the master. 1 Bro. C. C. 484 ; 2 Madd. Ch. 379.

The master's report should not have been confirmed. The decree is not sustained by it. The reference was to ascertain the assets of James Boyce, in the hands of the defendant. The report states that no assets have come to defendant's hands. This was all the master had in charge. It was within the reference, and fully responsive to it ; and upon this, no decree against
*283] the defendant, personally, could be made. Indeed, the *report states the fact which discharges Robert Boyce from individual responsibility. But the master, exceeding his authority, reports that R. Boyce has received a large sum for rents of the land in controversy, under an agreement with Grundy, of May 1823. The matter of rents was not referred to the master. When a master's report manifestly exceeds his authority, though not excepted to, but confirmed, still it must be considered a nullity. 2 Madd. Ch. 508 ; 1 Meriv. 179.

The receipt of the rents by Boyce, cannot charge him personally, in this suit for purchase-money paid to his intestate. Boyce received them as attorney in fact for Grundy ; and his responsibility for them, is in his individual capacity, not as administrator. The rents, when received by Boyce, did not become assets of the estate of James Boyce. The agreement under which they were collected, recites a contemplated suit for the rescission of the contract, and provides, that if the contract be affirmed, the rents may be applied by Boyce as purchase-money ; but if rescinded, they are to be held by Boyce, subject to future arrangement between the parties. Not only the event upon which alone they were to be applied as purchase-money, did not happen ; but, by the happening of the other event, the rescission of the contract, the express provision of the agreement took effect, and they were prevented falling into the estate of James Boyce as purchase-money

Boyce's responsibility for these rents is at law, upon the agreement. Suppose, an action against him by Grundy, could he plead this decree against him as administrator, for money due from the estate of another, as a bar? In a suit by the distributees of the estate of James Boyce, for an account and distribution of the estate, can R. Boyce be charged with these rents, as part of the assets, in the face of the agreement, making him responsible to Grundy for them? If this cannot be done, then, it seems clearly to follow, that Boyce cannot be made responsible for them in this suit; because, a plaintiff cannot, in one suit in chancery, unite a demand against the estate of James Boyce, with one against the representative, personally, for which the estate was never chargeable. The whole effort in this case, is to satisfy a decree against the estate of James Boyce, out of money due to plaintiff from Robert. Will the *court permit the plaintiff thus to unite his demands? Will it allow him the privilege of substituting the report [*284 of a master in chancery for an action at law upon the agreement, and have a summary decree for his money? Boyce may have a good legal defence to an action at law, upon the agreement; yet of this he is deprived by the proceedings below.

Upon the view of the matter now taken in behalf of Grundy, he has paid for purchase-money, not only $1250, but also $2100 (the amount of the rents). Yet he alleged the payment of $1250 only, and took his first decree for the return of that and interest. The report of the master is founded upon evidence in the court, prior to the first decree. It was not until after the affirmance of that decree by this court, that new light broke in upon Mr. Grundy. When a contract is rescinded, chancery puts the parties as nearly as may be *in statû quo*. If it returns to the one his money and interest, it gives to the other his land and rents. This has not been done here. Grundy possesses this land for five years, and now has a decree for his money and a large sum for interest, without the estate of James Boyce receiving any of the rents. This is unequal. The court should have done full justice.

The decree is erroneous in respect to interest. Interest is allowed upon interest. This is improper. *Waring* v. *Cunliffe*, 1 Ves. jr. 99; *Turner* v. *Turner*, 1 Jacob & Walker 37; 3 Hen. & Munf. 89–116.

A lien is declared upon land in Mississippi, and a sale of it is directed to satisfy the money due. The circuit court for Tennessee had no jurisdiction to do this. No court can act directly *in rem*, when the thing is out of its jurisdiction. Here, neither the person of the defendant, nor the land, is within the jurisdiction of the court. Boyce is a citizen of Kentucky, and it is because he is not a resident within the jurisdiction of the court, that the case is within its cognisance. The chancery of England has, it is true, taken cognisance of cases respecting land in Ireland and the colonies, but in such cases, it never attempts to act directly upon the land itself. Having the person, it acts upon the land through the person, and compels a performance of its decrees, by committing the party to the Fleet for a contempt by disobedience. The court below has not *taken that course. [*285
It has decreed as though the land in Mississippi were within its jurisdiction, and has directed its officer to sell it. This is certainly a novel proceeding.

Key, for the defendant.—The court below have only fairly proceeded, in obedience to the mandate, to such further proceedings as were proper. The mandate is referred to, to show that the cause was sent down for "such executions and proceedings to be had in said cause, as were according to right and justice." The appellee filed a petition in the circuit court on this mandate, and had the cause "set down for further directions," and then there was an order to the master to take an account. The report of the master says, there were no personal assets, but he reports other assets—real assets, equitable assets. The court then decreed, that out of these assets, thus found in defendant's hands, he shall pay over to the complainant the amount adjudged to him by this court. This is a proper execution of the mandate. The original decree gave a certain relief, and all that was done by the court below was, to adopt such further proceedings as were necessary to give the complainant the relief decreed.

As to the orders of the court, they are correct; and according to all the reasonable strictness required in chancery proceedings. Cited, 1 Swanst. 293, 573; 2 Bro. C. C. 548, as to motions and petitions, and further directions after decree: also, 1 Grant's Chan. 230, 243, 244; 4 Madd. 464; 2 Grant 248.

The masters report was properly confirmed. The decree states the money to have been collected by Boyce. According to the evidence, it was the money of the testator; having been received from the lands, which became his, by the rescission of the contract. The master finds that that sum was in his hands as executor, and was assets. If not assets, under the circumstances, the defendant might have been considered to have collected these rents, pending the controversy, as a receiver.

As to the objection that the court could not order land in the state of Mississippi to be sold, he contended, that the court *(the parties being within its jurisdiction) could proceed *in rem*. *Penn* v. *Lord Baltimore*, 1 Ves. sen. 454; *Lord Cranstown* v. *Johnson*, 3 Ves. 170; 1 Salk. 404; 1 Vern. 75, 405; *Carroll* v. *Lee*, 3 Gill & Johns. 509.

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Story, Justice, delivered the opinion of the court.—This is an appeal from a decree of the circuit court for the district of West Tennessee, rendered upon a mandate, directing that court to execute a former decree of this court. The case, when formerly before this court, will be found reported in 3 Pet. 210; to which reference may, therefore, be had, for a full statement of the facts.

The material facts are, that the original plaintiff, Mr. Grundy, in 1823, brought his bill against Robert Boyce and Richard Boyce, as executors of James Boyce, deceased, for the rescission of a contract for the sale of lands in the state of Mississippi, stated in the bill; and for the repayment of the sums of money paid by the plaintiff on the contract, and for a perpetual injunction of a judgment obtained on the same contract. It appeared from the bill and answer, that Robert Boyce alone was qualified as executor under this will; and the answer alleged, that another and later will had been subsequently discovered, by which the whole proceeds of the land in controversy were devised to Richard Boyce, who was appointed sole executor thereof; but he renounced the executorship, and Robert Boyce was appointed administrator with the will annexed. Upon the hearing of the

cause in the circuit court, in August 1826, it was, among other things, decreed, that the contract stated in the bill be in all things rescinded and annulled; and "that the defendant, Robert, administrator of the goods, &c., of James Boyce, deceased, do pay the said sum of $1250, with legal interest thereon at the rate of eight per centum per annum, which appears to be the legal rate of interest in the said state of Mississippi, from the said 5th day of July 1818, until this day, making the sum of $2065.28, to be levied of the goods, &c., of the said James, in his hands to be administered, and execution issued therefor, as at the law." From this decree, the defendants appealed to this (the supreme) court; and at the January term thereof, 1830, the decree of the circuit court was affirmed, with costs, nothing being *said as to any allowance of damages or interest. A mandate in the usual form was issued to the circuit court, to carry the same into [*287 effect. At the September term of the circuit court, 1830, in obedience to the mandate, the circuit court ordered the cause to be set down for further directions, and it was referred to the clerk, as master, to take an account of the assets of James Boyce in the hands of the defendant, Robert Boyce, to be administered, and to report thereon. The master made a report, at the same term, stating, in substance, that it did not appear, that any personal assets of James Boyce, came to the hands of the defendants, as his executors; but that it did appear from the agreement between the plaintiff and the defendant, Robert Boyce, admitted to have been dated on the 23d of May 1823, and returned with the report, and from certain depositions in the case, that Robert Boyce had received for rents, previous to the 1st of January 1824, the sum of $2100, and that the interest thereon, from the 1st day of January 1824, to the 1st day of September 1830, at the rate of eight per cent., will amount to $1120, making in all $3220. The report also stated, that the land in controversy was devised by James Boyce to the defendant, Richard Boyce.

Upon the coming in of the master's report, exceptions were filed by the defendant, Robert Boyce, and upon hearing the same, they were overruled, and the report was confirmed by the circuit court, at the same term, except as to the $1120. And thereupon, the court decreed, "that the plaintiff recover of Robert Boyce the sum of $2100, with interest from this day, to be levied of his own proper goods and chattels, &c.; and that for the balance due the plaintiff, amounting to $496.46, with interest from this time, and also the afore-mentioned sum of $2100, in case the same is not paid by the said Robert Boyce, on or before the first Monday in March next, and the costs of suit, the plaintiff has a lien on the tract of land in the state of Mississippi, in the pleadings mentioned, and is entitled to have the same sold to satisfy the above-mentioned sums of money." And it then proceeded to direct the time, manner, &c., of the sale.

It is from this decree that the present appeal is taken; and various objections to it have been insisted upon in the arguments at the bar. Some confusion arises in the case, from the *report of the master; he having stated, in one part thereof, that no assets came to the hands of [*288 the defendants as executors; and yet, in another part, having stated that the rents of the lands in controversy had come to the hands of Robert Boyce, under an agreement between the plaintiff and Robert Boyce, without stating that they had come to his hands as assets, and were now to be

deemed assets of James Boyce. If, under the agreement, these rents were received by Robert Boyce, as agent of the plaintiff, and not as executor, it is very clear, that in the present suit, no decree could be had against him therefor; since he is sued only in his representative capacity, as administrator, and therefore, no decree could be rendered against him in his personal capacity. But if the rents, under the agreement, upon the rescission of the contract stated in the bill, and finally decreed thereon, became virtually the money of James Boyce, then they might be properly deemed assets in the hands of the administrator, and as such, liable to the execution of the plaintiff. And we are of opinion, that under all the circumstances, the latter is the predicament in which they are to be viewed; and that the master ought to have reported the sum of $2100, so received, to be assets. And to this extent, there is no objection to the decree of the circuit court.

A more important objection is, that the decree is not rendered against the administrator, as such, payable out of the assets in his hands to be administered, or payable out of the said sum of $2100 (the rents above stated), and if these assets are not sufficient, then out of the assets of his testator *quando acciderint;* but the decree is personally against Robert Boyce, for the said sum of $2100, to be levied out of his own proper goods and chattels, &c., although no *devastavit* is either suggested or proved.[1] We are of opinion, that the decree is erroneous in this respect, and that it ought to have been for the amount, against the administrator in his representative character, to be levied of the assets of the testator in his hands; and as to the $2100, if no such assets should be found, then (as upon a *devastavit*) against the proper goods of the administrator, to the same amount, with costs. In no other way can the defendant, Robert Boyce be protected by the payment, in the course of his administration, of the assets of the testator; for it will not otherwise judicially appear, that the *289] *rents were treated as assets. And besides, the decree will not otherwise conform to the capacities and rights of the parties, according to the frame of the bill, and the original decree.

Another objection is to that part of the decree, which creates a lien upon the land in controversy, lying in another state, and decrees a sale for the discharge of the lien. We are of opinion, that the decree is erroneous in this respect. In the first place, the court had no jurisdiction to decree a sale to be made of land lying in another state, by a master acting under its own authority. In the next place, the original decree, affirmed by the supreme court, which alone the circuit court was called upon to execute, created no such lien, and authorized no such sale. The decree was, therefore, in both respects, not in execution of the former decree, but a new and enlarged decree. In the next place, the proper parties, the heirs-at-law or devisees, were not properly before the court; for though the master, in his report, states, that Richard Boyce was, under the will, devisee of the lands in controversy, this was a matter extra-official, and not confided to the master by the reference to him; and if it had been, the bill itself was not framed so as to charge the devisee, or seek relief against him personally, but only as representative of the deceased.

Another objection to the decree is, that it decrees the sum of $496.46,

[1] See Smith *v.* Chapman, 93 U. S. 41.

intended, as is understood (though not so stated in the decree), as interest upon the original sum decreed in the circuit court, viz., $2065.28, in 1826, from the time of the rendition thereof to the affirmance in the supreme court, in January term 1830. We are of opinion, that there is error also in this part of the decree. By the judiciary act of 1789, ch. 20, § 23, the supreme court is authorized, is cases of affirmance of any judgment or decree, to award the respondent just damages for his delay. And by the rules of the supreme court, made in February term 1803, and February term 1807, in cases where the suit is for mere delay, damages are to be awarded at the rate of ten per centum per annum on the amount of the judgment, to the time of the affirmance thereof. And in cases where there is a real controversy, the damages are to be at the rate of six per cent. per annum only. And in both cases, the interest is to be computed as part of the damages. It is, therefore, solely for the decision *of the supreme court, whether any damages or interest (as a part thereof) are to be [*290 allowed, or not, in cases of affirmance. If, upon the affirmance, no allowance of interest or damages is made, it is equivalent to a denial of any interest or damages; and the circuit court, in carrying into effect the decree of affirmance, cannot enlarge the amount thereby decreed; but is limited to the mere execution of the decree, in the terms in which it is expressed. A decree of the circuit court, allowing interest in such a case, is, to all intents and purposes, *quoad hoc*, a new decree, extending the former decree. In *Rose* v. *Himely*, 5 Cranch 313, it was said, that upon an appeal from a mandate, nothing is before the court but the proceedings subsequent to the mandate; and the court refused to allow interest in that case, which was given by the circuit court, in executing the mandate, because it was not awarded by the supreme court upon the first appeal. The same point was fully examined in the case of *The Santa Maria*, 10 Wheat. 431, 442, where the court held, that interest or damages could not be given by the circuit court in the execution of a mandate, where the same had not been decreed by the supreme court upon the original appeal.

For these reasons, the decree of the circuit court must be reversed; and a new decree will be entered by this court, upon the principles stated in this opinion.

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 West Tennessee, and was argued by counsel: On consideration whereof, it is ordered, adjudged and decreed, that the decree of the circuit court, rendered upon the mandate aforesaid, be and hereby is reversed and annulled. And this court, proceeding to render such decree as the circuit court ought to have rendered in the premises, do further order, adjudge and decree as follows: That the said sum of $2100, reported by the master as received for rents by the said Robert Boyce, under the agreement therein mentioned, ought, under all the circumstances of the case, to be deemed assets of the said James Boyce, deceased, in his, the said Robert's hands, to be administered according to law; and that the same ought to be *applied, in a due course of [*291 administration, to the payment of the debt of $2065.28, in the original decree of the circuit court, awarded to the plaintiff, and to the payment of the costs of the present suit; and it is, therefore, ordered, adjudged

and decreed, that the same be so applied and paid by the said Robert, as administrator with the will annexed of the said James Boyce, accordingly. And it is further ordered, adjudged and decreed, that execution do issue against the said Robert Boyce, administrator as aforesaid, for the said debt of $2065.28, and the costs of the present suit, to be levied of the goods and chattels, &c., of the said James Boyce, in the hands of the said Robert, administrator as aforesaid, and if none such shall be found, then to be levied out of the proper goods and chattels, &c., of him, the said Robert.

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*292] *James Greenleaf, Plaintiff in error, *v.* James Birth.

Court and jury.

Where there is no evidence tending to prove a particular fact, the court are bound so to instruct the jury, when requested; but they cannot legally give any instruction which shall take from the jury the right of weighing what effect the evidence shall have. An instruction to the jury, founded on part of the evidence only, is error.[1]

Error to the Circuit Court of the District of Columbia, in the county of Washington.

This case was argued by *Coxe* and *Jones*, for the plaintiff in error; and by *Swann* and *Key*, for the defendant. The case is fully stated in the opinion of the court, delivered by—

McLean, Justice.—This case is brought before this court by a writ of error to the circuit court of the district of Columbia. The plaintiff commenced an action of ejectment against the defendant, and on the trial, showed a legal title to the premises in dispute, deduced from the patentee, by mesne conveyances, down to the 13th of May 1796. This title was not controverted by the defendant, as he claimed under it; but he read in evidence the following deeds and documents, to show that the title to the premises in controversy, was out of the plaintiff and in himself.

1. Articles of agreement, dated the 10th of July 1795, between the plaintiff, Robert Morris and John Nicholson, in which the plaintiff sold all his title to a great number of lots, in the city of Washington, for the consideration specified, reserving all lots which had not been sold previously, supposed to be nine hundred and ninety, and also certain other lots designated.

2. A deed of conveyance by the plaintiff to Morris and Nicholson, in pursuance of the above articles of agreement, dated the 13th of May 1796. In this deed, there is the following clause, "excepting nevertheless, out of the lots, squares, lands and tenements above mentioned, all that square, marked and *distinguished on the plat of the said city of Washington, *293] by the number five hundred, all that other square lying next to and south of the said number, five hundred and six, &c.; and excepting also all such squares, lots, lands or tenements, as were either conveyed or sold, or agreed to be conveyed, either by all or either of them, the said James Greenleaf, John Nicholson and Robert Morris, or any of their agents or attorneys, to any person or persons whatsoever, at any time prior to the 10th of July 1795."

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[1] For prior decisions in this case, see 5 Pet. 132, and 6 Id. 302.

3. A deed from Morris and Nicholson, dated the 26th of October 1796, to William Duncanson, William Deakings, jun., and Uriah Forrest, for the consideration of $50,000, for a great number of squares in Washington City, and among others, square seventy-five, all of which squares were stated to be worth $212,068. In this deed there is excepted, "such part of the said squares, and all and every of them, as may have been heretofore sold by James Greenleaf, or by them the said Morris and Nicholson."

4. A deed from William Duncanson to Deakins and Forrest, dated 16th of August 1797, which conveyed to them all his interest in the squares recited in the above deed from Morris and Nicholson.

5. The last will and testament of William Deakins, which vested in his brother, Francis Deakins, the right of the testator to the above squares, for certain uses expressed in the will.

6. A deed from Francis Deakins to Uriah Forrest, dated the 31st of May 1802, for lot seventeen, in square seventy-five, being the property in dispute, together with other lots in the same and other squares.

7. The following instrument to Shaw and Birth:—"We agree to convey to John Shaw and James Birth, their heirs or assigns, the lots, number sixteen and seventeen, in square number seventy-five, in the city of Washington, assuring it against our heirs, and all persons claiming under us, on their paying two notes of this date, each for $450.02, bearing interest from and since the 1st day of September last past—one payable the 1st of September next, and the other the 1st of September 1801. Witness our hands and seals, this 16th October 1799. URIAH FORREST." [SEAL.]

8. A deed from the assignees of U. Forrest to John Shaw *and James Birth, dated 23d November 1807, for the lot in controversy. [*294

9. A deed by the trustee of Shaw to Birth, the defendant, for the same lot, dated 7th of August 1828.

10. A letter from Forrest to W. Cranch, the trustee of Greenleaf, stating that he had sold lot seventeen, with others, to which he understood Cranch had a claim, as part of the estate of Greenleaf, and a proposition is made, that should the property eventually be decided to belong to the estate of Greenleaf, the purchase-money should be received in lieu of the property. This letter is without date.

11. The reply of Mr. Cranch, dated 2d November 1799, in which he consents to the proposition, on certain conditions.

Thomas Monroe, a witness, was introduced by the defendant, who stated in substance, that the first occupation of the lot in controversy, known to him, was in May 1802. There was then a house on said lot, in which Shaw and Birth resided. This lot is bounded by the main avenue, leading from the President's house to Georgetown. That the plaintiff was frequently in the city, in the years 1794 and 1795, but witness did not see him in Washington, between the years 1795 and 1802. He heard, soon after the transaction, of the contract of General Walter Stewart with Greenleaf, Morris and Nicholson, for the purchase of the lot in controversy, and several other lots and squares in Washington. That Stewart built some houses, and commenced others, which were left unfinished, when he failed in business; and that he died insolvent, some time about the year 1796. That after the deed from plaintiff to Morris and Nicholson, they seemed to have the management and control of the property conveyed by that instrument; and also to

be generally recognised as having the settlement of the sales of the joint property of Greenleaf, Morris and Nicholson, made before said conveyance; and as having the right to receive the purchase-money from the several purchasers; and the witness states, that one Davis acted as agent for General Stewart respecting his purchases, and that after his death, Davis continued to act as agent for his representatives.

And it was also proved by defendant, that the said lot seventeen, in square seventy-five, was assessed on the corporation books, to *Shaw and Birth, from the year 1803 to the year 1828; and that the first assessment of corporation taxes was made in the year 1803. It was also proved, that square seventy-five is not either of the squares described in the deed from plaintiff to Morris and Nicholson, as lying next to, and south of square five hundred and six, and the one adjoining that square on the south. Defendant also proved, that Shaw and Birth took possession of lot seventeen, after their agreement with Forrest, in October 1799, and prior to that time, it was under the superintendence of Joseph Forrest, as the agent of U. Forrest.

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And the plaintiff, to explain and rebut the evidence introduced by the defendant, proved the contents of a written contract, under the hands and seals of Morris, Nicholson and Greenleaf, of the one part, and Walter Stewart, of the other, dated on the 19th of February 1795, in which Morris, Nicholson and Greenleaf bargained and sold, and covenanted to convey to said Stewart, on the 1st of June thereafter, certain lots and squares in the city of Washington; and among others, the lot now in controversy. And to lay the foundation for the introduction of a copy of this agreement, the deposition of Walter C. Livingstone was read, in which he states, that he has diligently searched, in various places, among the papers of Nicholson, for the original contract with Stewart, without being able to find it. That Nicholson died some years ago, insolvent. That the deponent received from W. P. Farrand a paper purporting to be a copy of said contract, a copy of which the deponent annexed to his deposition. The affidavit of the plaintiff was also read, stating that duplicates of the original agreement with Stewart were signed, one of which was taken by the affiant and the other was delivered to Stewart. That the affiant left his original with William Cranch, of Washington City, who was then acting as agent for him, and he believes that the agreement was delivered to Nicholson, by Cranch, some time in the year 1796. That affiant has never seen the paper since, although he has made diligent search for it among his own papers, and at many other places where he could expect to find it.

William Cranch, being sworn, states, that for several years he acted as the agent of the plaintiff, and had the charge of his papers, &c. That his agency extended to property in *which Nicholson and Morris were interested with the plaintiff. By means of this agency, he became acquainted with the transactions of the above parties, in relation to their property in Washington; and he believes, that, on the 10th of July 1795, and 13th of May 1796, there was an existing valid contract between Morris, Nicholson and Greenleaf, and the late General Walter Stewart, for the sale, by the former to the latter, of the lot in controversy. That he received from Greenleaf, then in Philadelphia, in a letter dated 19th February 1795, a paper purporting to be a copy of such an agreement, under the hands

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and seals of the parties, by which the square seventy-five, in Washington, with other squares, was contracted to be conveyed to Stewart, on or before the 1st of June 1795. That after the decease of Stewart, George Davis, of Philadelphia, acted as the agent of the representatives of Stewart, in relation to the property. That he has a strong impression, that he saw the original contract with Stewart; and if he ever had the original, he has no doubt he compared it with a copy which he had previously made in a book, and which copy he sets forth in his deposition. Various other facts are stated by the witness, as to notice given by him to certain purchasers under Morris and Nicholson, of lots included in the Stewart contract, and which were excepted in the deed of 13th of May 1796, from the plaintiff to Nicholson and Morris; but he does not recollect of ever having given notice to Shaw and Birth, or either of them.

It was insisted in the argument of this case, that the copy of the Stewart contract, which was admitted as evidence to the jury, should have been excluded; as a sufficient foundation for the admission of a copy was not laid; and that the paper read was a copy of a copy. This objection is sufficiently answered, by saying, that the defendant can only take advantage of it, on his own exception. The case is now before the court, on the exceptions of the plaintiff.

The evidence being closed, the plaintiff, by his counsel, moved the court to instruct the jury, "that the evidence produced on the part of the defendant does not show a sufficient legal title to the premises in controversy vested in him, by the documents and deeds read in evidence." The language of this instruction would seem to imply, that *to make good his [*297
defence, the defendant must establish a legal title in himself.

When this case was before the court on the former writ of error (6 Pet. 302), the defendant insisted, that the deed from the plaintiff to Nicholson and Morris showed an outstanding title; the court said, "the defendant sets up no title in himself, but seeks to maintain his possession as a mere intruder, by setting up a title in third persons with whom he has no privity. In such a case, it is incumbent upon the party setting up the defence, to establish the existence of such outstanding title, beyond controversy." The court do not say, that the defendant could not show an outstanding title, unless he exhibited some evidence of title in himself; but that where an intruder relies upon an outstanding title, he must establish it beyond controversy.

In the present case, the defendant gave in evidence to the jury a deed of conveyance from Morris and Nicholson, to Duncanson, William Deakins, jun., and Uriah Forrest, which covered the property in controversy, unless it was excluded by the exception of "such parts of the said squares, and all and every of them, as may have been heretofore sold." And also a deed from Duncanson to Deakins and Forrest, and a deed from the devisee of Deakins to Forrest, and a deed from the assignees of Forrest to Shaw and Birth; and also a deed, executed subsequently to the commencement of the action, from the trustee of Shaw to Birth. From this exhibition of title, it appears, that the defendant Birth had a legal title to one-half of the lot in controversy, when the suit was commenced; unless it was excluded by the exception in the deed from the plaintiff to Morris and Nicholson. And whether this exception excludes the lot, depends upon other evidence than that which the deeds referred to afford; and of the effect of which, a part

of it being in parol, the jury are the proper judges. It would seem, therefore, that the circuit court, when requested to instruct the jury, that the defendant had not proved a sufficient legal title in himself, very properly refused to give the instruction.

But the court, upon the prayer of the defendant's counsel, gave the following instruction: "If the jury should believe from the evidence, that, *298] prior to October 1799, Uriah Forrest *was in possession of the premises in the declaration mentioned, and that he agreed to sell the same to Shaw and Birth, on the 16th of October 1799; and that said Shaw and Birth and the defendant, claiming under them, have been in possession of the same ever since, and that they have paid the taxes on the same to the corporation of Washington, ever since 1803, when city property was first assessed; and that no claim or demand for said premises was ever made upon them or said defendant, until the bringing of this suit in 1818; then it is competent for the jury to presume, that the title to said premises passed from said James Greenleaf, by the deed of the 13th of May 1796; and that said premises were not included in any of the exceptions of said deed."

All the facts hypothetically stated in this instruction may be admitted, and yet the conclusion attempted to be deduced from them does not necessarily follow. The possession of the defendant did not enable him to plead in bar the statute of limitations; nor had the ordinary time elapsed which authorizes the presumption of a title. That the length of possession, and the other facts stated in the instruction were proper subjects of consideration for the jury, may be admitted; but the objection to the instruction is, that it was founded on only a part of the evidence in the case. It does not embrace any of the facts brought before the jury by the plaintiff, in relation to the contract with Stewart. This contract was introduced, to show that in February 1795, the lot in dispute was sold to Stewart, and was, consequently, within the exception of "all such squares, lots, lands or tenements, as were either conveyed, or sold, or agreed to be conveyed," which was contained in the deed from the plaintiff to Morris and Nicholson, of the 13th of May 1796. It is incumbent on the defendant, who claims under this deed, to show that the lot in question does not come within the exception. And the plaintiff may show that it does come within the exception; and consequently, that no title to this lot passed by the above deed. And if no title passed out of the plaintiff under this deed, then the fee remains in him, and he has a right to recover possession of the premises.

This was the main point in the case; but the evidence which, the plain- *299] tiff insisted, proved the lot in controversy to be *within the exception, was, by the instruction, excluded from the consideration of the jury. They were authorized to presume a conveyance of the lot, by the deed of 1796, upon the existence of facts wholly disconnected with Stewart's contract; and the existence of which might be admitted, without impairing the force of that contract. This was clearly erroneous. It was proper for the jury to consider this contract, connected with the other evidence, and to draw their conclusions, not from a part, but the whole of the facts in the cause.

The counsel for the plaintiff further prayed the court to instruct the jury, that "the evidence was not sufficient to prove that the said contract between Morris, Nicholson and Greenleaf, on the one part, and W. Stewart

on the other, had been annulled or rescinded between the parties, at any time prior to the execution of the deed by the plaintiff to Morris and Nicholson, in May 1796." If this instruction be considered as asking the court to determine on the effect of the evidence, it was properly refused. It is the province of the jury to weigh and decide on the sufficiency of the evidence; and from the words of the instruction, it would seem to be conceded, that there was some evidence of the rescission of the contract, as the court were asked to instruct the jury that the evidence was not sufficient to prove the fact. Where there is no evidence tending to prove a particular fact, the court are bound so to instruct the jury, when requested; but they cannot legally give any instruction which shall take from the jury the right of weighing the evidence and determining what effect it shall have. In this view, the circuit court did not err in refusing the above instruction.

As the instruction given on the prayer of the defendant, was founded on a part of the evidence only, the judgment of the circuit court must be reversed, and the cause remanded for further proceedings.

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 Columbia, holden in and for the county of Alexandria, and was argued by counsel: On consideration whereof, it is *adjudged and ordered by this court, that the judgment of the said circuit court in this cause be and the same [*300 is hereby reversed, and that this cause be and the same is hereby remanded to the said circuit court, with directions to award a *venire facias de novo*.

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*Henry Beard, William A. Beard, and Lewis Hawkins and Mary his wife, *v.* John Rowan. [*301

Will.—Executory devise.

The clauses in the will of John Campbell, under which the land in controversy was claimed, were as follows: "And if, within that time, my said half-brother, Allen Campbell, shall become a citizen of the United States, or be otherwise qualified by law to take and hold real estate within the same, I then direct that my said trustees, or the survivor or survivors of them, shall convey to my said half-brother, Allen Campbell, his heirs or assigns, in fee-simple, all the land herein-before described in this devise; but if my said half-brother shall not, within the time aforesaid, become a citizen as aforesaid, I then direct that my said trustees, or the survivor or survivors of them, shall sell and dispose of the said land, hereby directed to be conveyed to him, on two years' credit, with interest from the date, to be paid annually, and the money and interest arising from such sale to be transmitted to my said half-brother, to whom I give and bequeath the same; but, should my said half-brother become a citizen of the United States, or be otherwise qualified to hold real estate within the same, before his death, it is then my will and desire, that he shall have the sole and absolute disposal of all the estate herein-before devised or bequeathed to him; notwithstanding he may not have obtained deeds therefor from my said trustees." The testator died in October 1799.

Allen Campbell, a native of Ireland, came to the state of Kentucky, in December 1799; and continued to reside therein, until September 1804, when he died. On the 18th of December 1800, the legislature of Kentucky passed a law, reciting, that by the laws then in force, aliens could not hold lands therein, and it is considered the interest of the state that such prohibition should be done away; it then provides, that any alien, other than alien enemies, who shall have actually resided within the commonwealth, two years, shall, during the continuance of his residence therein, after that period, be enabled to hold, receive and pass any right, title or interest to any lands or other estate, in the same manner, and under the same regulations as the citizens of the state.

It was held, that the full effect and benefit of this act, and the clear intention of the legislature

requires a construction which give to it a prospective as well as retrospective application; and under this construction, Allen Campbell became qualified to take and hold the title to the land in question, as if he had been a citizen of the state. The devise to Allen Campbell was a good executory devise, depending on the contingency of his becoming a citizen of the United States, or being otherwise qualified to hold real estate. This contingency was not too remote; it must, necessarily, not only from the nature of the contingency, but by express limitation in the devise, happen in the lifetime of the devisee, if ever; and upon the happening of this contingency, there can be no doubt, but the devisee took an estate in fee.

Beard *v.* Rowan, 1 McLean 135, affirmed.

*302] *Error to the Circuit Court of Kentucky. John Campbell, a native of Ireland, who emigrated to the state of Virginia, before the revolutionary war, and continued to reside in Kentucky until his decease, which took place in October 1799, was the owner of a tract of land, situated above and below the mouth of Bear Grass creek, on the Ohio; comprising the land on which, by an act of the legislature of Virginia, the city of Louisville was laid out. Upon the erection of a part of Virginia into a separate state, these premises became a part of the state of Kentucky.

At the time of the making of his last will and testament, 25th of July 1786, John Campbell, who was never married, had a brother of the whole blood, Robert Campbell, also a citizen of the state of Virginia, a father, a half-brother, named Allen Campbell, and a sister of the whole blood, named Sarah Beard, who was a widow and had children. His father, half-brother and sister were natives of Ireland, and subjects of the king of Great Britain and Ireland, in 1786. The father of John Campbell died before him. By his will, which was duly proved and recorded on the 13th of January 1800, John Campbell devised his estate, both real and personal, to James Milligan, William Elliot and Philip Ross, and the survivor and survivors of them, in trust for the uses and purposes stated in the will. The provisions of the will of John Campbell, out of which the controversy between the parties to this case arose, were the following:

"I do further direct, that after the decease of my said father, all the profits of my lands within five miles of the mouth of Bear Grass, shall be annually paid to the guardian of my said half-brother, Allen Campbell, during his minority, to be applied to his education and maintenance, if so much be required therefor; if not, then the overplus to be laid out on interest by my said trustees, till my said half-brother shall arrive at the age of twenty-one years or marry; but upon either of the said contingencies happening, the aforesaid profits shall, then and thenceforth, be paid to my said half-brother, for and during the term of five ———, and if within that time, my said half-brother shall become a citizen of the United States, or be otherwise qualified by law to take and hold real estate within the same,

*303] *I then direct that my said trustees, or the survivors or survivor of them, shall convey to him, my said half-brother, Allen Campbell, his heirs or assigns, in fee-simple, all the lands hereinbefore described in this devise; but if my said half-brother shall not, within the time aforesaid, become a citizen as aforesaid, I then direct, that my said trustees, or the survivors or survivor of them, shall sell and dispose of the aforesaid lands hereby directed to be conveyed to him, on two years' credit, with interest from the date, to be paid annually, and the money and interest arising from such sale to be transmitted to my said half-brother, to whom I give and

bequeath the same. It is my further will and desire, that, in case my said half-brother shall die before the expiration of the aforesaid term of five years, after his arrival at the age of twenty-one years, the land intended by the next preceding clause to be devised to him, shall be sold by my said trustees on two years' credit, and the money arising from such sale, when received, shall be transmitted to the guardians of the children which my said half-brother may leave, to be by the said guardians lent out on interest, and an equal division shall be made thereof amongst them; but should my said half-brother become a citizen of the United States of America, or be otherwise qualified to hold real estate within the same, before his death, it is then my will and desire, that he shall have the sole and absolute disposal of all the estate hereinbefore devised and bequeathed to him, notwithstanding he may not have obtained deeds therefor from my said trustees. It is my further will and desire, that, in case my said half-brother shall die before he shall become qualified to hold real estate as aforesaid, and without children or a child, my said trustees shall make sale of the lands hereby directed to be conveyed to him, as is before directed, on two years' credit, and that the money arising by sale he appropriated to the use of my said sister, Sarah Beard, and all the children which she hath, or may hereafter have, to be lent out on interest, as is directed in the several devises, bequests and limitations hereinbefore made to them; the interest and principal to be transmitted, and their proportions thereof respectively to be the same, and subject to the same rules, limitations and conditions as are directed and prescribed in the cases of the other before-mentioned devises and bequests to my said sister and her children.

*"And whereas, I conceive it to be greatly to the interest of the several devisees herein before mentioned, to become citizens of America, and take possession of such parts of my estate as are hereby intended for them, respectively, instead of selling the same, and receiving the consideration thereof; I do therefore direct, that all and every such devisee shall have a right to receive their respective proportions of whatever lands may be undisposed of, at the time of their becoming qualified to take and hold the same, and that my said trustees, or the survivors or survivor of them, shall make fair and equitable divisions accordingly, and convey to them their respective proportions as aforesaid; and should my said sister come over to America, before that part of my lands hereby intended for her and her children shall be disposed of by my trustees, I then direct, that the same shall not be sold, but that the profits thereof shall be annually appropriated to the use of her and her children as aforesaid, until her children shall come of age or marry; but that whenever any one of them shall arrive at the age of twenty-one, or marry, his or her proportion of such land shall be conveyed by my said trustees, or the survivors or survivor of them, in fee-simple, provided such child shall be capable of holding the same. I hereby direct, that upon all sales which shall be made of any part of the property herein directed to be sold, good landed security shall be taken for the payment of the purchase-money in specie. I do declare, that it is my will and desire, that no part of my estate, of any kind, shall go to my brother, R. C., in any manner whatever, and as unforeseen events may happen which may make it prudent to delay making the sales herein directed to be made, I do therefore authorize my said trustees, or the survivors or [*304

survivor, to use their or his discretion therein, so as to guard against such inconveniences and losses, as there may be danger of the estate suffering by precipitating the sales. I also authorize them or him to alter the times of credit upon such sales, should it be found to the interest of the estate so to do. I do hereby revoke all former and other wills by me made. In witness whereof, I have hereunto set my hand, and affixed my seal, this 25th of July 1786. JOHN CAMPBELL." [SEAL.]

*305] *"Signed, sealed, published and declared by the testator as and for his last will and testament, in presence of us, who subscribed our names as witnesses, in his presence, and by his desire.

"HARRY INNIS, T. PERKINS, CHRIST. GREENUP.

"The executors named in my last will and testament are James Milligan, as afore mentioned; Charles Simms, of the town of Alexandria, in the county of Fairfax, attorney-at-law; Richard Taylor and ————, of Jefferson county; William Elliot, of Westmoreland county, and state of Pennsylvania; and Philip Ross, of the county of Washington, in the same state.

JOHN CAMPBELL."

"I, John Campbell, have this day erased the name of James Sullivan from the number of my executors, as he has destroyed, in my lifetime, the confidence which I would wish to repose in a man that would, in my opinion, be worthy to act for me after my death.

"April 5th, 1791. JOHN CAMPBELL."

In the circuit court of the district of Kentucky, the plaintiffs in error sued out a writ of right, on the 6th day of January 1830, and an *alias* writ of right, on the 3d day of June 1830, against John Rowan, the defendant in error, and claimed one hundred acres of the land near the mouth of Bear Grass; Henry A. Beard as a citizen of the state of Ohio, and the other plaintiffs, as citizens of Missouri. The defendant in his plea claimed ninety-five acres of the premises in question, and disclaimed as to the residue; put himself on the assize; and prayed recognition to be made, whether he or the plaintiffs had the greater right to hold the premises so claimed by him.

The cause came on for trial at the November term 1831, of the circuit court, and the following facts were agreed upon to be used on the trial. "The parties in this cause agree to the following facts, to wit: 1. That John Campbell was born in the kingdom of Ireland; that he came to the United States of America, prior to the revolutionary war; that he continued

*306] to reside in the said *United States, from the time of his migration thereto, until he departed this life, in the month of October 1799, in the county of Fayette, in the state of Kentucky, where he then resided; that on the 25th day of July 1786, he made and duly published his last will and testament, bearing that date, with an indorsement thereon, dated the 5th day of April 1791; that said will and indorsement were duly proved and recorded on the 13th day of January 1800, in the county court of the said county of Fayette; and that the said John Campbell was seised in fee-simple, at the time of his death, of the premises in question in this action, and that he died without ever having been married.

"2. That Robert Campbell was born in the kingdom of Ireland; that he migrated to the United States of America, before the revolutionary war

between the United States of America and Great Britain; that he continued to reside therein until his death, which happened in August 1805, near Louisville, in the county of Jefferson, in the state of Kentucky; that he had resided in Kentucky many years before his death; that he was a brother of the whole blood of the said John Campbell, and died intestate, and was never married.

"3. That Allen Campbell was born in the kingdom of Ireland, and was about twenty-five or twenty-six years of age when he died; that he migrated to the United Stated in the year 1796, and resided in the city of Philadelphia, until he came to the state of Kentucky, which was in the month of December 1799; that he resided in Kentucky from that time until the 16th day of September 1804, when he departed this life, intestate, and was never married. That he was a half-brother on the father's side to the said John and Robert Campbell and Sarah Beard.

"4. That Sarah Beard was born in the kingdom of Ireland, and migrated to the state of Kentucky in the year 1800, where she continued to reside until October 1806, when she departed this life; that she was a sister of the whole blood to the said John and Robert Campbell, and sister of the half-blood to the said Allen Campbell, on the side of the father; that she was a widow, when she came to Kentucky, and continued to be a widow until her death; that at her death, she had three surviving children, to wit, William Beard, Joseph Beard and Elizabeth Megowan, all of whom were born in *Ireland; that the said William Beard came to the United States in [*307
the —— 1790, and was never naturalized, and departed this life in the year 1813; that he was married and had two children, issue of said marriage, at the death of said John Campbell, to wit, Nancy C. Beard and Sarah Beard, who were his only children at that time; that said Nancy C. Beard intermarried with Robert Bywaters, and is still living; and Sarah Beard intermarried with Hankerson Bywaters, and is still living, that the mother of the said Nancy and Sarah departed this life, and the said William Beard married a second time, and had the following issue of said marriage, to wit, William A. Beard, Catharine Beard, Mary Beard, John Beard, Charles Beard and Joseph Beard, all of whom were born since the death of the said John Campbell; that the said Catharine Beard has intermarried with, and is now the wife of, Henry H. Shepard; that the said Mary Beard has intermarried with, and is now the wife of, Lewis Hawkins; that the said Charles Beard departed this life in March 1831, an infant, and childless; that the said John, Charles and Joseph Beard were born since the death of the said Sarah Beard; that the said Joseph Beard and Elizabeth Megowan, children of the said Sarah Beard, came with her to Kentucky, and are still living; that the following are the children of the said last-named Joseph Beard, to wit, Henry Beard, Ann Daley wife of Lawrence Daley, Isabella McLear wife of Charles McLear, Sarah McLear wife of Francis McLear, and Joseph Beard, jun.

"5. That the said John Campbell, Robert Campbell, Allen Campbell and Sarah Beard were the only surviving children of Allen Campbell, the elder, who departed this life, in Ireland, before the said John Campbell.

"6. That Charles Simms and Richard Taylor survived the other trustees and executors of John Campbell; that said Simms departed this life, in the district of Columbia, about the year 1825 or 1826, never having been in

the state of Kentucky; that neither of the other trustees, except Taylor and Sullivan, were ever in the state of Kentucky, after the death of said John Campbell; that said Taylor resided therein, at the death of Campbell, and so continued until his death, which happened in the year 1828 or 1829; and that said Taylor alone qualified as executor of said John Campbell, in Kentucky.

*308] *"7. That the said defendants were possessed of the premises in contest in this action, at the time of the service of the process on them in this case, and are now in possession thereof, and also were in possession of said premises, before and on the 21st day of April 1826.

"The parties aforesaid do further agree, that it shall be competent for either of them to introduce evidence, either written or parol, to establish any facts not herein and hereby agreed to and admitted, which they or either of them may deem necessary and within the issue."

The demandants made title under the will of John Campbell, and under a deed, executed on the 21st of April 1826, by Richard Taylor, as executor of the last will and testament, and trustee of the estate of John Campbell, to Joseph Beard, Elizabeth Megowan, and the heirs of William Beard, the material parts of which instrument were the following:

"The said John Campbell did, by his last will and testament, duly made and published, on the 25th day of July 1786, devise to James Milligan, Charles Simms, Richard Taylor, William Elliot and Philip Ross, and the survivors and survivor of them, whom he did thereby appoint executors of his last will and testament, all his estate, both real and personal, in trust for certain uses and intents therein mentioned; and whereas, all the said executors and trustees have renounced the execution of said will, except Richard Taylor, the first party to these presents; and whereas, the said John Campbell, deceased, did, by his last will and testament, provide, that all his real estate in the county of Jefferson aforesaid, within five miles of the mouth of Bear Grass creek, should be conveyed to his half-brother, Allen Campbell, so soon as he became a citizen of the United States, or should be otherwise qualified to hold real estate; or that, in either event happening, the said Allen Campbell should, without a deed from the trustees or trustee of said John Campbell's will, have the disposal of said real estate, within the limits aforesaid; and whereas, the said Allen Campbell died in 1804, without having disposed of certain parts of said real estate, in any way, and without having ever received a title to said real estate, by which it again reverted to the estate of said Campbell, and became subject to the devises in his will, as to so much thereof as was undisposed of by said

*309] Campbell, during his lifetime. *And whereas, the said Richard Taylor, sole executor and trustee as aforesaid, in consideration of the premises, is willing to convey the propert yaforesaid, except so much thereof as he hath this day conveyed, in a separate deed to same parties, to the heirs of Sarah Beard, deceased, as directed in the said last will and testament of the said John Campbell, as will more fully appear, reference being had thereto. Now, therefore, in consideration of the premises, and for the further consideration of one dollar to him in hand paid, the receipt whereof he doth hereby acknowledge, the said Richard Taylor, as executor and trustee as aforesaid, hath granted, bargained, sold, aliened and confirmed, and by these presents doth grant, bargain, sell, alien and confirm,

to the said parties of the said second part, excepting from the heirs of William Beard, Nancy C. and Sally Bywaters, who have already sold and disposed of all their right, title and interest in and to the same, a certain tract or parcel of land, lying and being in the county of Jefferson, on the Ohio river, adjoining the town of Louisville, containing, by estimation, three thousand acres, be the same more or less; one thousand acres of which, being the one-half of two thousand acres, patented by the king of Great Britain to John Connolly, by patent bearing date the 16th day of September 1773; the other two thousand patented to Charles D. Warnsdoff, the patent bearing the date the day and year last mentioned, and bounded as described in the said patents, as will more fully appear on reference being had thereto. Also, all the unsold lots in the town of Louisville, consisting of twenty acre lots, five acre lots, half-acre lots, and other lots and parcels of ground, deeded to Colonel John Campbell; also, all the island in the said river Ohio, near the said town of Louisville, lately in the possession of Allen Campbell; also, all the ground and ferry at the lower landing in Shippingport, together with all and singular the premises and appurtenances thereunto belonging, or in any wise appertaining; and all the estate, right, title, interest or claim of him, the said Richard Taylor, of, in or to the same—to have and to hold the said land, lots, island, ferry and all and singular the appurtenances, to the said party of the second part, their heirs and assigns for ever. And the said Richard Taylor, for himself, his heirs, administrators and assigns, the said estate above conveyed, to the said parties of *the second part, will for ever defend against the claim or claims of all [*310 and every person claiming by or through him."

And also, under a deed, executed by Joseph Beard and others, of which the following is a copy.

"This indenture, entered into this 5th day of April 1826, between Joseph Beard, of the one part, and Henry Beard, Lawrence Daley and Ann his wife, Francis McLear and Sarah his wife, Charles McLear and Isabella his wife, and Joseph M. Beard, witnesseth, that, for and in consideration of the natural love and affection which the said party of the first part bears towards his children, the parties of the second part, and for the further consideration of one dollar in hand paid to him by the said parties of the second, he doth hereby give, alien, sell, convey and assign to the said parties of the second part, all his right, title, claim and interest, in and to the estate of Colonel John Campbell, deceased, in the counties of Jefferson and Shelby, in the state aforesaid, for which suits are about to be commenced by the heirs of said Campbell, of which said Joseph is one, for and in consideration of which the parties of the second part hereby bind themselves to pay that part of the expenses of said suits which will fall on said Joseph in the prosecution thereof."

The title of the tenant, the defendant in error, was derived under the will of John Campbell, and under the following conveyances: A deed from Sarah Beard, the sister of John Campbell, the testator, to Fortunatus Cosby, executed on the 7th of July 1806; and other mesne conveyances, the last of which was from William Lytle to the tenant and defendant, executed on the 17th of February 1822.

In January or February 1800, Allen Campbell was put into possession of the whole landed estate of John Campbell, devised to him, and which was

within five miles of the mouth of Bear Grass, by Richard Taylor, one of the executors of John Campbell's will. When the lands were surrendered to him, and he was put into possession of the same, it was as the owner and proprietor thereof, in fee, as devisee under the will of his half-brother, John Campbell. He continued to occupy the same until his death, claiming it as his own, and occasionally selling various parts thereof. After the death of Robert Campbell, Sarah Beard, as the heir of Allen Campbell as to
*311] *one moiety, and heir of Robert Campbell of another moiety, claimed the whole estate.

On the trial in the circuit court, the demandants prayed the court to instruct the jury, that unless they find from the evidence, that the surviving trustees of Colonel Campbell's will conveyed by deed the land in contest, to Allen Campbell, that the law was for the demandants. That, unless they found from the evidence, that Allen Campbell was naturalized according to the laws of the United States, the law was with the demandants. That from the facts agreed, and the evidence offered, the law was for the demandants, and they ought to find accordingly.

The court refused to give the instructions as prayed ; and the defendant moved the following instructions to the jury, which were given. That the premises in question passed in fee to Allen Campbell, the half-brother of John Campbell, under his will, and at the death of said Allen, passed by descent, from him, to Robert Campbell and Sarah Beard, and then from him to her ; provided the jury believed from the evidence, 1st. That said John Campbell was a citizen of the United States, and died in October 1789, and had never been married. 2d. That said Allen Campbell came to the state of Kentucky, in December 1799, and continued to reside there until September 1804, and then died intestate, and had never been married. 3d. That said Robert Campbell was a citizen of the United States, and half-brother of the said Allen ; that said Sarah Beard was half-sister of said Allen ; and came to Kentucky in October 1800, and continued to reside therein until the death of said Allen ; that said Robert Campbell died in August 1805, intestate, and had never been married ; and that said Sarah Beard was the sister of the said Robert Campbell.

The jury found the following verdict, on which the court gave a judgment for the defendant. "We, the jury, find that the tenant has more right to hold the tenement as he now holds it, in the written count mentioned, than the demandants to have it, as they now demand it." The plaintiffs took a bill of exceptions, and sued out this writ of error.

*312] The case was argued by *Peters*, with whom was **Loughborough*, for the plaintiffs in error ; and by *Hardin* and *Sergeant*, for the defendant.

For the *plaintiffs* in error, it was contended :—1. That the title to the land in controversy passed by the will of John Campbell, in fee, to the trustees, and the survivors of them, named in said will, and so remained until the deed of R. Taylor, trustee to Beard, was made. 2. That at the making of the said deed, the title to so much of the said land devised by J. Campbell, as had not been disposed of by Allen Campbell, was in Taylor, the surviving trustee. 3. That the said deed of Taylor, trustee to Beard and others, was in due performance of the trust created by the will, and

that the title of J. Campbell passed by it to the grantees. 4. That the circuit court erred in not giving the instructions moved by the demandants. 5. That it erred in giving those moved by the tenant.

For the *defendant*, it was contended :—1. That, taking the whole will of John Campbell together, it is evident and manifest, that all his landed estate, within five miles of Bear Grass, was intended for Allen Campbell ; and to save it from forfeiture, as he was an alien when he made his will and codicil, he invested it in trustees. 2. That Allen Campbell became qualified, under the statutes of Kentucky, to take and hold real estate, accepted the devise, claimed the land in dispute, lived on it, used it, and sold part of it. 3. The consent of the executor was not necessary to perfect the title of Allen Campbell, and if it was, the executor did consent. 4. As soon as Allen Campbell became qualified to take and hold real estate in Kentucky, as he did on the 18th of December 1802, that instant he became vested with the title, in fee, as an executory devise, without a deed. 5. If Allen Campbell took the property as an executory devise, or by a release from the trustees ; then, on his death, Robert Campbell and Sarah Beard inherited each a moiety, and when Robert Campbell died in 1805, Sarah Beard became *seised of the whole fee, and conveyed it to Fortunatus Cosby, in 1806. 6. The title of the demandants is defective, because [*313 it is derived under a deed from Richard Taylor, who was not a trustee under the will of John Campbell, but was an executor. 7. When the conveyance was made by Taylor, the defendant was in adverse possession of the land. 8. The demandants cannot recover in a writ of right. Some of them have, on their own showing, no title at all : and if others have a title, it is not a joint title with some of the demandants ; and other persons, if any of the demandants have title, who also have title, are omitted in the suit, although they are joint-tenants with the demandants in the writ ; and a joint-tenant cannot recover his interest, unless all his co-joint-tenants are joined in the writ. 9. In a writ of right, the demandant may recover less than what he counts for, but it is less as to the quantity and not different in the nature of his title ; for if he could, then the rule that the proof must agree with the statement, would be defeated ; which would not be the case, when he recovered less in quantity : this is the distinction in almost every form of action.

Thompson, Justice, delivered the opinion of the court.—This cause comes up on a writ of error from the circuit court of the United States for the district of Kentucky. It is a writ of right, for the recovery of a piece or tract of land, the title to which is admitted to have been duly and legally vested in John Campbell. Both parties claim under the will of John Campbell, as the source of title. The demandants claim under a deed from Richard Taylor, the surviving executor of John Campbell, bearing date the 21st of April 1826, to Joseph Beard, Elizabeth Megowan and the heirs of William Beard. The tenant claims under a devise in the will of John Campbell ; and the decision of the case depends mainly upon the construction to be given to this devise.

The evidence in the cause being closed, each of the parties moved the court for instructions to the jury. The demandants prayed the court to

instruct the jury, that unless they find from the evidence, that the surviving
*314] trustee of Colonel Campbell's *will conveyed by deed the land in contest to Allen Campbell, the law is for the demandants. That unless they find, from the evidence, that Allen Campbell was naturalized according to the laws of the United States, that the law is with the demandants. That from the facts agreed, and the evidence offered, the law is for the demandants, and that they ought to find accordingly. These instructions the court refused to give; but, on the prayer of the tenant, gave the following instructions:

That the premises in question passed in fee to Allen Campbell, the half-brother of John Campbell, under the will; and at the death of the said Allen, passed by descent from him to Robert Campbell and Sarah Beard; and from him, Robert Campbell, to her, Sarah Beard: provided the jury believed—1. That John Campbell was a citizen of the United States, and died in October 1799, and had never been married. 2. That the said Allen Campbell came to the state of Kentucky in December 1799, and continued to reside therein, until September 1804, and then died intestate, and had never been married. 3. That the said Robert Campbell was a citizen of the United States, and half-brother of the said Allen; that Sarah Beard was half-sister of the said Allen, and came to Kentucky in October 1800, and continued to reside therein until the death of the said Allen; that the said Robert Campbell died in August 1805, intestate, and had never been married; and that the said Sarah Beard was the sister of the said Robert Campbell.

The material facts in this case are not at all drawn in question. They are agreed upon by a stipulation contained in the record. And we must at all events assume, for the purpose of the present decision, that the jury have found all the facts, hypothetically put by the court in the instruction given to them; and upon the assumption of which the court instructed the jury, that in point of law, the demandants were not entitled to recover: and whether this instruction was correct, is the question now before this court.

Upon the argument here, several objections have been made to the right of the demandants to recover in this action, claiming, as they do, different titles, which cannot, as is alleged, be set up under a joint action in this mat-
*315] ter. This, however, is *rather matter of form; and as the case is before us on the merits, and has been fully argued, we pass by this objection, without stopping to inquire whether it was well founded or not.

The clause in the will of John Campbell, upon which the right to the land in question depends, is as follows: "And if, within that time, my said half-brother, Allen Campbell, shall become a citizen of the United States, or be otherwise qualified by law to take and hold real estate within the same, I then direct that my said trustees, or the survivor or survivors of them, shall convey to him, my said half-brother, Allen Campbell, his heirs or assigns, in fee-simple, all the lands herein before described in this devise. But if my said half-brother shall not, within the time aforesaid, become a citizen as aforesaid, I then direct that my said trustees, or the survivor or survivors of them, shall sell and dispose of the said lands, hereby directed to be conveyed to him, on two years' credit; with interest from the date, to be paid annually. And the money and interest arising from such sale, to be transmitted to my said half-brother, to whom I give and bequeath the

same." The testator then provides for the disposition of these lands, and the proceeds thereof, in case his said half-brother shall die before the expiration of the aforesaid term of five years after his arrival at the age of twenty-one years; and then adds the following clause: "But should my said half-brother become a citizen of the United States of America, or be otherwise qualified to hold real estate within the same, before his death; it is then my will and desire, that he shall have the sole absolute disposal of all the estate herein-before devised and bequeathed to him, notwithstanding he may not have obtained deeds therefor from my said trustees."

It is contended on the part of the demandants, that under this will, the legal estate of the land in question is vested in the executors and trustees; and that Allen Campbell did not take any legal estate under the will, and could not acquire it, except by deed from the trustees or the survivor of them. And they contend, that Richard Taylor was such survivor; and they claim under the deed from him of the 21st of April 1826. But if Richard Taylor had no authority to convey this land, the demandants fail entirely to show any title whatever in the *land. His authority to convey the land, lies at the foundation of the right set up by them. [*316

Richard Taylor is not named as one of the trustees. The trustees named are, James Milligan, Charles Simms, William Elliot and Philip Ross; who are also appointed executors; and to whom the testator devises his estate, both real and personal, in trust for the uses and purposes provided and declared in his will. It is true, that he afterwards, in a codicil, names Richard Taylor as one of his executors. But the estate was vested in the other executors named, as trustees; and Taylor, in his capacity merely as executor, acquired no title to the land, nor any authority to sell it.

But it is unnecessary to rest the case upon this point, as it is very clear that, under the will of John Campbell, his half-brother, Allen Campbell, took an estate in fee-simple, as an executory devise, without any deed from the trustees. The intention of the testator in this respect cannot be mistaken. Allen Campbell was then an alien, and was not or might not be qualified to take and hold real estate. The title was accordingly vested in trustees, with directions to convey the same to him, when he should become qualified by law to take and hold the same. And if he should not, within a specified time, become qualified to take and hold real estate, his trustees are directed to sell the land, and transmit the avails thereof to the said Allen Campbell; thus providing for all supposed contingencies with respect to the situation of the devisee, and to enable him to receive the benefit of the devise. But that his right and title to this estate might not at all depend upon the trustees, he devises the land directly to the said Allen Campbell, if he should, at any time before his death, become a citizen of the United States, or be otherwise qualified to hold real estate; notwithstanding, he may not have obtained deeds therefor from his said trustees.

This was a good executory devise, depending on the contingency of his becoming a citizen of the United States, or otherwise qualified to hold real estate. The contingency was not too remote. It must necessarily, not only from the nature of the contingency, but by express limitation in the devise, happen in the lifetime of the devisee, if ever. And upon the happening of this contingency, there can be no *doubt, but the devisee took an estate in fee. The words in the will are amply sufficient to pass an [*317

estate in fee. And the only remaining inquiry is, whether Allen Campbell, before his death, became qualified to take and hold real estate, in the state of Kentucky. And this will depend upon the act of the legislature of that state, passed on 18th of December 1800, which is as follows:

"Whereas, by the laws now in force in this commonwealth, aliens cannot holds lands therein, and whereas, it is considered the true interest of this state, that such prohibitions be done away: be in therefore enacted, &c., that any alien, other than alien enemies, who shall have actually resided within this commonwealth two years, shall, during the continuance of his residence herein, after the said period, be enabled to hold, receive and pass any right, title or interest, to any lands or other estate, known within this commonwealth, in the same manner, and under the same regulations, as the citizens of his state may lawfully do." 2 Littell's Laws 400.

The evidence in the record shows, and it is so found by the jury, that Allen Campbell came to the state of Kentucky, in December 1799, and continued to reside therein until September 1804, when he died intestate, never having been married. It is argued on the part of the demandants, that this law only embraces aliens who shall have resided within the state two years before the passing of the act; and does not, therefore, reach the case of Allen Campbell. This is certainly too narrow an interpretation of this law, to meet the obvious intention of the legislature; even admitting that such is the strict grammatical construction.

The preamble in the act may be resorted to, to aid in the construction of the enacting clause, when any ambiguity exists. That preamble evidently shows, that the intention of the legislature was to make a general provision for removing the disability of aliens to hold real estate, and this, founded upon state policy, doubtless, for the purpose of encouraging the settlement of the country; and this object would be in a great measure defeated, by restricting the act to aliens who shall have resided two years in the state, before the passing of the act. The condition upon which aliens are placed on the same footing with citizens, with respect to the right of holding and
*318] *disposing of land, is a two years' residence within the state; and the full effect and benefit of the act, and the clear intention of the legislature, require a construction which gives to it a prospective as well as retrospective application. And under this construction, Allen Campbell became qualified to take and hold the title to the land in question, and pass the same; in the same manner as if he had been a citizen of the state.

No constitutional objection can be made to this act. It does not profess to naturalize aliens. It is not necessary that they should be made citizens, in order to hold and pass real estate; and the condition upon which this may be done, is a matter resting entirely with the state legislature. We are, accordingly, unanimously of opinion, that the judgment of the circuit court is correct; and it is, accordingly, affirmed.

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 Kentucky, and was argued by counsel: On consideration whereof, it is adjudged and ordered, that the judgment of the said circuit court in this cause be and the same is hereby affirmed, with costs.

*United States, Plaintiffs in error, *v.* William L. Robeson.

Set-off against the government.

An action was instituted on a treasury transcript, for the recovery of the balance stated to be due to the United States, by the defendant, as assistant deputy quartermaster-general; the defendant pleaded, as a set-off, a claim on the United States, which had been assigned to him by the owners of a schooner, for loss and demurrage of the schooner, chartered to the United States on a voyage from New Orleans to Appalachicola, with troops, &c.; this claim was presented to the proper officers of the government, and refused: *Held*, the defendant was not entitled to plead this as a set-off to the claim of the United States.[1]

The rule as to set-off, in questions arising exclusively under the laws of the United States, cannot be influenced by any local law or usage; the rule must be uniform in the different states; for it constitutes the law of the courts of the United States, in a matter which relates to the federal government.

When a defendant has, in his own right, an equitable claim against the government, for services rendered or otherwise, and has presented it to the proper accounting officer of the government, who has refused to allow it, he may set up the claim as a credit, in a suit brought against him, for any balance of money claimed to be due by the government; and when the vouchers are not in the power of the defendant before the trial, or, from the peculiar circumstances of the case, a presentation of the claim to the treasury could not be required, the set-off may be submitted to the action of the jury. But a claim for unliquidated damages cannot be pleaded by way of set-off, in an action between individuals; and the same rule governs in an action brought by the government.

Where the parties, in their contract, fix on a certain mode by which the amount to be paid shall be ascertained, the party that seeks an enforcement of the agreement must show that he has done everything on his part, which could be done, to carry it into effect; he cannot compel the payment of the amount claimed, unless he procure the kind of evidence required by the contract; or show that, by time or accident, he is unable to do so.

Error to the District Court for the Eastern District of Louisiana. The United States, on the 10th of January 1822, instituted a suit, by petition, in the district court of the United States in Louisiana, against the defendant, William L. Robeson, late assistant deputy quartermaster-general in the army of the United States; claiming to recover the sum of $2663.61, for the balance of his account, as such officer, as settled and examined, adjusted, admitted and certified at said department.

*To this petition, and the citation issued thereon, the defendant [*320
answered and pleaded, that the United States were indebted to him in the sum of $3000 for work, labor, attendance, &c., bestowed, by him, in and about the business of the United States, and for the United States, at their request; and for materials and necessary things by him, before the time of action, bought, found and employed, in and about the said work and labor; for goods sold and delivered, and for money laid out and expended for the United States, at their request; for money due and owing to him, and interest thereon; which sums of money exceeded the sum claimed by the United States from him; and out of which sum, so claimed, he was willing, and offered, to set off and allow to the United States the full amount of their claim.

On the same day this answer and plea were filed, the 21st January 1822, William L. Robeson filed an affidavit, sworn to and subscribed in open court, stating that he was equitably entitled to credits which had been sub-

[1] United States *v.* Buchanan, 8 How. 83; s. c. Crabbe 563; United States *v.* Wells, 2 W. C. C. 161.

mitted, previously to the commencement of the suit, to the accounting officers of the treasury and rejected; that the credits were as follows, viz., the sum of $30, for transportation of officers to Baton Rouge and back to New Orleans, and an amount of $39, for transportation of officers from Pass Christianne to New Orleans. That a claim of $364.50, for transportation of contractors' stores, taken from the wreck of the schooner Italian, and delivered at Appalachicola, in April 1818; a claim for demurrage at Mobile Point, of the schooner Experiment, in a voyage from New Orleans to Appalachicola, in 1818, to wit, $330, were presented to the quartermaster-general's department, and returned.

Issue being joined, and the cause having been brought to trial, in December 1829, a verdict was found for the plaintiff for a less amount than the balance of the account stated at the treasury of the United States, the verdict being for $1656.11, instead of $2663.61. This difference resulted from allowances made by the jury, under the ruling and direction of the court, upon various points which arose at the trial; in respect to which, several bills of exception were filed by the counsel of the United States.

*321] The first bill of exceptions stated, that the defendant gave *in evidence certain depositions to prove the amount of loss and damage claimed by Forsyth & Walton, and Breedlove, owners of a certain schooner, called the Experiment, to be due to them by the United States, together with an assignment by the said owners to the defendant, for the consideration of $500, of the whole of the amount so claimed by them under a charter of the Experiment to the defendant, as assistant deputy quartermaster-general, to proceed from New Orleans to Appalachicola with stores; their claim being for the transportation, by the Experiment, of provisions and stores belonging to the United States, taken from the wreck of a schooner, and carried to Appalachicola, amounting to $364.50; for demurrage of the schooner, $330; and for the loss of a cable and anchor, $226.20, together $920.70. The plaintiffs prayed the court to instruct the jury, that the defendant could not set off against the demand of the United States, a greater sum than that expressed as the consideration of the transfer, viz., $500. The demurrage claimed was for detention of the schooner at Mobile Point; and he proved by the charter-party, the right of the charterers to the same, and his right under the assignment thereof; and offered evidence of the detention of the vessel at Mobile Point. The plaintiffs prayed the court to instruct the jury, that evidence of a detention at Mobile Point could not sustain a claim for damage under the charter-party; and that, under the pleading and treasury report, no set-off could be sustained for a detention at Mobile Point; but the court refused so to instruct, and to these refusals the plaintiffs excepted.

The third bill of exceptions related to the assignment from the owners of the schooner Experiment, mentioned in the first bill. The plaintiffs objected to its admission in evidence, because it had been received by the defendant, after he had ceased to be in the employment of the United States, and because not offered as proof of payment of a debt due from the United States, but as evidence of the purchase of a claim against the United States, which could not be set off in this action. The court overruled these objections; and the plaintiffs excepted. The other bills of exception are not inserted, as they were not noticed in the opinion of the court.

United States v. Robeson.

*The case was submitted to the court, by *Butler*, Attorney-General, on a printed argument. No counsel appeared for the defendant in error.

It was contended, that the judgment of the court below was erroneous, and ought to be reversed, for the following reasons. The several decisions of the court, in relation to the off-sets claimed by the defendant under the assignment from the owners of the Experiment, as specified in the first, third and fourth bills of exceptions, were erroneous. There is no act of congress defining, generally, the law of set-off. The third and fourth sections of the act of the 3d of March 1797 (1 U. S. Stat. 515), imply that persons sued as debtors at the treasury, might be entitled, in certain cases, to set off claims for credits rejected by the accounting officers, but they do not attempt to define the nature of those credits. They, however, impose the following restrictions on the right of set-off, that is to say: first, they require the defendant to make oath that he is equitably entitled to credits which had been previously presented to and rejected by the accounting officer. And secondly, they forbid the allowance of any claims for credits except such as shall have been so presented and rejected; unless the defendant shall be in possession of vouchers at the trial, not before in his power, &c. In all other respects, the laws and modes of proceeding on the subject of set-off in the state in which the trial is had, must, under the judicial and process acts, be observed as rules of decision; "except when the constitution, treaties, or statutes of the United States shall otherwise require or provide." Judiciary Act of 1789, § 34. (1 U. S. Stat. 92.)

The claim for detention at Mobile Point not being especially provided for in the charter-party, could not be sustained as a claim for demurrage; it was a mere unliquidated claim for damages. Such a claim could not, under the law of Louisiana, be set off. Civil Code of 1808, p. 298, art. 191; Civil Code of 1825, p. 718, art. 2205; 7 Mart. 516. It is not pretended, that Robeson paid to the owners of the schooner the moneys he desired to set off, in the execution of his duty as disbursing officer. If they had been so paid, in good faith, and for valid claims, they might have been proper credits, because they related to the same general appropriation. Act of March 3d, 1809, § 1. (2 U. S. Stat. 535.) But the credit *claimed [*323
by the party is for an outstanding demand, bought up by this officer, for a gross sum. The second and third sections of the act of the 3d March 1813 (Ibid. 816), by necessary implication, forbid any disbursing officer to apply puplic money remaining in his hands to any such purpose; and require the prompt payment to the treasury of all moneys remaining in his hands, except such as he may be authorized to retain for salary, pay or emolument.

This attempt of the defendant is equally forbidden by the general law of principal and agent, as universally understood. An agent intrusted with moneys to be disbursed for his principal, will not be permitted to pay off his principal's debts, without authority, or to purchase up claims against him, for the purpose of setting off such debts or claims, in an action against him for the moneys remaining in his hands. *Middletown and Harrisburg Turnpike Company* v. *Watson's Administratrix*, 1 Rawle 330. The same principle is recognised in the law of Louisiana. Civil Code of 1808, p. 424,

art. 19, 24, 26, 29; Civil Code of 1825, p. 938, art. 2974–84, p. 942, art. 2990–94. And without reference to the character of the defendant as an agent, the courts of Louisiana will not allow a defendant to set off money paid by him on account of a debt due from the plaintiff to a third person, unless it be shown to have been made at plaintiff's request. *Roger's Heirs* v. *Bynum*, 9 Mart. 82. It is unnecessary to enlarge on the injurious consequences which would probably follow the allowance, in cases of this nature, of the course adopted by the defendant.

At all events, the defendant should only have been allowed to set off the amount actually paid by him; no rule being better established, or more important, in reference to all cases of a fiduciary nature, than that which denies to a trustee the benefit of any profit made in purchasing up claims against the trust estate. *Van Horn* v. *Fonda*, 5 Johns. Ch. 388.

McLean, Justice, delivered the opinion of the court.—The plaintiffs brought their action against the defendant, in the district court of Louisiana, to recover a balance of public money which remained in his hands as late assistant deputy quartermaster-general. The pleadings being made up, the cause was submitted to a jury, who rendered a verdict for a *sum less
*324] by $1007, than the reported balance at the treasury department. This difference was produced by certain decisions of the court, on the trial, and to which exceptions were taken. And these exceptions are now brought before this court by a writ of error.

In the first bill of exceptions, it appears, the defendant gave in evidence certain depositions, to prove the amount of loss and damage sustained by the owners of the schooner Experiment, on a voyage from New Orleans to Appalachicola, with troops and stores for the government of the United States; and also a certain instrument referred to (margin A), by which instrument the owners of the said schooner Experiment transferred to the defendant their claims for compensation upon the United States, &c. And in the third bill of exceptions, the district-attorney prayed the court to instruct the jury, that the above claim could not be pleaded by the defendant as a set-off in this action, which prayer was refused.

The first question which arises on these exceptions is, whether a claim which has been transferred to the defendant, forms a proper subject of set-off, under the acts of congress, to a demand of the government. If this question shall be decided in the negative, it will not be necessary to inquire whether the claim in itself constitutes a proper item of set-off. It seems to have been presented to the proper accounting officer of the government as a credit, and that he refused to allow it. This is a question which arises, exclusively, under the acts of congress, and no local law or usage can have any influence upon it. The rule as to set-off in such cases must be uniform in the different states; for it constitutes the law of the courts of the United States, in a matter which relates to the federal government.

Where a defendant has, in his own right, an equitable claim against the government, for services rendered or otherwise, and has presented it to the proper accounting officer of the government, who has refused to allow it; he may set up the claim as a credit, on a writ brought against him for any balance of money claimed to be due by the government. And *where
*325] the vouchers were not in the power of the defendant, before the trial;

or, from the peculiar circumstances of the case, a presentation of the claim to the treasury could not be required, the set-off may be submitted for the action of the jury. But a claim for unliquidated damages cannot be pleaded by way of a set-off, in an action between individuals; and the same rule governs in an action brought by the government.

There is no law of congress which authorizes the assignment of claims on the United States; and it is presumed, that if such assignment is sanctioned by the treasury department, it is only viewed as an authority to receive the money, and not as vesting in the assignee a legal right. But whatever may be the usage of the treasury department on this subject, it is clear, that such an assignment, as between individuals, on common-law principles, cannot be regarded as transferring to the assignee a right to bring an action at law, on the account, in his own name; or to plead it, by way of set-off, to an action brought against him, either by an individual or the government.

The claim set up by the defendant as a set-off in this case, may have been fairly obtained; and, indeed, such is the presumption, in the absence of all evidence going to impeach the assignment or the consideration on which it was made; but the assignee, not holding the legal right, cannot assert the claim, as a set-off, in this action. If any individual who holds in his hands public money, could defend himself against an action brought by the government, by purchasing claims against it, he might speculate on such claims to almost any extent. This practice would be as impolitic for the government, as it would be injurious to individuals.

The practice of the state courts, which has been adopted under the act of congress of 1824, for the courts of the United States in Louisiana, cannot affect the point under consideration. For if it were made to appear, that under the laws of that state, an open account is assignable, so as to enable the assignee to bring an action in his own name, or to plead the account by way of set-off, it could not be done in the present case. The principles involved in this case are connected with the fiscal action of the government,[1] and they cannot depend either upon the local practice or law of any state.

*The second bill of exceptions states, that, "on the trial of this cause, a certain charter-party or instrument, (marked B, &c.) and by which the steamboat Tennessee was chartered for the conveyance of a detachment of troops under the command of Colonel Arbuckle, was offered in evidence; that by said charter-party, it was agreed, that if a larger quantity of baggage and stores should be carried in said boat than was stipulated in said charter-party, that freight should be paid on the same, on the production of the certificate of the said commanding officer, Colonel Arbuckle. The defendant offered in evidence the deposition of witnesses, to prove the carrying, by the said steamboat Tennessee, of a greater quantity of baggage and stores than that stipulated in the charter-party; to the introduction of which testimony the district-attorney objected; because, under the terms of the said charter-party, no other evidence than the certificate of the said Colonel Arbuckle could be received to establish the claim to surplus freight; but the court overruled the objection, and admitted the evidence." [*326

[1] Watkins v. United States, 9 Wall. 765; Hall v. United States, 91 U. S. 562.

In the charter-party, it is agreed, that Breedlove, Bradford & Robeson should transport, unavoidable accidents excepted, a part of the seventh regiment of infantry, under the command of Colonel M. Arbuckle, and their baggage, together with a quantity of stores, not to exceed the bulk of eight hundred barrels, to the port of Arkansas, &c. "For the true and faithful performance of the above, certificates of which to be given by Colonel M. Arbuckle, or officer commanding, the party of the second part binds himself, as agent of the United States to pay," &c. And on the charter-party is indorsed, "It is understood, that, for all stores, &c., above the quantity specified, the same rate shall be paid, upon producing duplicate specified certificates of the commanding officer." The following certificate of Colonel Arbuckle was indorsed on the charter-party. "I certify, that Captain A. B. Bradford did, in compliance with the foregoing agreement, transport from New Orleans to this place, a part of the seventh regiment of infantry, amounting to one hundred and ninety-nine, with a suitable number of officers, and their baggage; and that he did also transport thirty men of the seventh regiment, not belonging to the Arkansas command, from New Orleans to
*327] the *mouth of Red river. The boat was detained at Baton Rouge about nine hours, and at the mouth of Red river, about twenty hours. Captain Bradford furnished, for the use of the troops, six cords of wood, for which he is entitled to compensation." As it appears in the record, that payment has been made for the services covered by the above certificate, the evidence which was admitted to be given to the jury, it is presumed, must have been to show the transportation of freight or men, in addition to that which is certified by Colonel Arbuckle. And the question as to the legality of this evidence is raised.

It appears, that the agent of the government expressly stipulated to pay the money under the contract, on the certificate of Colonel Arbuckle, or the officer commanding the party. And for any additional services, to those provided for in the contract, payment was to be made at the same rate, "upon producing duplicate specified certificates of the commanding officer." It does not appear, that any excuse was offered why these certificates were not procured; and the question is, whether the claimant, at his option, can establish his claim by other evidence. The contract is a law between the parties in this respect; as they expressly agree, that the amount of the service shall be established by the certificates of the commanding officer. Can it be established in any other manner, without showing the impracticability of obtaining the certificates? Is not this part of the contract as obligatory as any other part of it; and if so, is not the obtaining of the certificate a condition precedent to the payment of the money?

Where the parties, in their contract, fix on a certain mode by which the amount to be paid shall be ascertained, as in the present case, the party that seeks an enforcement of the agreement must show that he has done everything on his part, which could be done, to carry it into effect. He cannot compel the payment of the amount claimed, unless he shall procure the kind of evidence required by the contract, or show that by time or accident he is unable to do so. And as this was done by the defendant in the district court, no evidence to prove the service, other than the certificates, should
*328] have been admitted by the court. Had the defendant proved that application had been made *to the commanding officer for the proper

certificates, and that he refused to give them; it would have been proper to receive other evidence to establish the claim.

Other exceptions were taken to the rulings of the court in the course of the trial, but as they relate to the assigned claim set up by the defendant, it cannot be necessary to consider them.

On the grounds that the district court permitted the assigned account to be given in evidence by the defendant, as a set-off; and allowed, under the circumstances stated, other evidence than the certificates of the commanding officer to prove the transportation account; the judgment below must be reversed, and the cause remanded for further proceedings.

Judgment reversed.

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*Joseph D. Beers, William L. Booth and Isaac R. St. John, [*329
Plaintiffs in error, *v.* Richard Haughton.

Special bail.—Insolvency of principal.

In June 1830, Beers and others brought an action of *assumpsit*, in the circuit court of Ohio, against J. Harris and C. Harris, and obtained judgment against them for $2818 and costs, at December term; Haughton became special bail in this action, by recognising, viz., that the defendants in the action should pay and satisfy the judgment recovered against them, or render themselves to the custody of the marshal of the district of Ohio; in October 1831, a writ of *capias ad satisfaciendum* was issued upon the judgment, and returned to December term 1831; that the Harris's were not found; in February 1831, C. Harris was discharged from imprisonment for all his debts, under the insolvent law of Ohio; J. Harris was in like manner discharged in February 1832. In December 1832, Beers *et al.* commenced an action of debt, on the recognisance of bail, against Haughton; the defendant pleaded the discharge of J. & C. Harris under the insolvent law of Ohio of 1831, and a rule of the circuit court, adopted at December term 1831. The rule of court was as follows: "If the defendant on a *capias* does not give sufficient appearance bail, he shall be committed to prison, to remain until discharged by due course of law; but under neither mesne nor final process shall any individual be kept in prison, who, under the insolvent law of the state, has, for such demand, been released from imprisonment." The plaintiffs demurred to the plea; and upon joinder in demurrer, the circuit court gave judgment for the defendant. The judgment of the circuit court was affirmed.

The recognisance of special bail being a part of proceedings on a suit, and subject to the regulation of the court, the nature, extent and limitations of the responsibility created thereby, are to be decided, not by a mere examination of the terms of the instrument, but by a reference to the known rules of the court, and the principles of law applicable thereto; whatever, in the sense of these rules and principles, will constitute a discharge of the liability of the special bail, must be deemed included within the purview of the instrument, as much as if it were expressly stated.

By the rules of the circuit court of Ohio, adopted as early as January 1808, the liability of special bail was provided for and limited; and it was declared, that special bail may surrender their principal, at any time before or after judgment against the principal, provided such surrender shall be before a return of a *scire facias* executed, or a second *scire facias* returned "*nihil*," against the bail; and this, in fact constituted a part of the law of Ohio, at the time the present recognisance was given; the same having been so enacted by the legislature. This act of the legislature of Ohio was in force at the time of the passage of the act of congress of the 19th of May 1828, regulating the process of the courts of the United States, in the new states, and must, therefore, be deemed a part of the "modes of proceeding in suits," and to have been adopted by it, so that the surrender of the principal *within the time thus pre- [*330
scribed, is not a mere matter of favor of the court, but is strictly a matter of a legal right.

It is not strictly true, that on the return of "*non est inventus*" to a *capias ad satisfaciendum* against the principal, the bail is "fixed," in courts, acting professedly under the common law, and independently of statute; so much are the proceedings against bail deemed a matter sub-

ject to the regulation and practice of the court, that the court will not hesitate to relieve them in a summary manner, and direct an *exoneretur* to be entered, in cases, by the indulgence of the court, by giving them time to render the principal, until the appearance day of the last *scire facias* against them, as in cases of strict right.

When bail is entitled to be discharged, *ex debito justitiæ*, they may not only apply for an *exoneretur* by way of summary proceeding, but they may plead the matter as bar to a suit, in their defence; but when the discharge is matter of indulgence only, the application is to the discretion of the court; and an *exoneretur* cannot by insisted on, except by way of motion.

When the party is, by the practice of the court, entitled to an *exoneretur*, without a positive surrender of the principal, according to the terms of the recognisance; he is, *à fortiori*, entitled to insist on it by way of defence, when he is entitled, *ex debito justitiæ*, to surrender the principal.

The doctrine is fully established, that where the principal would be clearly entitled to an immediate and unconditional discharge, if he had been surrendered, there the bail are entitled to relief, by entering an *exoneretur*, without any surrender. And *à fortiori*, this doctrine will apply, when the law prohibits the party from being imprisoned at all, or when, by the positive operation of law, a surrender is prevented.

There is no doubt, that the legislature of Ohio possessed full constitutional authority to pass laws whereby insolvent debtors should be released or protected from arrest or imprisonment of their persons, on any action for any debt or demand due by them; the right to imprison constitutes no part of the contract; and a discharge of the person of the party from imprisonment, does not impair the obligation of the contract, but leaves it in full force against his property and effects.

State laws cannot control the exercise of the powers of the national government, nor in any manner limit or affect the operation of the process or proceedings in the national courts; the whole efficacy of such laws in the courts of the United States, depends upon the enactments of congress. So far as they are adopted by congress, they are obligatory; beyond this, they have no controlling influence; congress may adopt such state laws, directly, by substantive enactments; or they may confide the authority to adopt them, to the courts of the United States.

Under the authority conferred on the courts of the United States, by the acts of 1789 and 1792 there would be no solid objection to the decision of the circuit court of Ohio, in this case, but it is directly within, and governed by, the process act of the 19th of May 1828.[1]

The progress act of 1798 expressly adopts the mesne process, and modes of proceeding in suits at common law, then existing in the highest state court, under the state laws; which, of course, included all the regulations of the state laws as to bail, and exemptions of the party from arrest and imprisonment; in regard, also, to writs of execution, and other final process, and "the proceedings *thereupon;" it adopts an equally comprehensive language, and declares they shall be the same as were then used in the courts of the state.

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The rule of the circuit court is in perfect coincidence with the state laws existing in 1828; and if it were not, the circuit court had authority, by the very provisions of the act of 1820, to make such a rule, as a regulation of the proceedings upon final process, so as to conform the same to those laws of the state on the same subject. Sturges *v.* Crowninshield, 4 Wheat. 200; Mason *v.* Haile, 12 Ibid. 370; Wayman *v.* Southard, 10 Ibid. 1; United States Bank *v.* Halstead, Ibid. 51, cited,

Beers *v.* Haughton, 1 McLean 226, affirmed.

ERROR to the Circuit Court of Ohio. On the 14th of June 1830, the plaintiffs, citizens and residents of the state of New York, commenced their action of *assumpsit*, in the United States circuit court for the district of Ohio, against Joseph Harris and Cornelius V. Harris, of the state of Ohio, and recovered judgment against them, at the December term 1830, for $2846.56. In this action against the Harris's, the present defendant, Haughton, became their special bail. On the 12th day of October 1831, a writ of *capias ad satisfaciendum* was issued against the Harris's, and returned to the December term of that year "not found." On the 24th day of December 1832, the plaintiffs commenced their present action against Haughton,

[1] See Smith *v.* Cockerill, 6 Wall. 756.

upon his recognisance of bail, returnable to the 1st day of May, then next. A declaration was filed in the usual form, to which the defendant filed several pleas, and among others, the following, designated in the record as the 8th (the 4th, 5th, 6th and 7th being withdrawn), to wit:

"And the said defendant, for further plea in this behalf, says" (*actio non*), "because, he says, that by the tenth rule of practice of this court, established and adopted by this court, at its December term 1831, which said rule has ever since been and now is in full force and effect, it is provided, that if a defendant upon a *capias* does not give sufficient appearance bail, he shall be committed to prison, to remain until discharged by due course of law. But under neither mesne nor final process, shall any individual be kept imprisoned, who, under the insolvent *law of the state, has for such demand, been released from imprisonment. And the [*332
said defendant avers, that after the said debt became due, upon which the said judgment in the said declaration mentioned is founded, to wit, in February term, in the year 1831, the said Cornelius V. Harris being returned to the court of common pleas for Hamilton county, and state of Ohio, by the commissioner of insolvents of Hamilton county, and state of Ohio, as a resident of said county and state for more than two years next, preceding, as an applicant for the benefit of the act entitled an act for the relief of insolvent debtors, and having also returned a schedule in writing, delivered to said commissioner by said Cornelius V. Harris, of all debts by him owing, among which the said debt in the judgment in the said plaintiff's declaration mentioned is founded, is named, did, at said February term of said court, personally appear before the judges of said court, in open court, and the said court then and there having full jurisdiction of such matters and such applications for relief, did, then and there, at the term last aforesaid, order and adjudge that the said Cornelius V. Harris should for ever after be protected from arrest or imprisonment for any civil action or debt or demand in the said schedule of his debts, so delivered to the said commissioner of insolvents for Hamilton county; which said order and judgment of said court is now in full force and virtue and unreversed. (*a*) And the said defendant further avers, that afterwards, to wit, in the term of February, in the year 1832, the commissioner of insolvents in and for Hamilton county, in the state of Ohio, returned the said Joseph Harris to the court of common pleas of said county, as a petitioner for the benefit of an act passed by the legislature of the state of Ohio, entitled 'an act for the relief of insolvent debtors,' who, at the time of his application, was under arrest, and returned to said court a schedule delivered to him by the said Joseph Harris, showing the debts by him owing, and the names of his creditors, among which debts was the said judgment mentioned in the said plaintiff's *declaration, and the said Joseph Harris afterwards, in the term of [*333
February, in the year 1832, appeared in said court of common pleas, before the judges thereof, and filed his petition in said court, praying for the benefit of the act for the relief of insolvent debtors, and such other proceedings were had thereon, that the said court, at the term last aforesaid,

(*a*) The act of the legislature of Ohio referred to, will be found in the 29th volume of Ohio Statutes, 1831, p. 329, 340; there was a similar statute in existence prior to the act of 1831.

ordered and adjudged, that the said Joseph Harris be discharged from arrest on account of the debts in said schedule mentioned, in pursuance of the statute in such case made and provided ; which said order and judgment is now in full force and virtue and unreversed. All which the said defendant is ready to verify ; wherefore, he prays judgment if the said plaintiffs ought further to have and maintain their aforesaid action thereof against him," &c.

To this plea, the plaintiffs filed a general demurrer, in which the defendant joined. The circuit court overruled the demurrer, and gave judgment for the defendant, and the plaintiffs sued out this writ of error.

The case was submitted to the court on printed arguments, by *Elisha W. Chester*, *D. J. Caswell* and *Henry Starr*, for the plaintiffs in error; and by *Charles Fox*, for the defendant.

For the *plaintiffs* in error, it was argued :—The insolvent law of Ohio makes it the duty of the court of common pleas of each county to appoint an officer, denominated the commissioner of insolvents, and any person, being arrested upon civil process, either mesne or final, may require the arresting officer to take him before such commissioner, and upon making out a schedule of all the debts which he owes, and also of all his property, and assigning the same to the commissioner, for the benefit of his creditors, the commissioner gives him a certificate, which has the effect to release him from the present arrest, and from arrest for any of the debts contained in his schedule, until the same be acted upon by the court of common pleas of the county, where the arrest is made. This, discharge, however, can only be given upon his making oath that he has no other property than that contained in his schedule, &c. He may be examined under oath, touching his property *by the commissioner or any creditor. These proceed- *334] ings are to be certified into the court of common pleas of the county, where the discharge is either consummated or the application dismissed. A person not under arrest, who has resided for a certain period in the state and county, may, by a like proceeding, exempt his person from arrest. The question presented for the consideration of the court, is, whether the facts set forth in this plea constitute a good bar to the plaintiff's action. We maintain that they do not, and that upon the demurrer to the plea, the plaintiffs were entitled to judgment in the court below.

Before proceeding with the argument, it may be proper to draw the attention of the court to the facts, that, as it appears from the declaration and plea, neither of the Harris's was discharged by the court of common pleas, until after judgment was rendered against them in the circuit court ; that Joseph Harris was not discharged until after the return of the *ca. sa.*, and that the rule of court relied on in the plea, was adopted after the return of the *ca. sa.*, and of course, after the plaintiff's right of action had accrued. We hold, upon general principles, that an insolvent law of a state, providing a mode for the discharge of the persons of debtors from imprisonment, has no force, except in the courts of the state—is only a law affecting the remedy—the mere *lex fori*. It seems to us, that the very statement of this proposition is enough to secure it a ready assent.

Between a bankrupt law and an insolvent law, a distinction has not unfrequently been made, defining the former as a law, by virtue of which

the debtor is discharged, upon certain terms, from his contracts; and the latter, as a law, by which, on similar terms, the person of the debtor is exempted from imprisonment. In relation to the rights of the several states to pass bankrupt laws, thus defined (no law of congress existing upon the subject), after much ligitation, and a thorough investigation of the subject, it has been settled by the supreme court: 1. That bankrupt laws may be passed by a state, affecting all contracts subsequently made within the state, between citizens of the state. 2. *That such laws cannot affect contracts, though made within the state, with a citizen of another [*335 state. 3. That they cannot affect contracts not made, or not to be performed within the state. 3 Story's Commentaries on the Constitution, 256.

But as to the insolvent laws of the states, thus understood, we deny that they have any force in the courts of the Union. A bankrupt law reaches the contract—such an insolvent law only the person of the debtor. The one discharges the contract upon certain specified terms—the other, only the body. The one absolves the debtor from his debt—the other, leaving the debt in existence, declares that the creditor shall look only to the property of the debtor for satisfaction. The one acts upon and limits the effect of the contract—the other, the remedy for a breach of the contract. One is the *lex loci contractûs*, the other the *lex fori*. By a bankrupt law, the contract is discharged, and cannot be enforced in any court or in any place. An insolvent law of this kind extends only to the courts, and the suitors in the courts, and the remedies by the courts of the government enacting the law. The right to pass insolvent laws of this description, is incident to the power of establishing courts of justice, and as respects the federal courts, it would not be necessary to derive it from the clause in the constitution authorizing congress to pass bankrupt laws. 2 Kent's Com. 462.

The laws of the states, *vi propria*, have no other force and effect in the federal courts than the laws of a foreign country. They regulate, limit and control contracts and the titles to property, and give to the injured a right to satisfaction for wrongs done to their persons and property. The rights of parties arising out of any of these matters will be enforced in a foreign country, taking the laws of the state where the contract was made or to be performed, where the title was acquired, or the injury done, as the rule by which to ascertain the rights of parties litigant; but in the mode of redress and the remedy to be applied, the law of the country where the action is brought, the *lex fori*, must prevail. The law of the place where the right of action accrued, can in no manner control the court, nor absolve it from its own law in applying the remedy.

*The courts of the United States, in relation to the laws of the [*336 several states, stand, in these respects, in the same situation. Under the decisions of this court, a state may, as between its own citizens, provide a mode by which contracts, made after the passing of the law, and to be performed within the state, shall be discharged, without payment, provided no bankrupt law of the United States be in existence at the time. But in relation to the effect of the discharge of the person of the debtor, the debt remaining, the law, so far as state adjudications go, has been well settled. See 2 Cow. 626; 3 Mass. 84; 1 Dall. 188; 2 Johns. 198; 7 Ibid. 117; 11

Ibid. 194; 14 Ibid. 346; 2 Cow. 632; Graham's Practice 93–4; 8 Wheat. 253.

Judge JOHNSON, in delivering the opinion of the court, in *Ogden* v. *Saunders*, said: "No one has ever imagined, that a prisoner in confinement, under process from the courts ot the United States, could avail himself of the insolvent laws of the state in which the court sits. And the reason is, that these laws are municipal and peculiar, and appertaining exclusively to the exercise of state power in the sphere in which it is sovereign; that is, between its own citizens, between suitors subjected to state power exclusively, in their controversies between themselves." 12 Wheat. 367; *Wayman* v. *Southard*, 10 Ibid. 1–51. Upon general principles, therefore, we consider it beyond question, that the insolvent laws of Ohio, and discharges under them, can have no effect, when urged in the courts of the United States. Has any act of congress given to them an effect which they would not have *vi propria?*

By the act of the 24th of September 1789, it is enacted, "that the laws of the several states, except where the constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, where they apply. This is a mere recognition of the principles of universal jurisprudence as to the operation of the local law, and cannot, therefore, affect
*337] the general principle contended for. *Robinson* *v. *Campbell*, 3 Wheat. 221; *United States* v. *Howland*, 4 Ibid. 108; *Wayman* v. *Southard*, 10 Ibid. 1.

The first section of the act of the 19th of May 1828, was passed, to regulate process, &c., in the courts of the United States, held in the states admitted into the Union since the 29th of September 1789. It provides, that the forms of mesne process, and the forms and modes of proceeding in suits in such courts, shall be the same in each of the said states, respectively, as were then used in the highest court of original and general jurisdiction of the same, subject to be altered by rules of court. By the third section of the same statute it is enacted, "that writs of execution and other final process, issued on judgments and decrees rendered in any of the courts of the United States, and the proceedings thereon, shall be the same, except their style, in each state, respectively, as are now used in the courts of such state; provided, however, that it shall be in the power of the courts, if they see fit, in their discretion, by rules of court, so far to alter final process in said courts, as to conform the same to any change which may be adopted by the legislatures of the respective states for the state courts." This last section applies to all the courts of the United States, except those held in Louisiana, and is the only part of the act that has any reference to final process. Does it reach the present case, or in any way affect the liability of the Harris's to be arrested and imprisoned upon a *ca. sa.*, or of the defendant, their bail, in the present action? We think not.

It may be proper to observe, that in this act, the word process, throughout, is used in its limited, and not in the extended sense which has sometimes been given to it. In the first section, "mesne process" is spoken as distinct from "the forms and modes of proceeding," and in the last section, the expression, "writs of execution and other final process, and the proceedings thereon," renders it certain that, by process, the legislature intended a writ,

or something analogous, and that it is contradistinguished from the proceedings to be had by virtue of a writ.

Under this act, the plaintiff had a right to a *capias ad respondendum* against the Harris's, and thereon was entitled to bail, as given; for that was according to the forms of mesne *process, and to the forms and modes of proceeding in the court of Ohio. After judgment, he was [*338 entitled to a *capias ad satisfaciendum* against them, for this is the same writ that was, in 1828, and at the time, used in Ohio. This right of the party, and the duty of the court or its officer to issue the writ, cannot be disputed. The right and duty existed before the passage of the act of congress of 1828, and is confirmed by it, so long as such writ is used in the state courts. But the very nature of this writ requires, that the party be arrested and detained; this is its command, its object. If there be a right to issue it, it is obligatory upon the marshal to execute it, and there is but one way in which the command of the writ can be obeyed, to wit, by arresting the defendant. Subsequent proceedings—the manner in which the defendant shall afterwards be dealt with; the limits within which he shall be confined; the nature of the walls within which he shall be inclosed, whether the walls of an actual prison, or the paper walls erected by the bond of a friend, may be regulated by the statutes of the state adopted by this act of congress (had there existed no law of congress upon the subject of prison-bounds). Yet the defendant is obliged to maintain, that the proceedings which ought to be had in the case of the Harris's, if they had been arrested, are nothing more nor less than instantly discharging them. This would not be a proceeding upon a *capias ad satisfaciendum*, but an annulling of the writ and all its efficacy. If they would have been entitled to such a discharge, it must be, because the arrest was wrongful and illegal, and could be for no other reason. If the arrest by the officer would be illegal, the issuing of the writ commanding the arrest must be illegal. And if it were illegal to issue the writ, then the plaintiff had not a right to a writ of execution used in the state courts, which the statute expressly gives him.

We beg leave to present another view of this statute. If the defendant can claim any benefit from it, it is under that part of it which requires that the proceedings upon final proceedings upon final process shall be the same as used in the state courts. Does this enjoin upon the marshal, with a *capias ad satisfaciendum* in his hands, every duty, which, in the same circumstances, is enjoined upon the sheriff of the state by its laws? If so, when *he makes an arrest of an individual, who, not having taken benefit of the insolvent law of the state, is desirous of doing so; shall [*339 he carry him before the state commissioner of insolvents, as the sheriff is required to do? If so, the state commissioner takes the prisoner's bond to appear—where? In the state court. He takes this schedule and certifies all his proceedings into the state court, and there the prisoner must appear, there his discharge be consummated, or, his petition being dismissed, he may still remain liable to imprisonment upon the *capias ad satisfaciendum*. Here there would be no difficulty, in a case arising in a state court. The sheriff being of course present, would take the defendant immediately into custody, and commit him to jail. But the marshal of the United States not being present, unless by accident, his prisoner would go at large. Can a defendant, when thus arrested by the process issuing from the court of one govern-

ment, in the exercise of its legitimate jurisdiction, be thus turned over to another power, entirely disconnected with that which has the rightful jurisdiction of the case? This certainly would be something different from adopting the same mode of proceedings used in the state courts; it would be transferring its own proceedings, its process, its jurisdiction over persons, to another tribunal with which it has no connection—it would be taking from a party a right secured to him by the constitution of the United States. There could be no such transfer of a prisoner and process, from the court of one goverment to that of another. Nor can the benefit of the state insolvent law be extended to a prisoner, under federal process, in any other way. No one could, for a moment, entertain any such idea; and we only mention it, to show, that proceedings to be had under the insolvent law of the state, are not such proceedings, upon either mesne or final process, as are adopted by the act of congress. Indeed, proceedings under the insolvent law of the state cannot be regarded as proceedings upon final process; process, either mesne or final, is not necessary to exist, to entitle an applicant to the benefit of the act; though, when that benefit has been extended to him, it affects final process from the court of the state, in its operation upon him.

But supposing that our reasoning is thus far unsatisfactory, there is another argument which must set this matter at rest. *In relation *340] to the right of discharge from imprisonment, under final process from the courts of the United States, congress has left nothing to inference or implication. It has legislated directly upon the subject, has prescribed the cases in, and the mode by, which prisoners in execution may be discharged. The act referred to was passed in 1800, and is found in Gordon's Dig. pl. 2834–7. By this act, the district judge, or commissioner appointed by him, is authorized to administer an oath, prescribed in the statute, to the prisoner, and to discharge him from imprisonment; but notice must be served on the opposite party, or his attorney, at least thirty days previous, if within one hundred miles, to show cause, on a given day, against the discharge. If any sufficient cause be shown, or appear from the examination, in the opinion of the judge or commissioner, the prisoner is not to be discharged.

The legislature having thus prescribed the mode and the terms upon which prisoners, under process from the United States courts, shall be discharged, upon what principle is it contended, that they are entitled to a discharge, without complying with any of these terms—without pursuing, for a single step, that mode, and virtually by a tribunal different from that provided; and one which, in the nature of our governments, can have no control over, or power in the matter? It cannot be contended, that this act of 1800 is repealed by anything in the act of 1828. A repeal would not be inferred by this court from an act of that nature, and passed for the objects obviously aimed at by congress. Nor can it be supposed, that the legislature intended to confer upon the courts, the officer, or upon the prisoner, a power to dispense with its minute provisions, and to be governed, at pleasure, by the law of the state in preference. It is too obvious, that congress could never, in the act of 1828, have contemplated any such thing.

But even if this act of 1800 were out of existence, we think there would be in the way of the defendant another obstacle, which he could not surmount. Let it be admitted, that the federal courts are required to adopt the

mode of proceeding upon final process, prescribed by the state legislature, in all the latitude that can be claimed, still they are not required to adopt the acts of the state *tribunal in a particular case. These acts are not made binding upon them, or upon the present plaintiffs. It is [*341 not so much the law of the state, that the defendant would avail himself of, as a particular adjudication of the state court. It is the discharge by the court, which he pleads. This act—this adjudication—this discharge, is not reached—is not in any manner contemplated or affected by the act of 1828. It is the law of the state, as it regulates process and the proceedings thereon, that is adopted. The judgments and adjudications of the state courts stand in the same situation, and have neither more nor less effect in the courts of the Union, than if this act had never been passed. And to make them binding upon the plaintiffs, and conclusive upon their rights, they must have been a party in the cause in which they were made—they must have been rightfully subject to the jurisdiction of the court; the state, in legislating, and the court, in adjudicating, must have possessed a power over them, to bind them by their acts. Such was never the fact; they were citizens of another state, suing upon a contract made and to be performed in another state, and in no respect whatever bound by the laws of Ohio, or amenable to her tribunals. The act of the court of common pleas of Hamilton county, therefore, could affect none of their rights, nor deprive them of any legal remedies for the violation of those rights.

We think, then, upon general principles, and upon a review of the acts of congress supposed to bear upon the question, that an insolvent law of a state, providing a mode for the discharge of debtors from imprisonment, and discharges under such a law, do not confer upon them an exemption from any process used in the courts of any other state, or of the United States. If we have established this, the Harris's were liable to arrest and imprisonment upon a *capias ad satisfaciendum*, and not having been found, their bail, the present defendant, is liable to pay the judgment recovered against them.

Can the rights of the parties, as drawn in question in this case, be affected by any rule which it was competent for the circuit court to establish? Rules of court can never vary the mode of proceeding prescribed by statute, nor give a right of discharge in any other mode, or upon any other terms than those contained in it. *They are the only mode adopted [*342 by the court in administering the laws of the land; they can never add to, diminish, nor vary the provisions of a statute. A recognisance of bail is a contract, the form of which may be prescribed by the court; the obligation of the contract can only be discharged by law, never by the mere virtue of a rule of practice established by court; certainly, not by a rule, made after the execution of the bond or recognisance.

The tenth rule of the circuit court for the district of Ohio, relied on by the defendant in this case, is in these words: "But under neither mesne nor final process, shall any individual be kept imprisoned, who, under the insolvent law of the state, has, for such demand, been released from imprisonment." One in prison only can be released from imprisonment. One who has never been imprisoned on a debt, never can have been released from imprisonment for that debt, though he may have been absolved or released from liability to imprisonment on account of it. If, in this case, the plaintiffs

had, in the state court, caused the Harris's to be arrested and imprisoned for their debt, and they had been discharged by the court, to whose jurisdiction the plaintiffs voluntarily submitted their rights, there would have been an adjudication by a competent tribunal, and the circuit court might well refuse to suffer a second arrest for the same debt. We think the rule susceptible of this construction, and thus literally understood, we do not object to it. But, if it was intended to be understood as broadly as the defendant claims, we must, with all due respect to the circuit court, deny its competency to establish such a rule.

If we are not mistaken, it has been attempted to derive the authority to establish such a rule, from the act of 1828. No such power is there given. The power given, is, so far to alter final process, by rules, as to conform it to any changes made in the state courts. If the authority existed at all, it must be derived from some other act of congress, or from the power inherent in a court. We know of no such conferred or inherent power. We think we have sufficiently shown before, that the state court or the state legislature could not confer on an individual, *by its insolvent law, *343] an exemption from arrest in the federal courts; that they had no power to release the Harris's from the operation of any process used in the circuit court. Could such a power be granted by the circuit court? Surely not.

Perhaps, it may be said, that it is not because of any force in the discharge, of itself, by the state court, that a defendant can claim an exemption from arrest in the federal court, but because the federal court, in its comity to the state court, sees fit to take it as a reason for discharging him from its own process. This answer is certainly claiming for the federal court a very high prerogative power. A court pronounces the law; it declares, not who shall be imprisoned and who released, in civil causes, according to its own will and pleasure, but who is pronounced by the law to be a prisoner, or to be liable to imprisonment—enforces the law in its operation upon an individual, not in its arbitrary pleasure. We know not this thing, called comity, between courts, when our rights are involved and to be adjudicated. In making a rule of practice (and courts cannot create a rule of law) the first inquiry is, what is the law; and what are the rights of persons conferred or secured by the law; and this being ascertained, the province of rules of court is to fix the mode and form of enforcing the law.

But what is claimed here for a rule of court? Not that it is a form and mode of administering the law as it previously stood; but an overruling power to suspend, to vary, to annul the law. Before this rule was established, the defendant had become bail for the Harris's; had entered into a contract, the force, effect and operation of which were settled and established by the laws of the land; a *capias ad satisfaciendum* against them had been issued, and returned "not found;" the legal effect of this return was also fixed by the law in existence, and rights were thereby acquired—and then what is claimed? Nothing less, than that the court, by some high power, exercised in the shape of a rule, can provide a mode, before unknown, by which this bail should be discharged from liability—this contract vacated—these vested rights wrested from the present plaintiffs; we cannot argue against such an assumption, because the simple statement of it carries, to our mind, a stronger refutation than any argument.

*The point insisted upon by the defendant in the court below is, that, according to the law of the state, if the Harris's had been arrested upon a *capias ad satisfaciendum*, issued from a state court, after their discharge under the insolvent law of the state, it would have been the duty of the sheriff, upon the production to him of their certificates of discharge, instantly to release them—in other words, that they were not liable to arrest by the state officer; that as, by the act of the state legislature, this is the course of proceeding pointed out for the sheriff, so it must be the proper course to be adopted by the marshal, upon a similar writ from the United States court, for the proceeding on final process must be the same in the United States, as used in the state court. To this argument, we reply, as we have already said, that this would not be a proceeding upon the writ, but a forbearance to proceed upon, or execute it in any way, and that, for the reason that it does not lie against this particular person—that is not the "same" process which could be used against him in the state courts. The matter, therefore, is not governed by that part of the law which requires "the proceedings to be the same," but by that part which requires "writs of execution to be the same as used in the state courts." To our mind, it is clearly sufficient, that a *capias ad satisfaciendum* is a writ used in the state courts, and if it be such a writ, the adjudication of a state tribunal cannot restrain the use of it by the federal court against a particular person; no such efficacy is given by the act of congress of 1828, to an adjudication by a state court. The federal court and federal officer are neither authorized nor required to look into the records of the state court, to ascertain the extent of their power over a certain person. No such thing was contemplated by the act of congress. The same answer to the argument of the defendant may be given, if, as is claimed, this matter should be considered as more properly coming within that part of the act of congress, which relates to the proceedings upon the execution.

It will be recollected, too, that before any of these proceedings under the insolvent laws of Ohio, the circuit court was exercising its jurisdiction over all the parties; that the defendant had become special bail for the Harris's, and that judgment *had been rendered against them, before the discharge of either of them, and that one of them was not discharged until after a *capias ad satisfaciendum* had been issued against them, and returned not found. The recognisance was, therefore, forfeited, and the present defendant liable to an action, before the discharge of Joseph Harris. Was it intended, by the act of 1828, directly or indirectly, to give to a state court power to release a bail from his recognisance in the federal court? To release to him an action accrued against him? To discharge him from a contract, after it was broken? Could the act of the state court divest the present plaintiffs of rights thus acquired under, and cognisable by, another jurisdiction? Is there an inherent power in a state court—is there an authority conferred upon such a court, by a necessary construction of any act of congress, or by any rule of court, which it is competent for judges to establish, to take from the federal courts their prisoners, confined under their process, in a suit of which they not only have the right of jurisdiction, but in which they are actually exercising that jurisdiction, and set them at large? The principle insisted upon by our opponents goes the full extent; the courts of common pleas of Ohio can, upon this principle, extend the [*345

benefit of her insolvent laws to the actual prisoners of the United States courts, as well as to those who are liable to imprisonment under their process, by a proceeding commenced in the state courts, after the key has been actually turned upon the prisoners. If they can protect the one, they can, by the same means, release the other. It may be the law of the land; but we have not thus learned the nature of our federal and state institutions.

We have endeavored to show: 1. That an insolvent law of a state, by which an individual is relieved from imprisonment, is merely a law affecting the remedy, the mere *lex fori*, and that it can have no force except in the courts of the government enacting it; that, therefore, upon general principles, it does not govern the courts of the United States. 2. That there is no act of congress that gives to such insolvent laws any force or effect in the courts of the Union. 3. That if the act of congress of May 1828, could *346] be supposed to give any effect to the insolvent law of Ohio, yet it *does not give any new effect to the adjudications of her courts; that it does not give to them the power of exempting any individual from any process used in the courts of the United States. 4. That it is not competent for the circuit courts of the United States, by any rule, to confer such a power upon the state courts, nor in any way to alter the legal effect of the adjudications of a state court upon parties litigant in the circuit court; and especially, that the circuit court could not, by any general rules, made after a contract—whether such contract be a recognisance of bail or any other contract—has been made and broken, alter the effect of that contract, nor take away the right of the party to damages for that breach. 5. We think we have also shown in the course of our argument, and that it is manifest, that the present plaintiffs, being residents of another state, their contract with the Harris's having been made in another state—judgment having been recovered against them in the circuit court upon that contract—the present defendant having been special bail in the case—the state courts could not so interfere with the persons of any of the parties—with their contracts, or any matter relating thereto, as directly or indirectly to affect any for their rights or liabilities in the circuit court. We think that we have thus shown that the plea of the defendant to the plaintiff's action below, was insufficient, and that the demurrer thereto ought to have been sustained, and judgment rendered for the plaintiffs.

We are aware, that there have been decisions in the circuit courts of the United States, differing, in some respects, from the principles for which we have contended. Persons arrested on mesne process have sometimes been discharged on common bail, because they had been previously discharged under a state insolvent law. But even this has been refused, when the plaintiff was not at the time within the jurisdiction of the state, or where the contract sued on, was made without its jurisdiction: see Pet. C. C. 484, and cases there cited. But it is obvious, that in many cases, defendants are entitled to be discharged on common bail, who, after judgment, are not exempt from a *capias ad satisfaciendum*, and to all the effects of this writ. No at- *347] tempt, however, so far as we are aware, *has ever before been made, to nullify a final process of the United States courts, by means of such an insolvent law of a state, or by means of any adjudication by a state tribunal, under such law. Yet even if this were a question, as to a right of bail on mesne process, the plaintiffs being citizens of another state, and the

debt on which judgment was recovered having been contracted in that state, the case would come within the principle decided by Judge WASHINGTON, above referred to, of *Read* v. *Chapman.*

Fox, for the defendant.—The defendant in error thinks this judgment ought to be sustained. But whether it shall be sustained or reversed, depends upon the question, whether a discharge from imprisonment, obtained in the state courts of Ohio, under her insolvent law, can be of any validity in the United States courts. If such a discharge is valid, the question is at an end. That it is valid in the Ohio courts, is not questioned. I maintain it is valid in the federal courts.

By the act of congress of 19th May 1828, (4 U. S. Stat. 278), it is provided, "that writs of execution, and other final process, issued on judgments and decrees rendered in any of the courts of the United States, and the proceedings thereon, shall be the same, except their style, in each state, respectively, as are now used in the courts of such state; provided, however, that it shall be in the power of the courts, if they see fit, in their discretion, by rules of court, so far to alter final process in said courts, as to conform the same to any change which may be adopted by the legislatures of the respective states in the state courts." By this statute, I understand the same executions then in use in the state courts of Ohio, and the same modes of proceeding on those executions, were adopted for the federal court in Ohio. Such appears to have been the object of congress in passing that law, and such I believe has been the practice under it, in the seventh circuit, at least. And for the purpose of enabling the circuit courts to continue to use the same executions, and the same modes of proceeding thereon, power is given to the courts to "alter final process, so as to conform the same to any change which may be adopted by the legislatures of the respective states for the state courts." *In Kentucky, where imprisonment for debt is abolished, I understand, the federal courts do not pretend to issue a *capias.* [*348

If this was the object of the law in question, this court has only to ascertain the mode of proceeding to execute writs of *capias ad satisfaciendum* in the courts of Ohio; for it is that mode of proceeding which is to govern this cause. By the law of Ohio, passed 12th March 1831 (29 Ohio Statutes 329), entitled "an act for the relief of insolvent debtors," it will be found (§ 21), that on the applicant first applying to the commissioner of insolvents for the benefit of that act, he obtains a certificate which protects his person from arrest or imprisonment for any debt or demand in any civil action, at the suit of any person named in his schedule, until the second day of that term of the court of common pleas, to which the commissioner shall return copies, &c. By the 22d section, the sheriff, or any officer having custody of the defendant, is directed to discharge him out of custody, on his producing his certificate; and the officer is directed "to return a copy of such certificate, and also return, that in obedience to such certificate, he had discharged the person named therein." Provision is made for the court of common pleas of the county to receive the returns of the proceedings before the commissioner of insolvents, and for the final granting or rejection of such application, and granting to the applicant a final certificate of discharge from arrest, on account of any and all debts mentioned in his schedule, for

ever. And by the 36th section it is provided, in addition, that "if any sheriff or other officer shall arrest any person having been so discharged by the court, such officer having knowledge of such discharge, and that the person so arrested has a certificate so granted to him by the court, or shall refuse to discharge the person so arrested, out of his custody, as soon as such certificate shall be produced and shown to him, the officer so offending shall be deemed guilty of a trespass, and shall be liable to be prosecuted in the court of common pleas, in an action at the suit of the person injured," &c.

Here, then, we have the whole law which governs this case. The mode of proceeding to execute a *capias* writ in Ohio, if the defendant has not been discharged from imprisonment under the insolvent law, is to arrest him. If the defendant *has taken the benefit of that act, or has only *849] applied for it and obtained a certificate of exemption from arrest until the sitting of the next court, the officer having the execution is bound to release him from arrest. If he knows of the defendant's having been previously discharged by the court from imprisonment on account of the debt named in the writ, he is considered as a trespasser in making the arrest. The return of the defendant's having taken the benefit of the act, is a good return to such an execution; and the reason why such a return is good, is, because it is the mode of proceeding required by the statute. And by the tenth rule of practice of the circuit court of Ohio, this practice or mode of proceeding is adopted by that court, as is admitted by the demurrer. This rule of proceeding was adopted at the December term 1831, and was intended to avoid all doubt as to the course which the marshal ought to pursue on mesne and final process. There can be no question, I think, but the rule does adopt in effect the whole insolvent law of Ohio, so far as the same is connected with *capias* writs.

But there was no necessity, in fact, for the court to have adopted this rule, after the passage of the act of 19th May 1828; for by the fair construction of that act, as has been already remarked, the proceedings of the state courts are expressly adopted, and by that adoption, became the law of the federal courts in Ohio. And it will be found, that at the time the act of congress was passed, the proceedings upon execution, in the state of Ohio, were the same as in December 1831. 22 Ohio Laws 326.

It is said, the legislature intended by the term "process," a writ, or something analogous; and that it is contradistinguished from the proceedings to be had by virtue of a writ; and that mesne process is spoken of as distinct from the "forms and modes of proceeding." The distinction may exist, but affords no favorable argument for the plaintiffs. The act is to regulate the processes in the courts of the Union. How can the process be regulated, unless by directing the mode of proceeding in executing it? The form of process, whether mesne or final, is of no benefit to the plaintiffs, unless a mode is pointed out, by law or rule of court, of making that form available. To make a demand available against a debtor, a *350] *writ must be devised, and a mode of executing that writ adopted, or the debtor cannot be brought into court. For the purpose of ascertaining or fixing that form or mode of executing it, the first section of the act of 19th May 1828, was adopted. And the third section of the act adopts the same executions, and the proceedings thereupon, as were, at the passing

of the act, used in the courts of the state. Of what beneficial use could the mere blank execution have been, without a mode of executing it? The mere formal writ is of no validity, without the mode of executing it. The form and the mode of executing it constitute its real value. And it is evident, that congress intended to adopt the form and mode of proceeding also, as they have used the language of the act of 1789; which has been construed by this court to embrace the whole progress of an execution, from its formation to the time of its being fully executed. 10 Wheat. 1. Congress, therefore, have adopted the state court executions, and also the mode of proceeding upon these executions, as they existed in May 1828. And if the sheriff could not arrest a person on a *capias ad satisfaciendum* issued from a state court, neither could the marshal on an execution from the federal court.

It is not contended on the part of the defendant in error, that the state legislature could pass insolvent laws to affect the process of the federal courts. But we do contend, that congress may adopt any of the state laws as a rule for the government of the federal courts; and they have adopted the laws of Ohio in force at the passage of the act of 19th May 1828. The laws of Ohio, therefore, are the laws of congress by adoption. It is only in this view of the act of 1789, the federal courts have any known modes of practice or serving writs. The great object of the latter act was, to assimilate the process and proceedings of the federal courts to the process and proceedings of the then state courts. The object of the act of 1828 was to assimilate the process and practice of the new states and the federal courts therein.

And is it not a matter known to us all, that the federal courts did not pretend to issue writs not issued in the state courts, and that they always made their rules, practice, &c., to conform to the rules and practice of the state courts? Did *the federal courts pretend to sell land in Virginia, as they did in New York and Pennsylvania? They did not. [*351
But when Kentucky authorized land to be sold, the federal courts, under the authority given them so to alter the form of process, &c., by the act of 1789–1792, adopted the state writs of execution suitable to subject land for sale on judgments obtained in those courts.

The counsel appear to be laboring under a great mistake, in supposing they have shown the special bail-bond forfeited absolutely, by the return of the *capias ad satisfaciendum*, not found. That the bond is so far forfeited by the return, as to authorize an action to be brought on the bond, I admit; but still the bail has the right to surrender his principal, at any time before the return-day of the *scire facias* against the bail, and thus defeat the plaintiff's right of action. This right of surrender is absolute. And if the principal dies after the return of the *capias ad satisfaciendum*, and before the return of the *scire facias* against the bail, the bail is discharged by the statute law of Ohio. The bail is not fixed, until the *scire facias* is served. *Bank of Mount Pleasant* v. *Administrators of Pollock*, 1 Ohio 35. And at the time this bail-bond was given, by special rule of the seventh circuit court, it was provided, that special bail might surrender the principal, before the court, at any time, before or after judgment, or to the marshal, provided such surrender be made before a return of a *scire facias* executed, or a second *scire facias*, *nihil*. It is not true, therefore, as suggested in the plaintiff's

argument, that the rule of court relied upon, took away any vested right from plaintiff, or conferred any on defendants.

Such being the right of the principal to surrender, I take it to be a well-settled principle, that wherever the law takes the principal out of the custody of his bail, either by the operation of an insolvent or bankrupt law, or otherwise, so as to prevent his surrendering, it is tantamount to a surrender. The law having made it unlawful to arrest, excuses the surrender. 14 East 593; 1 vol. Law Library, July 1833, p. 124; 1 McCord 373; 18 Johns. 335; 5 Binn. 338; 9 Serg. & Rawle 24. This question is
*352] referred to, for the purpose of showing the *plaintiff's counsel are mistaken in supposing that the court below, by adopting the rules of December 1831, undertook to divest them of any vested right of action on the bail-bond, by the return of the *ca. sa.;* because, as before remarked, the tenth rule of the court, then existing, gave the right to surrender at any time before the *scire facias* against the bail returned executed.

Having, as is supposed, established the proposition that the act of congress of May 1828, has adopted the state court executions, and the modes of proceeding thereon, as used in 1828, I might here leave this branch of the case. But should the court differ with me in this view, it is contended, that the rules of practice adopted by the court below, at December term 1831, fully shield the defendant from all responsibility. The tenth rule, recited in the plea, refers to the insolvent law of Ohio particularly, and adopts it altogether. Under neither mesne nor final process, shall any individual be kept imprisoned, who, under the insolvent law of the state, has for such demand been released from imprisonment. Is not this a full and complete recognition of the validity of the insolvent law? Does it not recognise the effect of that law, as an excuse to the bail for not surrendering? By the 5th rule, bail may surrender their principal at any time before judgment; that is, judgment against the bail. Now, as before remarked, the principal having become protected by the law from arrest for this debt, his bail could not legally surrender him, and hence he is excused.

But it is said, the court has no power to adopt rules which take from a citizen of another state the right to imprison his debtor. This position cannot be sustained. This court have decided, that the states have the right to abolish imprisonment altogether. 12 Wheat. 378, 381; 4 Ibid. 200. The United States courts have the right to suit their process to such legislation: they have the power, therefore, to abolish, by rule of court, the use of the *capias* writ. If they can abolish it as to all the citizens of Ohio, cannot they do it in favor of that small but unfortunate class of debtors, whose necessities compel them to petition for that liberty, which ought to be the right of every American?

*353] But it is said, there is provision made by the act of congress *of 1800, by which an insolvent may be discharged; and hence, it is urged, that no other mode than the one pointed out in that act could be resorted to, for the purpose of releasing him from imprisonment. I contend that the act of the 19th of May 1828, so far as it conflicts with the act of 1800, repeals the latter act. But whether this be so or not, the act of 1800 is not an act for the general relief of insolvents, but is only intended to release an insolvent debtor from imprisonment, on the particular debt on

which he is charged in execution, while the insolvent law relieves the debtor from arrest in any debt he is owing at the time of his application. The object of the two laws, therefore, is widely different; and congress, by adopting the state laws, and the circuit court, by adopting those laws, may prevent the defendant from being arrested; and I contend that the act of 1828, and the rules aforesaid, have virtually abolished imprisonment of insolvent debtors.

But it is said, that in attempting to relieve himself from responsibility in the present case, the defendant is not availing himself of the state law, but of a particular adjudication of a state court. But suppose, the law of Ohio had declared, that no man should be arrested for debt; suppose, the legislature had extended to defendants, Harris's, an exemption from imprisonment, by a legislative act, as was done in the case of *Mason* v. *Haile*, 12 Wheat. 370, would it be contended, that in that case no exemption from imprisonment could be claimed?

Again, will it be contended, that no rights or exemption can be acquired under judicial acts of the state courts? Surely not. An application for the benefit of the insolvent act, although a judicial proceeding, is not therefore void. All creditors named in the application are parties to it, and are bound by the judgment rendered. They may appear and object to the applicant's discharge.

It is said, that if the Harris's, after being arrested, were entitled to be immediately discharged, this would be annulling the execution, not proceeding to execute it. But might not the same remark be made in all cases? Would it be considered as annulling an execution in the state courts, by the sheriff discharging a defendant from arrest, on his producing the certificate *of his discharge? The sheriff, in proceeding to execute a *capias ad satisfaciendum*, would not be considered as annulling the [*354 execution, under such circumstances. And certainly, if congress, by the act referred to, or by the rules of its own courts, have adopted the state practice, the marshal performs his duty, by returning the discharge of the defendant, by the insolvent debtor proceeding, in the same manner as the sheriff is discharging his duty on the state court execution, by a similar return.

Nor is it true, that a *capias* writ can only be obeyed by an actual arrest. If the law forbids the arrest, or if the defendant dies, or if he is imprisoned on a criminal charge, so that the officer cannot legally arrest, he may return the facts, and by so doing he obeys, in a legal sense, the command of the writ. It does not necessarily follow, that the writ unlawfully issued, merely because the defendant is privileged from being arrested. A writ is lawful, when issued against a suitor attending court; but the suitor would be privileged from arrest, and if he claimed his privilege, by suing out a *habeas corpus*, he would be discharged. So, of a member of congress, a judge, and all that class of persons whom the policy of the law has seen fit to exempt from arrest. The insolvent laws of the state are, in principle, nothing more than granting like privileges for arrest to an unfortunate class of honorable men; and the period during which that privilege shall continue, depends upon the legislature.

Again, it is said, the court could not adopt any rule, the effect of which would be to discharge the bail from liability to vacate their contract, and

wrest their vested rights from the plaintiffs. Before we discuss the proposition as to whether the court below did, by their rule, vacate the contract of the plaintiffs, we had better ascertain what that contract was. The contract is found in the declaration, in these words: the defendant, at the time mentioned, "acknowledged himself special bail for the said Joseph Harris and Cornelius V. Harris, in the sum of $4000, in the cause or suit in which judgment was rendered as aforesaid; that is to say, that they, the said Joseph Harris and Cornelius V. Harris, should pay and satisfy the said judgment, or render themselves into the custody of the marshal." Now, it is asked, what contract does this present, in and of *itself? Without the aid of the rules of court, or the statute of Ohio, it is perfectly senseless. What is meant by special bail, the rules of court tell; but without those rules, the contract is senseless jargon. If, then, the contract depends upon the rules of court; if they give it life originally; if they preserved its existence; the plaintiffs are entitled to what those rules give them, and to nothing more. When they took the recognisance, it was with a knowledge that those rules were under the entire control of the court; that they could be moulded by the court; that the state legislature could abolish imprisonment for debt, and the writ of *capias* also; and that the court were authorized to alter their writs to suit the state legislation. The plaintiffs took their recognisance, subject to all those contingencies. 12 Wheat. 370.

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No contract, therefore, has been violated, nor have there been any vested rights wrested from the plaintiffs. To make the worst possible case, all that can be said, is, that the plaintiffs, by the adoption of the rule in question, were deprived of one remedy which they had when the bail was given, viz., the imprisoning the defendants. But as it is admitted, that this only affected the remedy, the plaintiffs in error cannot complain.

The counsel appear not to view the contract of bail correctly, when they attempt to liken it to other contracts. It is, in fact, nothing but a part of the process of the court. It is a mere substituting of a keeper of the defendant's own choice for one appointed by law. For the bail is said to be the keeper of the principal; he can take him wherever he pleases, and his obligation is to keep him so that the plaintiff may take him at the proper time. And the moment the creditor loses his right to take or hold the principal, the bail is discharged; for the latter cannot keep, where the former cannot take the body. It is no question, therefore, about interfering with vested rights. The simple inquiry is, had the plaintiffs a right to take the bodies, after they had taken the benefit of the insolvent act? If they had, the judgment is erroneous: if they had not, it is correct. 14 East 598; Law Library, tit. Bail.

Story, Justice, delivered the opinion of the court.—This is a writ of error to the judgment of the circuit court for the district of Ohio. *The material facts are these. In June 1830, the plaintiffs in error (who are citizens of New York) brought an action of *assumpsit* in the circuit court of Ohio, against one Joseph Harris and Cornelius V. Harris, and at the December term of the court, recovered judgment for $2818.86 and costs. In this action, the defendant in error became special bail by recognisance, viz., that the Harris's should pay and satisfy the judgment recovered against

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them, or render themselves into the custody of the marshal of the district of Ohio. In October 1831, a writ of *capias ad satisfaciendum* was issued upon the same judgment, directed to the marshal; who, at the December term 1831, returned, that the Harris's were not to be found. At the same term, the circuit court adopted the following rule: "That if a defendant, upon a *capias*, does not give sufficient appearance bail, he shall be committed to prison, to remain until discharged by due course of law. But under neither mesne nor final process, shall any individual be kept imprisoned, who, under the insolvent law of the state, has for such demand been released from imprisonment." In February 1831, Cornelius V. Harris was duly discharged from imprisonment for all his debts, under the insolvent law of Ohio, passed in 1831; and in February 1832, Joseph Harris was in like manner discharged. In December 1832, the plaintiffs in error commenced the present action of debt, upon the recognisance of bail, against the defendant in error, stating in the declaration, the original judgment, the defendant becoming special bail, and the return on the execution "not found." The defendant, among other pleas, pleaded the discharge of the Harris's under the insolvent law of Ohio of 1831, and the rule of the circuit court, above mentioned, in bar of the action. The plaintiffs demurred to the plea, and, upon joinder in demurrer, the circuit court gave judgment for the defendants; and the present writ of error is brought to revise that judgment.

The question now before this court is, whether the plea contains a substantial defence to the action of debt brought upon the recognisance of special bail. In order to clear the case of embarrassment from collateral matters, it may be proper to state, that the recognisance of special bail being a part of the proceedings in a suit, and subject to the regulation of the court, the nature, extent and limitations of the responsibility created *thereby, are to be decided, not by a mere examination of the terms of the instrument, but by a reference to the known rules of the court and the principles of law applicable thereto. Whatever, in the sense of those rules and principles, will constitute a discharge of the liability of the special bail, must be deemed included within the purview of the instrument, as much as if it were expressly stated. Now, by the rules of the circuit court of Ohio, adopted as early as January term 1808, the liability of special bail was provided for and limited; and it was declared, that special bail may surrender their principal at any time, before or after judgment against the principal; provided such surrender shall be before a return of a *scire facias* executed, or a second *scire facias*, *nihil*, against the bail. And this in fact constituted a part of the law of Ohio, at the time when the present recognisance was given; for in the Revised Laws of 1823–24 (22d vol. of Ohio Laws 58), it is enacted, that, subsequent to the return of the *capias ad respondendum*, the defendant may render himself, or be rendered, in discharge of his bail, either before or after judgment; provided such render be made at or before the appearance day of the first *scire facias* against the bail returned *scire feci*, or of the second *scire facias* returned *nihil*, or of the *capias ad respondendum* or summons, in an action of debt against the bail on his recognisance, returned served; and not after. This act was in force at the time of the passage of the act of congress of the 19th of May 1828, ch. 68, and must, therefore, be deemed as a part of the "modes of proceeding" in suits, to have been adopted by it. So that the surrender of the principal [*357

by the special bail, within the time thus prescribed, is not a mere matter of favor of the court, but is strictly a matter of legal right.

And this constitutes an answer to that part of the argument at the bar, founded upon the notion, that by the return of the *capias ad satisfaciendum*, the plaintiffs had acquired a fixed and absolute right against the bail, not to be affected by any rules of the court. So far from the right being absolute, it was vested *sub modo* only, and liable to be defeated in the events prescribed by the prior rules of the court, and the statute of Ohio above referred to. It is true, that it has been said, that by a return of *non est inventus* on a *capias ad satisfaciendum*, *the bail are fixed; but this language is not strictly accurate, even in courts acting professedly under the common law, and independently of statute. Lord Ellenborough, in *Mannin* v. *Partridge*, 14 East 599, remarked, "that bail were to some purposes said to be fixed by the return of *non est inventus* upon the *capias ad satisfaciendum*; but if they have, by the indulgence of the court, time to render the principal, until the appearance day of the last *scire facias* against them, and which they have the capacity of using, they cannot be considered as completely and definitively fixed till that period." And so much are the proceedings against bail deemed a matter subject to the regulation and practice of the court, that the court will not hesitate to relieve them in a summary manner, and direct an *exoneretur* to be entered, in such cases of indulgence, as well as in cases of strict right. But there is this distinction: that where the bail are entitled to be discharged *ex debito justitiæ*, they may not only apply for an *exoneretur* by way of summary proceeding, but they may plead the matter as a bar to a suit in their defence. But where the discharge is a matter of indulgence only, the application is to the discretion of the court, and an *exoneretur* cannot be insisted on, except by way of motion.

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And this leads us to the remark, that where the party is, by the practice of the court, entitled to an *exoneretur*, without a positive surrender of the principal, according to the terms of the recognisance, he is, *à fortiori*, entitled to insist on it by way of defence, where he is entitled, *ex debito justitiæ*, to surrender the principal. Now, the doctrine is clearly established, that where the principal would be entitled to an immediate and unconditional discharge, if he had been surrendered, there the bail are entitled to relief by entering an *exoneretur*, without any surrender. This was decided in *Mannin* v. *Partridge*, 14 East 599; *Boggs* v. *Teackle*, 5 Binn. 332; and *Olcott* v. *Lilly*, 4 Johns. 407. And, *à fortiori*, this doctrine must apply where the law prohibits the party from being imprisoned at all; or where by the positive operation of law, a surrender is prevented. So that there can be no doubt, that the present plea is a good bar to the suit, notwithstanding there has been no surrender, if by law the principal could not, upon such surrender, have been imprisoned at all.

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*This constitutes the turning point of the case, and to the consideration of it we shall now proceed. In the first place, there is no doubt, that the legislature of Ohio possessed full constitutional authority to pass laws, whereby insolvent debtors should be released, or protected from arrest or imprisonment of their persons, on any action for any debt or demand due by them. The right to imprison constitutes no part of the contract; and a discharge of the person of the party from imprisonment does

not impair the obligation of the contract, but leaves it in full force against his property and effects. This was clearly settled by this court in the cases of *Sturges* v. *Crowninshield*, 4 Wheat 200; and *Mason* v. *Haile*, 12 Ibid. 370. In the next place, it is equally clear, that such state laws have no operation, *proprio vigore*, upon the process or proceedings in the courts of the United States, for the reason so forcibly stated by Mr. Justice JOHNSON, in delivering the final opinion of the court in *Ogden* v. *Saunders*, 12 Wheat. 213; and by Mr. Chief Justice MARSHALL, in delivering the opinion of the court in *Wayman* v. *Southard*, 10 Ibid. 1; and by Mr. Justice THOMPSON, in delivering the like opinion in the *Bank of the United States* v. *Halstead* 10 Ibid. 51. State laws cannot control the exercise of the national government, nor in any manner limit or affect the operation of the process or proceedings in the national courts. The whole efficacy of such laws in the courts of the United States, depends upon the enactments of congress. So far as they are adopted by congress, they are obligatory; beyond this, they have no controlling influence. Congress may adopt such state laws directly, by a substantive enactment, or they may confide the authority to adopt them to the courts of the United States. Examples of both sorts exist in the national legislation. The process act of 1789, ch. 21, expressly adopted the forms of writs and modes of process of the state courts, in suits at common law. The act of 1792, ch. 36, permanently continued the forms of writs, executions and other process, and the forms and modes of proceeding in suits at common law, then in use in the courts of the United States, under the process act of 1789; but with this remarkable difference, that they were subject to such alterations and additions as the said *courts respectively should, in their discretion, deem expedient, or to such regulations as the supreme court of the United States should think proper, from time to time, by rule, to prescribe to any circuit or district court concerning the same. The constitutional validity and extent of the power thus given to the courts of the United States, to make alterations and additions in the process, as well as in the modes of proceeding in suits, was fully considered by this court in the cases of *Wayman* v. *Southard*, 10 Wheat. 1, and the *Bank of the United States* v. *Halstead*, 10 Ibid. 51. It was there held, that this delegation of power by congress was perfectly constitutional; that the power to alter and add to the process and modes of proceeding in a suit, embraced the whole progress of such suit, and every transaction in it, from its commencement to its termination, and until the judgment should be satisfied; and that it authorized the courts to prescribe and regulate the conduct of the officer in the execution of final process, in giving effect to its judgment. And it was emphatically laid down, that "a general superintendence over this subject seems to be properly within the judicial province, and has always been so considered;" and that "this provision enables the courts of the Union to make such improvements in its forms and modes of proceeding as experience may suggest; and especially, to adopt such state laws on this subject, as might vary to advantage the forms and modes of proceeding, which prevailed in September 1789." The result of this doctrine, as practically expounded or applied in the case of the *Bank of the United States* v. *Halstead*, is, that the courts may, by their rules, not only alter the forms, but the effect and operation of the process, whether mesne or final, and the modes of proceeding under it; so that it may reach prop- [*360

erty not liable, in 1789, by the state laws, to be taken in execution, or may exempt property, which was not then exempted, but has been exempted by subsequent state laws.

If, therefore, the present case stood upon the mere ground of the authority conferred on the courts of the United States by the acts of 1789 and 1792, there would seem to be no solid objection to the authority of the circuit court of Ohio to make the rule referred to in the pleadings. It is no more than a regulation of the modes of proceeding in a suit, in order to *conform to the state law of Ohio, passed in 1831, for the relief of insolvent debtors. A regulation of the proceedings upon bail-bonds and recognisances, and prescribing the conduct of the marshal in matters touching the same, seems to be as completely within the scope of the authority as any which could be selected.

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But in fact the present case does not depend upon the provision of the acts of 1789 or 1792, but it is directly within and governed by the process act of the 19th of May 1828, ch. 68. That act, in the first section, declares, that the forms of mesne process, and the forms and modes of proceeding in suits at common law in the courts of the United States, held in states admitted into the Union since 1789 (as the state of Ohio has been), shall be the same in each of the said states, respectively, as were then used in the highest court of original and general jurisdiction in the same; subject to such alterations and additions as the said courts of the United States, respectively, shall, in their discretion, deem expedient, or to such regulations as the supreme court shall think proper, from time to time, by rules, to prescribe to any circuit or district court concerning the same. The third section declares, that writs of execution and other final process issued on judgments and decrees rendered in any courts of the United States, and "the proceedings thereupon," shall be the same in each state, respectively, as are now used in the courts of such state, &c. Provided, however, that it shall be in the power of the courts, if they see fit, in their discretion, by rules of court, so far to alter final process in such courts, as to conform the same to any change which may be adopted by the legislature of the respective states, for the state courts.

This act was made after the decisions in *Wayman* v. *Southard*, and the *Bank of the United States* v. *Halstead*, 10 Wheat. 1, 51, and was manifestly intended to confirm the construction given in those cases to the acts of 1789 and 1792, and to continue the like powers in the courts to alter and add to the processes, whether mesne or final, and to regulate the modes of proceedings in suits and upon processes, as had been held to exist under those acts. The language employed seems to have been designed to put at rest all future doubts upon the subject. But the material consideration now to be taken notice of is, *that the act of 1828 expressly adopts the mesne processes and modes of proceeding in suits at common law, then existing in the highest state courts, under the state laws; which, of course, included all the regulations of the state laws as to bail, and exemptions of the party from arrest and imprisonment. In regard also to writs of execution and other final process, and "the proceedings thereupon," it adopts an equally comprehensive language, and declares that they shall be the same as were then used in the courts of the state. Now, the words, "the proceedings on the writs of execution and other final process," must, from their very import,

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be construed to include all the laws which regulate the rights, duties and conduct of officers in the service of such process, according to its exigency, upon the person or property of the execution-debtor, and also all the exemptions from arrest or imprisonment under such process, created by those laws.

We are then led to the inquiry, what were the laws of Ohio in regard to insolvent debtors, at the time of the passage of the act of 1828? By the insolvent act of Ohio, of the 23d of February 1824 (Laws of Ohio, Revision of 1824, vol. 22, § 8, 9, p. 327–8), which continued in force until it was repealed and superseded by the insolvent act of 1831, it is provided, that the certificate of the commissioner of insolvents, duly obtained, shall entitle the insolvent, if in custody upon mesne or final process, in any civil action, to an immediate discharge therefrom, upon his complying with the requisites of the act. And it is further provided, that the final certificate of the court of common pleas, duly obtained, shall protect the insolvent for ever after from imprisonment for any suit or cause of action, debt or demand mentioned in the schedule given in under the insolvent proceedings; and a penalty is also inflicted upon any sheriff or other officer, who should knowingly or wilfully arrest any person contrary to this provision. The act of 1831 (Laws of Ohio, Revision of 1831, vol. 29, § 21, 36, p. 333, 336) contains a similar provision, protecting the insolvent, under like circumstances, from imprisonment and making the sheriff or other officer, who shall arrest him contrary to the act, liable to an action of trespass. Now, the repeal of the act of 1824, by the act of 1831, could have no legal effect to change the existing forms of mesne or final process, or the modes of proceeding thereon in the courts *of the United States, as adopted by congress, or to vary the [*363 powers of the same courts in relation thereto; but the same remained in full force, as if no such repeal had taken place. The rule of the circuit court is in perfect coincidence with the state laws existing in 1828; and if it were not, the circuit court had authority, by the very provisions of the act of 1828, to make such a rule, as a regulation of the proceedings upon final process, so as to conform the same to those of the state laws on the same subject.

Upon these grounds, without going into a more elaborate review of the principles applicable to the case, we are of opinion, that the judgment of the circuit court was right; and that it ought to be affirmed, with costs.

Thompson, Justice. (*Dissenting.*)—This is the first time this court has been called upon to give a construction to the act of congress of the 19th May 1828. (4 U. S. Stat. 478.) And the rules and principles adopted by the circuit court, and which appear to be sanctioned by this court, when carried out to their full extent, appear to me to be such an innovation, upon what has been heretofore understood to be the law by which the courts of the United States were to be governed, as could not have been intended by congress by the act of 1828. It is giving to the courts the power, by rule of court, to introduce and enforce state insolvent systems. It authorizes the courts to abolish all remedy which a creditor may have against the body of his debtor who has been discharged under a state insolvent law. And if the courts have this power, they have the same power over a *fieri facias*, and to exempt all property acquired after the discharge of the insolvent from the payment of his antecedent debts; if such be the state law.

The act is general, extending to writs of execution, and all other final process. And in addition to this, it alters the whole law of remedy against bail, in such cases. A *capias ad satisfaciendum* against the principal is an indispensable preliminary step to a prosecution against the bail; and if the court has a right to order that no *capias ad satisfaciendum* shall be issued, it is taking from the creditor all remedy against the bail. To say, that an execution may be taken out, but shall not be executed upon the party, is a mere mockery of *justice. The constitutionality of the insolvent law *364] of Ohio is not drawn in question; and whether, as a measure of policy, it is not wise to abolish imprisonment for debt, is not a question which we are called upon to decide.

As between the citizens of Ohio, and in their own courts, they have full power to adopt such course in this respect as the wisdom of their legislature may dictate. But the present is a question between the citizens of that state, and the citizens of another state. And that made the great and leading distinction adopted by this court in the case of *Ogden* v. *Saunders*, 12 Wheat. 531; and, indeed, it was the very point upon which that cause turned. And if the practical operation of the act of 1828 is to be what is now sanctioned by this court, it is certainly overruling that decision. So far as that goes, I can have no particular objection, as I was in the minority in that case. But this case involves other important considerations. It is an action brought by citizens of the state of New York, against citizens of the state of Ohio, upon a recognisance of bail. The pleadings in the cause terminated in a demurrer to the plea; and the judgment of the court sustained the validity of the plea, and defeated the plaintiff's right of recovery.

A brief statement of the facts, as disclosed by the record, will aid in a right understanding of the questions that are presented for consideration. The defendant, Richard Haughton, became special bail for Joseph Harris and Cornelius V. Harris, in a suit brought against them by the plaintiffs in this cause. On the 12th day of October 1831, a *capias ad satisfaciendum* was issued against them, on the judgment which had been recovered, for $2846.56. This *capias ad satisfaciendum* was returned "not found," at the December term 1831, of the circuit court. This execution, it is to be presumed, was returnable on the first day of the term, which is according to the ordinary course of proceedings. At the same December term 1831, the rule of court set out in the plea was adopted; which orders and directs, that no person, either under mesne or final process, shall be kept in prison, who, under the insolvent law of the state, has, for such demand, been released from imprisonment. The plea alleges, that Cornelius V. Harris, one of the defendants in the original suit, was, at the February term 1831, of the court of common *pleas for Hamilton county, in the state of Ohio, ordered *365] and adjudged to be for ever thereafter protected from arrest or imprisonment for any civil action, or debt, or demand in the schedule of his debts delivered to the commissioner of insolvents; among which was the judgment above mentioned. The plea also alleges, that a like discharge was given to the other defendant, Joseph Harris, at the February term 1832, of the same court. So that it appears, that the rule of court, and the discharge of one of the defendants, took place after the bail was fixed in law, by the return "not found," upon the *ca. sa.* against the defendants in the original suit. As against Joseph Harris, therefore, a retrospective effect

has been given to his discharge, and a vested legal right of the plaintiff thereby taken away, upon this demurrer to a special plea, founded upon a particular rule of court specified in the plea; it cannot, I should think, be claimed that other rules of court have the notoriety of public laws, which the court is bound judicially to know and notice. Was the bail, under these circumstances, discharged? and could such matters be set up by way of plea in bar to the present action against the bail? are the questions to be considered.

In the case of *Ogden* v. *Saunders*, the parties, as in the present case, were citizens of different states; and the decision of the court was, that as between parties of different states, the state insolvent laws had no application. Mr. Justice JOHNSON, who delivered the opinion of the court, uses very strong language on this point, and which cannot be misunderstood. "All this mockery of justice," says he, "and the jealousies, recriminations, and perhaps retaliations which might grow out of it, are avoided, if the power of the states over contracts, after they become the subjects exclusively of judicial cognisance, is limited to the controversies of their own citizens. And it does appear to me almost incontrovertible, that the states cannot proceed one step farther, without exercising a power incompatible with the acknowledged powers of other states, or of the United States, and with the rights of the citizens of other states. Every bankrupt or insolvent system in the world must partake of the character of a judicial investigation. Parties whose rights are to be affected are entitled to a hearing But on what principle can a citizen of another state be forced into the courts of a state for this investigation? The judgment to be passed is to *prostrate his right; and on the subject of these rights, the constitution [*366 exempts him from the jurisdiction of the state tribunals, without regard to the place where the contract originated. In the only tribunal to which he owes allegiance, the state insolvent or bankrupt laws cannot be carried into effect; they have a law of their own on this subject: Act of 1800. (2 U. S. Stat. 4.) The constitution has constituted courts professedly independent of state power in their judicial course; and yet the judgments of those courts are to be vacated, and their prisoners set at large under the power of the state courts, or of the state laws, without the possibility of protecting themselves from its exercise. I cannot acquiesce in an incompatibility so obvious. No one has ever imagined, that a prisoner in confinement, under process from the courts of the United States, could avail himself of the insolvent laws of the state in which the court sits. And the reason is, that those laws are municipal and peculiar, and appertaining exclusively to the exercise of state power, in that sphere in which it is sovereign; that is, between its own citizens, between suitors subject to state power exclusively, in their controversies between themselves." And in conclusion, he sums up the argument by saying, that "when, in the exercise of that power" (passing insolvent laws), "the states pass beyond their own limits, and the rights of their own citizens, and act upon the rights of citizens of other states, then arises a conflict of sovereign power, and a collision with the judicial powers granted to the United States, which renders the exercise of such a power incompatible with the rights of other states, and of the constitution of the United States."

I have been thus particular in quoting the very language of the court,

that it may speak for itself. And that it was adopted in its fullest extent is evident, by what fell from the court in the case of *Boyle* v. *Zacharie and Turner*, 6 Pet. 643. "The ultimate opinion," say the court, "delivered by Mr. Justice JOHNSON in the case of *Ogden* v. *Saunders*, was concurred in and adopted by the three judges who were in the minority upon the general question of the constitutionality of state insolvent laws, so largely discussed in that case. It is proper to make this remark, in order to remove an erroneous impression of the bar, that it was his single opinion, and not of the
*367] three other *judges who concurred in the judgment. So far, then, as decisions upon the subject of state insolvent laws have been made by this court, they are to be deemed final and conclusive." The decision, in that case, turned exclusively upon the point, that state insolvent laws did not apply to suitors in the courts of the United States. And the emphatic language is used, "no one has ever imagined, that a prisoner in confinement under process from the courts of the United States, could avail himself of the insolvent laws of the state in which the court sits." Apply this principle to the case now before the court. A *capias ad satisfaciendum* was in the hands of the marshal against the Harris's, the defendants in the original suit. Suppose, the marshal had arrested them (as was his duty to do, if they could be found) and put them in confinement. No one, say the court, could imagine, that they could avail themselves of the state insolvent law. But that is the very thing which the plea in this case does set up, under the authority of the rule of court, that no one shall be kept imprisoned who has been discharged under the insolvent law of the state; and it is the very thing that has proved available to deprive the plaintiffs of a recovery in this case.

The case of *Boyle* v. *Zacharie and Turner*, was decided in the year 1832; and the enacting clause of the act of congress of 1828, could not have been supposed to change the principles adopted in *Ogden* v. *Saunders*. If that act is to govern and control the case now before the court, it must be by virtue of the rule which has been adopted by the circuit court of Ohio. What is the law of 1828? It declares, "that writs of execution and other final process, issued on judgments and decrees rendered in any of the courts of the United States, and the proceedings thereupon, shall be the same, except their style, in each state, respectively, as are now used in the courts of such state, &c., provided, however, that it shall be in the power of the courts, if they see fit, in their discretion, by rules of court, so far to alter the final process in said courts, as to conform the same to any change which may be adopted by the legislatures of the respective states for the state courts." A *capias ad satisfaciendum* was an execution in use in the courts of the state of Ohio, in the year 1828, when the act in question was passed. It was, therefore, adopted as a writ to be used in the courts of the United States.

*But it is said, that the act adopts also the proceedings thereupon.
*368] It does so. But what is to be understood by proceedings? Can this, in any just sense, be satisfied by prohibiting all proceedings on the execution? Proceedings, both in common parlance and in legal acceptation, imply action, procedure, prosecution. And such is the explanation given to the term proceedings, in the case of *Wayman* v. *Southard*, 10 Wheat. 1. "It is applicable," say the court, "to writs and executions, and is applic-

able to every step taken in a cause; it indicates the progressive course of the business, from its commencement to its termination." If it is a progressive course, it must be advancing, and cannot be satisfied by remaining at rest. In the cases of *Wayman* v. *Southard*, and the *Bank of the United States* v. *Halstead*, 10 Wheat. 1, 51, this term proceedings was applied to the mode and manner of executing the execution in the progress of obtaining satisfaction; and the power of the court under the process act of 1792, to alter and add to the execution, by extending it to lands. But no part of those cases contains an intimation, that proceedings to obtain satisfaction, implies or warrants an arrest and stopping all execution whatever of the process. If the enacting clause in this act does not forbid the execution of the *capias ad satisfaciendum*, as it certainly does not, could it be done by a rule of court, under the proviso? I think it could not. The proviso does not authorize any rule relative to the proceedings in the cause. The term is not used at all. It only authorizes the court so far to alter final process, as to conform the same to that used in the state courts.

The rule set up in this plea does not make any alteration whatever in the execution. That remains the same precisely as it was before; and it only forbids the effect and operation of it. And if the rule is to be considered a part of the execution, and to be taken as if incorporated in the body of the writ, it would present a very singular process, commanding the marshal to take the body of the defendant, but forbidding him to keep the prisoner in confinement. Such incongruity cannot be attributed to this proviso. The rule, I think, is not authorized by this statute, and specially, as it was adopted after the bail was fixed in law, by the return "not found," upon the *capias ad satisfaciendum* issued against the principals. That such a *return fixes the bail, is a settled rule of the common law. Courts have, *ex gratiâ*, extended the right to surrender, until the return of [*369
the writ or process against the bail; and perhaps, in some instances, the right to surrender has been extended to a later period. But the contingency of not being able to make the surrender, after the return of the *capias ad satisfaciendum* "not found," is at the risk of the bail. And the relief of the bail in such cases is, on motion, addressed to the favor of the court; and relief is granted, upon such terms as the circumstances of the case will warrant; and always upon payment of the cost of the suit against the bail. No stronger case upon this point can be put, than that of *Davidson* v. *Taylor*, decided in this court, 12 Wheat. 604. "This," say the court, "is a case of bail, and is to be decided by the principles of English law, which, the case finds, constitute the law and practice of Maryland on the subject. According to these principles, the allowance of the bail to surrender the principal, after the return of a *capias ad satisfaciendum*, is considered as matter of favor and indulgence, and not of right; and is regulated by the acknowledged practice of the court. To many purposes, the bail is considered as fixed by the return of the *capias ad satisfaciendum;* but the court allow the bail to surrender the principal, within a limited period after the return of the *scire facias* against them, as matter of favor, and not as matter pleadable in bar. In certain cases, even a formal surrender has not been required, when the principal was still living and capable of being surrendered, and an *exoneretur* could be entered, and the principal discharged immediately on the surrender; but the rule has never been applied to cases

where the principal dies before the return of the *scire facias*. In such a case, the bail is considered as fixed by the return of the *capias ad satisfaciendum;* and his death afterwards, and before the return of the *scire facias*, does not entitle the bail to an *exoneretur;* the plea, is, therefore, bad."

This case would seem to put at rest the question as to the manner in which the bail is to avail himself of any matter which entitles him to relief, when application is made after the return of the *capias ad satisfaciendum*—that it must be by motion, and not by plea in bar. But if this was pleadable, the plea now in question is defective. It does not allege a surrender of the principals, nor that an *exoneretur* has been entered. *370] *It may be admitted, that the bail would have been entitled to relief, on motion to the court for that purpose. But this will not sustain the plea, according to the doctrine of the case just referred to, of *Davidson* v. *Taylor*. But it may be questionable, whether the bail would have been relieved in this case, on motion. Such an application is seldom, if ever, granted, unless the matter upon which the motion is founded arose before the bail is fixed in law; viz., before the return of the *capias ad satisfaciendum*. 1 Caines 10. In this case, one of the principals was not discharged, until several months after the return of the *capias ad satisfaciendum;* and this appears upon the record. In the case of *Olcott* v. *Lilly*, 4 Johns. 408, Chief Justice KENT says, there is no case in which the death of the principal, after the return and filing of the *capias ad satisfaciendum*, has been allowed as ground for the relief of the bail. All the cases agree, that after the bail are fixed, *de jure*, they take the risk of the death of the principal; the attempt for relief has frequently been made, and as often denied. That the time which is allowed the bail *ex gratiâ*, is at their peril, and they must surrender. That there are many cases where the bail have been relieved on motion; but in these cases, the event upon which the bail has been relieved happened before the bail became fixed. That, in cases of insolvency, time has been allowed the bail *ex gratiâ* to surrender, to prevent circuity of action; but there is no intimation that such insolvency could be pleaded in bar. Indeed, its being allowed *ex gratiâ*, according to the language of all the cases, is conclusive to show, that it could not be pleaded as a legal discharge of the bail. In the case of *Cheetham* v. *Lewis*, 2 Johns. 104, the surrender was within eight days after the return of the writ against the bail, and the court ordered an *exoneretur;* saying, that, technically speaking, such surrender cannot be pleaded, and so is not *de jure;* the relief is on motion and not by plea, and the court always requires the costs in the suit on the recognisance to be paid. The same doctrine is fully settled in the English courts. In the case of *Donnelly* v. *Dunn*, 1 Bos. & Pul. 448, the position is laid down broadly, that bail cannot plead the bankruptcy and certificate of their principal in their own discharge. Lord ELDON, however, observed, that they did not mean to preclude any application for sum- *371] mary relief on the part of the *bail. The same case came again before the court, after leave to amend the plea, had been obtained, 2 Bos. & Pul. 45, and was very analogous in its circumstances to the one now before this court. It was an action of debt on recognisance of bail; and the defendant pleaded the bankruptcy of the principal, very circumstantially; to which there was a general demurrer and joinder. In support of the

plea, it was contended, as it has been in the case now before the court, that if the bankruptcy and certificate was a legal discharge of the principal, it was also a legal discharge of the bail, and if so, may be pleaded. To this it was answered, that the plea of bankruptcy could only be interposed by the bankrupt himself; and the bail, if entitled to any relief, must obtain it by application to the summary jurisdiction of the court; and this principle was sanctioned by the court. Lord ELDON said, we do not mean to preclude any application for summary relief on the part of the bail; but on this record, judgment must be given for the plaintiff. That the plea of bankruptcy is given to the bankrupt, to be made use of as the means of discharging himself, if he please; but there may be cases in which the bankrupt may not choose to make use of his certificate. And he cannot, through the medium of his bail, be obliged to make use of his certificate, whether he will or not. It is the duty of the bail, under their recognisance, to surrender the bankrupt; and it remains with the bankrupt himself, to determine whether any use shall be made of the certificate. And Mr. Justice BULLER observed, that it is of importance to the public and to the profession, to put an end to attempts to introduce upon the record questions of practice, which cannot be considered as legal defences; but which belong to what may be called the equity side of the court. This action is brought for a legal demand, arising upon a debt of record, and the defendant is called upon to state a legal defence upon record, and not merely to say he has equity in his favor. He must either show a legal impossibility to perform the condition of the recognisance, or state something that will discharge him; and he has done neither.

These cases are abundantly sufficient, to show that it is a well-settled rule of law, that the bail cannot set up by plea in bar, the matter contained in the plea now in question. But if *available at all, it must be by motion. It is true, as is said in *Mannin* v. *Patridge*, 14 East 599, [*372 the bail are not completely and definitively fixed, by the return of the *capias ad satisfaciendum*. They have, by the indulgence of the court, time to surrender the principal, until the appearance-day of the last *scire facias*. But this was an application for relief on motion, and addressed to the favor and indulgence of the court; and no intimation is given, that it might be pleaded as matter of right. And it is not, I believe, pretended, that any rule of court had or could authorize such matter to be pleaded. The relief of bail, by the surrender of their principal is matter of practice, and may be regulated by rules of court. And the acts of the legislature of Ohio, or the decisions of their courts on the subject, can have no binding force on the courts of the United States, or regulate their practice, any further than they have been adopted by the court. And I do not understand, that any rule of the circuit court professes to do more than extend the time for the surrender, until the return-day of a second *scire facias* against the bail. But the mode of relief, after the bail are fixed in law, must be by an application to the favor of the court; and cannot, if the cases to which I have referred be law, be pleaded in bar. The cases of *Wayman* v. *Southard*, and the *Bank of the United States* v. *Halstead*, 10 Wheat., establish, most clearly and explicitly, that a state legislature cannot, by virtue of any original inherent power they have, arrest or control the proceedings of the courts of the United States; or regulate the conduct of the officers of the United

States in the discharge of their duty. The doctrine of this court always has been, that executions issuing out of the courts of the United States, are not controlled or controllable, in their general operation and effect, by any collateral regulations which the state laws have imposed on the state courts to govern them. That such regulations are exclusively addressed to the state tribunals, and have no efficacy on the courts of the United States, unless adopted under the authority of the laws of the United States. And it appears to me, that by no sound and just construction of the act of congress of 1828, can the insolvent law of Ohio be considered as adopted by it; or as giving the circuit court the power to adopt it by rule of court, without overruling the case of *Ogden* v. *Saunders;* *nor without giving to the *373] term "proceedings," a meaning not warranted in common parlance, or in legal acceptation. But whatever might have been the power of the circuit court to relieve the bail in this case, on motion; if such application had been made; I feel great confidence in saying, that the bail cannot avail himself of the matters set up, by way of plea in bar to the action; and that the plaintiff was entitled to judgment upon the demurrer.

Baldwin, Justice. (*Dissenting.*)—As I fully concur in opinion with Judge Thompson, in all the views which he has taken of this case, it would be unnecessary for me to do more than express such concurrence; but the course of adjudication which has prevailed in the circuit court of Pennsylvania, on the subject of the insolvent laws of the states of the Union, since April 1831; renders it indispensable for me to do more than declare my dissent to the opinion of the court. In the case of *Woodhull and Davis* v. *Wagner*, the defendant had been discharged by the insolvent law of Pennsylvania; after which he was arrested on a *capias ad satisfaciendum* from the circuit court, on a judgment obtained there. An application was made for his discharge, which was refused by the court; and he was remanded to custody, on the ground, that the debt, being payable in New York, and the plaintiffs citizens of that state, when the debt was contracted, and when the defendant was discharged by the insolvent law of Pennsylvania, such discharge was wholly inoperative. Similar cases have since occurred, in which that court held the law to be settled, and do not suffer the question to be argued.

In coming to, and for four years adhering to, this course of adjudication, the judges of that court did not act on their own opinion; they considered the law to have been settled by the final judgment of this court in *Ogden* v. *Saunders*, 12 Wheat. 369; and the case of *Shaw* v. *Robbins*, referred to in the note to the former case; and as the rule on which we proceeded was laid down by the authority of this court, we felt bound to observe and enforce it, whatever may have been our views of it, as individual judges, or as a circuit court. But in so doing, we did not consider it as a question of *practice, the form and mode of proceeding in court, or the mere *374] execution of its final process. We examined it as one of constitutional law, directly involving the power of the states, to affect in any manner the rights of citizens of other states, in enforcing the performance of contracts in the circuit courts of the United States. And when we found that the third proposition laid down by Judge Johnson, in *Ogden* v. *Saunders*, was considered as the established rule of this court, we at once submitted to

its obligation as a guide to our judgment. The declaration of Judge STORY, in delivering the opinion of the court in *Boyle* v *Zacharie and Turner*, 6 Pet. 643, was a direct affirmance of the proposition of Judge JOHNSON; from which no member of the court dissented; nor from the concluding paragraph of the sentence—"So far, then, as decisions upon the subject of state insolvent laws have been made by this court, they are to be deemed final and conclusive."

The third proposition of Judge JOHNSON, thus adopted as a principle of constitutional law, finally and conclusively, is this:—"But when, in the exercise of that power, the states pass beyond their own limits and the rights of their own citizens, and act upon the rights of citizens of other states; then arises a conflict of sovereign power, and a collision with the judicial powers granted to the United States, which renders the exercise of such a power incompatible with the rights of other states and with the constitution of the United States." A more important principle of constitutional law was never presented for the consideration of any judicial tribunal; and when, three years since, it was solemnly declared by this court, that it was to be deemed as one which had become by its decisions final and conclusive, the circuit court of Pennsylvania did not feel at liberty to depart from it, but followed it as a prescribed rule enjoined on their observance by paramount authority; deeming it their judicial duty. That court could not consider, that the effect of a discharge by the insolvent law of Pennsylvania, on a debt due to a citizen of New York, and payable there, depended on a rule of court which it could make and unmake, at its discretion, from time to time, as a matter of practice.

With the cases of *Ogden* v. *Saunders*, *Shaw* v. *Robbins*, and *Boyle* v. *Zacharie*, before them, they could not judicially *consider the question in any other respect, than that so solemnly declared by this [*375 court; presenting a conflict of sovereign power, a collision with the judicial powers of the Union, and an exercise of a state power incompatible with the rights of other states, and with the constitution of the United States. When the final and conclusive decisions of this court had declared the law obnoxious to such objections, the circuit court had but one course to pursue—to declare it inoperative, by the supreme law of the land; which is as imperative on courts, as suitors, not as a guide to their discretion, but as the standard rule to direct their judgment.

A circuit court may be holden by a judge of this court, or, in his absence, by the district judge alone; and either has the same power to make rules of court, as both together. The question is simply this: The constitution—the rights of other states—the judicial powers granted to the United States as declared by this court, are violated by a state insolvent law. Yet a circuit court adopts, by a rule of its own, that state law, as the rule of its decision, and renders a judgment according to its provisions; and this is the case before us. The plaintiffs are citizens of New York; the defendants citizens of Ohio, sued in the circuit court of that district; by whose judgment the defendant is released from the obligation of this contract, as special bail; solely by the operation of a law of Ohio adopted by a rule of court, when, in the absence of such a law, he would be absolutely bound to pay the debt demanded from him. That judgment is now affirmed by this court, on their construction of acts of congress, whose titles are, to regulate processes

in the courts of the United States; and the enacting clauses of which are confined to the "forms of mesne process," the forms and modes of "proceedings in the courts of the United States," to writs of execution "and other final processes, and the proceedings thereupon." A law which the legislative power of a state is incompetent to pass, because it is unconstitutional and void, without a rule of court, has become valid and operative, by the potency of judicial power, exercised by any judge, at his mere discretion. Thus removing all conflicts of sovereign power by the exercise of one, which becomes practically paramount to the final and conclusive decisions of this court, the rights of other states, and the constitution of the United
*376] States, as *judicially expounded. The judgment now rendered admits of no other conclusion; and as I cannot admit, for a moment, the principle, that the power of congress, if brought to bear directly, by its most explicit enactments, on this subject, is competent to cure the objections of this law, which are fastened on its vitals by the adjudications of this court, in the cases alluded to; I cannot admit, that they do it by the construction of a law which does not profess to touch the questions necessarily involved in this case; still less, that it can be done by the rule of a court subordinate to the appellate jurisdiction of this.

If a state law is incompatible with the constitution of the Union, it must be inoperative, until the constitution is amended. The legislative and judicial power combined, cannot cure a defect which the supreme law of the land declares to be fatal to a state law; and when, by the solemn judgment of this court, it is declared, that a state law, adopted by a rule of the circuit court, is the rule of both right and remedy, in a suit between a citizen of New York, plaintiff, and a citizen of Ohio; I am judicially bound to consider, that it is not open to any objections stated in the third proposition of Judge JOHNSON, in *Ogden* v. *Saunders;* or that that case, with that of *Shaw* v. *Robbins*, and *Boyle* v. *Zacharie*, are now overruled. As the case on the record does not admit of the first alternative, but is directly, on its four corners, obnoxious to those objections, the inevitable result is, that the affirmance of this judgment may be taken to be the latter. The consequence is, that the effect of state insolvent laws on the citizens of other states is, for the present, an open one in the courts of the states, and of the United States, notwithstanding any former decisions of this court in the cases referred to. So I shall consider it here, and in the circuit court, and answer to the profession and suitors for past errors, as those of adoption, not from choice, but a sense of judicial duty; and being now absolved from an authority heretofore deemed binding, shall act, for the future, on principle. That a paramount authority, prescribing a rule for my judgment, cannot leave my discretion uncontrolled; when my judgment is free, my discretion is not bound; and that what, in the exercise of my best judicial discretion, I feel bound to do, in pronouncing the judgments of a circuit court, according to my deliberate conviction on the law of the case, I cannot undo or
*377] avoid doing, by any *rule of my own, in the adoption, construction or revocation of which, my discretion is my only guide.

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 Ohio, 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 affirmed, with costs.

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*Bank of the United States, Plaintiffs in error, *v.* Herbert G. Waggener, George Wagley and Alexander Miller. [*378

Usury.

The office of the Bank of the United States, at Lexington, Kentucky, in February 1822, held a large amount of notes of the Bank of Kentucky, which had been received in the usual course of business, at the full value expressed on their face, as equivalent to gold and silver, and were so considered by the bank; on the amount of these notes so held, the Bank of Kentucky had agreed to pay interest, at the rate of six per centum, until the same should be redeemed; all the notes of the Bank of Kentucky, held by the Bank of the United States, were finally paid with the interest. In February 1822, when the notes of the Bank of Kentucky were at a depreciation of between thirty-three and forty per cent., Owens applied to the office of the Bank of the United States, for a loan of $5000 of the said notes, saying they would answer his purpose as well as gold or silver; after repeated refusals and re-applications, with the consent of the board of directors of the Bank of the United States, at Philadelphia, the sum of $5000, in the notes of the Bank of Kentucky, was loaned to him, on a promissory note, signed by him, and by Waggener, Miller and Wagley, payable in three years, with interest, at the rate of six per cent. per annum; the money so loaned was paid to the borrower in the notes of the Bank of Kentucky, and in a check on that bank; and the interest on that amount of the notes, being so much of the sum due by the Bank of Kentucky to the Bank of the United States, ceased from the date of the loan. In an action on the note given by Owens and others, the defence was set up, that the transaction was usurious, contrary to the charter of the Bank of the United States, and void: *Held*, that there was no usury in the transaction.

The statute of usury of Kentucky of 1798, declares, that all bonds, notes, &c., taken for the loan of money, where "is reserved or taken" a greater rate of interest than six per cent, shall be void. In this case, no interest at all was taken, the interest being payable at the termination of three years mentioned in the note; and if the case be brought within the statute, it must be, not as a taking, but as a reservation, of more than legal interest.

The ninth article of the fundamental articles of the charter of the Bank of the United States, declares, among other things, "that the bank shall not be at liberty to purchase any public debt whatsoever, nor shall it take more than at the rate of six per centum per annum, for or on its loans or discounts." It is clear, that the present transaction does not fall within the prohibition of dealing or trading, in the preceding part of the same article; according to the interpretation thereof given by this court in the case of Fleckner *v.* Bank of United States, 8 Wheat. 338, 351, to which the court deliberately adhere.

The words of the article are, that the bank shall not take (not, shall not reserve or take) more than at the rate of six per cent. In the construction of statutes of usury, this distinction between the reservation, and the *taking, of usurious interest, has been deemed very material; for the reservation of usurious interest makes the contract utterly void; but if usurious interest be not stipulated for, but only taken afterwards, then the contract is not void, and the party is only liable for the excess. [*379

In the case of the Bank of the United States *v.* Owens, 2 Pet. 527, 538, it was said, that in the charter, the word "reserving" must be implied in the word "taking." This expression of opinion was not called for by the certified question which arose out of the plea; for it was expressly averred in the plea, that in pursuance of the corrupt and unlawful agreement therein stated, the bank advanced and loaned the whole consideration of the note, after deducting a large sum for discount, in the notes of the Bank of Kentucky, at their nominal value.

The case of the Bank of the United States *v.* Owens, 2 Pet. 527, turned upon considerations essentially different from those presented in the present record. The questions certified in that case, arose upon a demurrer to a plea of usury; and the demurrer, in terms, admitted that the agreement was unlawfully, usuriously and corruptly entered into; so that no question as to the intention of the parties, or the nature of the transaction, was put; the transaction was usurious

and the agreement corrupt; and the question there was, whether, if so, it was contrary to the prohibitions of the charter, and the contract void. In the present case, the questions are very different; whether the agreement was corrupt or usurious; or *bonâ fide*, and without any intent to commit usury, or to violate the charter, are the very points which the jury were called upon, and under the instructions, were asked, to decide; the decision in 2 Pet. 527, cannot, therefore, be admitted to govern this; for the *quo animo* of the act, as well as the act itself, constitute the gist of the controversy.

In construing the usury laws, the uniform construction in England has been, and it is equally applicable here, that to constitute usury, within the prohibitions of the law, there must be an intention, knowingly to contract for, and to take, usurious interest; for if neither party intend it, and act *bonâ fide* and innocently, the law will not infer a corrupt agreement.

This principle would seem to apply to the charter of the bank; there must be an intent to take illegal interest; or, in the language of the law, a corrupt agreement to take it, in violation of the charter; the *quo animo* is, therefore, an essential ingredient in all cases of this sort.

There has been no taking of usury, and no reservation of usury, on the face of this transaction. The case, then, resolves itself into this inquiry, whether, upon the evidence, there was any such corrupt agreement, or device or shift, to reserve or take usury; and none of these appear in the case.

Because an article is depreciated in the market, it does not follow, that the owner is not entitled to demand or require a higher price for it, before he consents to part with it; he may possess bank-notes which to him are of par value, in payment of his own debts, or in payment of public taxes; and yet their marketable value may be far less; if he uses no disguise, if he seeks not to cover a loan of money, under the pretence of a sale or exchange of them, but the transaction is *bonâ fide* what it purports to be; the law will not set aside the contract, for it is no violation of any public policy against usury.[1]

*380] ERROR to the Circuit Court of Kentucky. *The plaintiffs in error instituted an action against the defendants, and one William Owens, on a promissory note for $5000, dated the 7th of February 1822, and payable at the office of the Bank of the United States, at Lexington, Kentucky, on the 7th of February 1825, with interest at the rate of six per centum per annum; the defendants were joint and several promisors with William Owens. Upon a plea and demurrer in the suit, a division of opinion was certified by the judges of the circuit court to this court, upon which the opinion of the court was given, as reported in 2 Pet. 527.

Afterwards, at May term 1833, the case having been remanded, judgment was entered against William Owens, for want of a plea, and the other defendants pleaded the general issue; upon which, the cause was tried by a jury, and a verdict and judgment, under the direction of the court, were given for the defendants. A bill of exceptions to the refusal of the court to give the instructions asked by the plaintiffs, and to those given by the court, at the request of the defendants, was tendered on behalf of the plaintiffs, and was sealed by the judges of the circuit court.

The note declared on was in the following terms:

"On or before the 7th day of February 1825, we, William Owens, Alexander Miller, Herbert G. Waggener, George Wagley, jointly and severally promise to pay to the president, directors and company of the Bank of the United States, at their office of discount and deposit at Lexington, the sum of five thousand dollars, in lawful money of the United States, with interest thereon, in like money, after the rate of six per cent. per annum, from this day, until paid, for value received, at the said office of discount

[1] See notes to United States Bank *v.* Owens, 2 Pet. 527.

and deposit at Lexington, without defalcation. Witness our hands, this 7th day of February 1822.

WILLIAM OWENS,
ALEXANDER MILLER,
HERBERT G. WAGGENER,
GEORGE WAGLEY."

Witness—JOHN BREEN."

On which note was the following indorsement: "Mem.—Interest is to be charged on this note from the 21st day of May 1822, only, and not from the 7th of February *1822, within mentioned, the former being the day on which the amount was actually received by the makers of the note. [*381

H. CLAY."

The evidence in the case established the following facts: Before the time when the note was given, the office of the Bank of the United States at Lexington, was the holder of a large amount of notes of the Bank of Kentucky, which had been received in the usual course of business, at the full value of the notes expressed upon them, in gold and silver. These notes were considered as valuable to the full extent of their amount, although the Bank of Kentucky had suspended paying their notes in specie. No doubt was entertained by the officers of the office of the Bank of the United States, of the full ability of the Bank of Kentucky so to redeem them. At the time the loan was made to Owens on the note sued upon, the notes of the Bank of Kentucky had depreciated to the amount of between thirty-three and forty per cent. It was also in evidence, that when the Bank of Kentucky suspended specie payments, in 1819, the institution was considerably indebted to the plaintiffs, at the office at Lexington, for her notes taken in the usual course of business, and for government deposits transferred to that office from the Bank of Kentucky and its branches; and that the accounts had been settled between the institutions, the balance ascertained and placed to the credit of the plaintiffs, on the books of the Bank of Kentucky, as a deposit upon which the Bank of Kentucky agreed, in consideration of forbearance of the plaintiffs, to pay interest at the rate of six per cent. per annum; and that said interest, as it accrued, was carried, at stated intervals of time, to the credit of the plaintiffs, on the books of the bank; and that the amount paid Owens on the said check had the effect of stopping the interest on that sum from that time. The balance which remained due from the Bank of Kentucky to the Bank of the United States was finally settled and discharged, in specie or its equivalent, about seven months after the date or time of the said loan to Owens. The Bank of Kentucky did not, for many years after the date of the loan to Owens, generally resume the payment of its notes in specie or its equivalent.

In the state of things existing in 1822, William Owens applied *to the office at Lexington, for a loan of $5000, in the notes of the Bank of Kentucky, assuring the bank that they would answer his purpose as well as gold or silver. The offer was rejected by the directors of the bank; and on its renewal, was again refused. A third time, the loan was applied for, the interference of a gentleman connected with the business of the bank, not a director, to procure it, was solicited and obtained; and the application was referred to the board at Philadelphia, by which the loan was authorized, [*382

a mortgage on real estate being given as an additional security for the loan. The mortgage and note having been executed, the amount of the same was paid to William Owens, by handing him $1100, in notes of the Kentucky Bank, and a check of that bank for $3900, which was paid to him at that bank in its notes.

The defence to the action was, that the transaction was usurious; and therefore, contrary to the act of congress incorporating the Bank of the United States, and void. On the trial, the following instructions to the jury were asked by the counsel for the plaintiffs.

1. That if they believed from the evidence, that the consideration of the note sued on was $3900, paid in a check on the Bank of Kentucky, and $1100 in Kentucky notes, and that the contract was fairly made, without any intention to evade the laws against usury; but that the parties making the contract intended to exchange credits, for the accommodation of Owens; that the Bank of Kentucky was solvent, and so understood to be, and able to pay all its debts by coercion; that the contract is not void for usury, nor contrary to the fundamental law or charter of the bank, notwithstanding it was known to the parties, that said bank did not pay specie for its notes, without coercion, and that the difference in exchange between bank-notes of the Bank of Kentucky and gold and silver, was from thirty-three to forty per cent. against the notes of the Bank of Kentucky.

2. To instruct the jury, that if they believe, from the evidence, that the contract was made on the part of the bank, fairly, and with no intention to avoid the prohibition of their charter, by taking a greater rate of interest than six per cent., or the statutes against usury, but at the instance, and for the accommodation and benefit, of the defendant Owens; and that at the *383] time of the *negotiation and contract for the check on the bank, and the $1100 in bank-notes of the Bank of Kentucky, that bank was indebted to the Bank of the United States, at their office aforesaid, the sum of $10,000 or more, bearing an interest of six per cent., which sum, it was understood and believed by the parties to the contract, at and before its execution, the Bank of Kentucky was well able to pay, with interest, and which sum it did pay, after deducting the $3900, paid to the defendant Owens, with interest, in gold or silver, or its equivalent; that the contract was not usurious, unless they believed that the contract was a shift or device entered into to avoid the statute against usury, and the prohibition of the charter, notwithstanding the jury should find that the check and notes aforesaid were, in point of fact, of less value than gold and silver.

3. If the jury find, from the evidence in the cause, that the defendants applied to the plaintiffs to obtain from them $5000 of the notes of the president, directors and company of the Bank of Kentucky; and in consideration of their delivering, or causing to be delivered, to the defendants, $5000 of such notes; and the said Bank of Kentucky was then solvent and able to pay the said notes, and has so continued up to this time; and that the holders thereof could, by reasonable diligence, have recovered the amount thereof, with six per centum per annum interest thereon, from the time of the delivery of them by plaintiffs to defendants, up to the time of such recovery; and that said arrangement and contract was not made under a device, or with the intent, to evade the statutes against usury, or to evade the law inhibiting the plaintiffs from receiving or reserving upon loans, interest at a

greater rate than six per centum per annum; then the transaction was not in law usurious or unlawful, and the jury should find for the plaintiffs.

4. That unless the jury find from the evidence in the cause, that the advance, sale or loan of the notes on the Bank of Kentucky, made by plaintiffs to defendants, was so made as a shift or device to avoid the statute against usury, or in avoidance of the clause of the act of congress which inhibits the plaintiffs from taking or reserving more than at the rate of six per centum per annum for the loan, forbearance, or giving day of *payment of money, the law is for the plaintiffs, and the jury should find accordingly. [*384

5. That unless they believed, from the evidence in this cause, that there was a lending of money, and a reservation of a greater rate of interest than at the rate of six per centum per annum, stipulated to be paid by defendants to plaintiffs; the law is for the plaintiffs, and the jury should find for them; unless they further find, that there was a shift or device resorted to by the parties, with the intent and for the purpose of avoiding the law, by which something other than money was advanced, and by which a greater rate of interest than six per cent. was allowed.

6. That if the defendants applied to the plaintiffs for a loan of $5000 of the notes of the Bank of Kentucky, and agreed to give therefor their note for $5000, payable three years thereafter, with interest, and the Bank of Kentucky was then, and continued thereafter to be, solvent, and the said Bank of Kentucky did thereafter pay and discharge to the holders thereof the said notes, the said contract was not unlawful—although the notes of the Bank of Kentucky would not then command, in gold or silver, their nominal amount, when offered for sale or exchange as a commodity or money.

7. That if they found from the evidence, that the defendants obtained from the plaintiffs $5000 of the notes of the Bank of Kentucky, or $3900 in a check upon said bank and $1100 of its notes, and in consideration thereof made the note sued upon, the said transaction was not, therefore, unlawful or usurious—although the notes of the Bank of Kentucky were then at a depreciation in value of thirty-three per cent., in exchange for gold or silver.

8. That there was no evidence in this cause, conducing to prove, that there was a loan by the plaintiffs to the defendants of notes on the president, directors and company of the Bank of Kentucky.

The court refused to give these instructions, and on motion of the defendants instructed the jury: "That if they find from the evidence, that the only consideration for the obligation declared upon was a loan made by the plaintiffs to Owens, of $5000 in notes of the Bank of Kentucky, estimated at their nominal amounts, part paid in the notes themselves, and the residue *in a check drawn by the plaintiffs on the Bank of Kentucky, on the understanding and agreement that the said Owens was to receive the notes of said bank in payment thereof, and he accordingly did so; that the Bank of Kentucky had, before that time, suspended specie payments, and did not then pay its notes in lawful money; that the said notes then constituted a general currency in the state of Kentucky, commonly passing in business and in exchange at a discount of between thirty and forty per cent. below their nominal amounts, and could not have been sold or passed at a higher price; that the said facts were known to the plaintiffs and said Owens, yet the plaintiffs passed the said notes to the said Owens, the [*385

borrower, at their nominal amounts; then the transaction was in violation of the act of congress incorporating the plaintiffs, the obligation declared on is void, and the verdict ought to be for the defendants." The plaintiffs prosecuted this writ of error.

Sergeant, for the plaintiffs in error, submitted the following printed argument.

The errors assigned are: 1. That the court erred in giving the instructions prayed by the defendants. 2. That they erred in not giving the instructions prayed by the plaintiffs.

The case presented and adjudicated by this court, in *The Bank* v. *Owens*, 2 Pet. 527, was essentially different from the case now submitted. There, unfortunately, the plaintiffs, by demurring to the defendant's plea, admitted all the allegations it contained, in their strongest sense, including the allegation of corrupt and usurious intention. In short, they confessed that the contract was properly characterized as corrupt, usurious, and in violation of the charter. The court were thus compelled to declare the law as applied to a contract thus alleged on one side, and confessed on the other, with all its offensive description, without the power of looking into the true merits of the case, and ascertaining whether the transaction was really such as it was represented to be. To this their decision was limited.

*386] *The real state of the case is now brought before the court upon the evidence; from which it will be perceived, at once, that the injurious charges of the plea, so incautiously admitted by the demurrer, have no support whatever from the facts; and that the judicial prejudice the bank has suffered, as well as the extensive prejudice in public opinion, are wholly unmerited. The transaction was innocent and just, entered into with the fairest intentions, upon a full and adequate consideration, and with no view to any gain by the bank, or any loss to Owens. The bank, literally, did not gain one cent by the negotiation; it did not even gain the interest, for interest, at the same rate, was payable at the Bank of Kentucky. Neither did it, by the negotiation, convert capital that was dead, into active capital; a long credit being allowed. On the other hand, Owens did not lose. He declared, that what he received was, to him, equal to gold or silver; and it must be taken for granted, that it proved to be so, for there is no evidence, nor even an allegation, to the contrary. It further appears, that this negotiation was at the earnest instance of Owens, and for his accommodation. When he thought his own instances insufficient, he sought the aid of others, and especially applied to Mr. Clay, who was counsel of the bank, and to the late Colonel Morrison, who had been president of the office, to use their influence, as his friends, to aid him in obtaining what he asked. And finally, it appears that the application, from the beginning, was for the notes of the Bank of Kentucky, which, to him, were equal to gold or silver. These facts are conclusively proved by the depositions of the witnesses, and especially by the minutes of the office, and Mr. Cheves's letter of the 27th March 1822, in the record.

The instruction given by the court was, that the "transaction was in violation of the act of congress incorporating the plaintiffs, the obligation declared on is void, and the verdict ought to be for the defendant." Is this

instruction correct? This is the question, and the only question, in the case. The plaintiffs in error submit, that it is not.

The words of the charter, are that, in its loans or discounts, *the bank shall not take more than at the rate of six per centum per [*387 annum. The negotiation with Owens cannot, with any propriety (now that the evidence is disclosed), be termed "a loan or discount," within the meaning of this section of the act of congress. The language of the act is properly applicable to the lending of money, that is to say, gold or silver. It is very true, that borrowers seldom receive in gold or silver. They commonly take bank credits, or notes of the bank which makes the loan; but these give a present right to demand gold or silver, and are taken by the borrower, for his own convenience, as the evidence that he has so much gold or silver in the bank. Here, there was no such loan. There was no discount, in the ordinary way of discounting; but a special agreement, the nature of which will be presently considered. The bank did not "take more than at the rate of six per centum per annum." If we look at the terms of the agreement, we find the rate of interest agreed upon was precisely six per centum per annum, neither more nor less. So particular was the learned counsel of the bank in observing precisely the spirit as well as the words of the charter, that he took care, by an indorsement on the note, to prevent the interest from beginning to run before the day when the consideration was actually received by Owens, which happened to be some time after the date of the note.

The decision, however, in *The Bank* v. *Owens*, 2 Pet. 527, rested entirely upon a position which admitted the express and apparent terms of the contract to be quite consistent with the provision of the act of congress already quoted. The position was, that it presented "one of those cases in which a device is resorted to, by which is reserved a higher profit than the legal interest, under a mask thrown over the transaction." This, the court say, is a fraud upon the statute, and "a fraud upon a statute is a violation of the statute." From this conclusion the court derive another, namely, that such a contract is entirely void, and no court will aid its being enforced. Upon the pleadings in the case just cited, this conclusion was deduced by the court, but even upon those pleadings, it was deduced with hesitation, only upon the authority of a case which decides, that "the confession of the *quo animo*, implied *in a demurrer, will affect a case with usury." Immediately after, it is added by the court, "a very similar case in [*388 the same book, in which the plaintiff had traversed the plea, was left to the jury with a favorable charge." The decision of the court, therefore, turned entirely upon the *quo animo* averred in the plea, and admitted by the demurrer, and was confined entirely to a case so brought up, with a very strong intimation, that upon a traverse the result would be different.

This plea has been withdrawn, and is no longer before the court. The unfortunate demurrer has gone along with it. In lieu of it, the general issue of *non assumpsit* has been pleaded, and issue joined thereon, which is at least as beneficial to the plaintiffs as a traverse of the former plea would have been. Such an issue presented to the jury the question of *quo animo*, which was closed up in the former case by the issue of law, and led to the decision by this court. Upon the very principle, then laid down by this court, according to the authority of *Bedingfield* v. *Ashley*, Cro. Eliz. 741,

this question ought to have been left to the jury. The counsel of the plaintiffs asked for instructions to that effect, but the learned judge refused those instructions, and gave the instruction prayed by the defendant's counsel, taking the inquiry from the jury, and deciding, as a question of law, that the contract was void. The plaintiff was entitled to have the whole question of intention, or *quo animo*, left to the jury; and he was entitled to more, that is, to have it left to the jury, "with a favorable charge." Was there, or was there not, "a device resorted to," or "a mask thrown over the transaction," to disguise and cover an intention, scheme or plan, to violate or evade the charter, by taking more than lawful interest? There could not be, unless such an intention existed. Was there, then, such an intention? The evidence is full and clear, to show that there was not. The whole transaction was fair and *bonâ fide*, in the best good faith on the part of the bank, and with no disguise or concealment whatever. The court erred in not so leaving it to the jury.

Mr. Sergeant also contended at the bar: 1. That the negotiation was at
*389] the repeated instance of *Owens. The office twice declined his application, and then he employed the influence of his friends, Mr. Clay and Colonel Morrison, to obtain an order from the parent board. 2. That, according to his own statement, the notes he received were to him equal to gold and silver; he, therefore, sustained no loss. 3. That the bank gained nothing by the negotiaton. The notes were settled in account with the Bank of Kentucky, and were bearing interest; there was no gain in interest; there was no gain in time, but the contrary; the notes would have been paid much sooner by the Bank of Kentucky. The bank did not even gain the advantage of converting dead capital into active capital; it had less activity than before. 4. That the value of this paper was not to be ascertained by the value of paper in circulation. It was not in circulation; it was held by agreement, as evidence of debt, bearing interest; which no note in circulation bears. 5. That upon a fair estimate, the debt of the Bank of Kentucky was at the time, and is now, fully proved to have been worth more than the debt for which it was exchanged. 6. That the negotiation on the part of the bank was innocent, and without intention of usury, or any unlawful profit.

He then proceeded to argue, that there was error in the instruction given at the instance of defendants, and the refusal to give the instructions asked for by the plaintiffs in the court below. The court assumed, that the question was for the court, and as such, decided it as a question of law; when it really was a question of fact and intention, to be decided by the jury. This is manifest from the former decision of this court, when the case came up, on demurrer. *Bank* v. *Owens*, 2 Pet. 527.

There are two ways in which usury may be committed. 1. By agreeing for more interest than is allowed by law. 2. By some device which is a cover for the same thing.

1. The first may be decided by the court. This is the meaning of the case of *Roberts* v. *Trenayne*, Cro. Jac. 507. It is apparent to the court; *res ipsa loquitur*.

2. This is invariably a question for the jury. Ord on Usury *208;
*390] *Massa* v. *Darling*, 2 Str. 1243; *Lowe* v. *Waller*, 2 Doug. 736; 1 Esp.
But it has been decided in the *Bank* v. *Owens*, that we are not to be

affected by the usury laws of the states. 1. Was this a violation of charter? 2. If it were, how are we affected by it?

1. The charter meant only to fix the rate of interest on discounts; but this was no discount at all. It was a specific negotiation, and that negotiation was an innocent one. The bank gave a full consideration, with no view to gain; it did not gain. All its debt was paid in less than half the time. It was an exchange of credits.

2. The act is simply prohibitory. The effect, where there is nothing more, is only to relieve against the excess; or to enable the party to recover it back. The statutes of usury declare the contract void; but wherever the case is in the power of a court, either of law or equity, they compel the payment of principal and interest. A motion to set aside judgments upon the ground of usury, was refused in the exchequer. *Mathews* v. *Lewis*, 1 Anst. 7; Ord 118.

If one voluntarily pay the money and legal interest, he cannot recover it back; if more, only the excess. *Astley* v. *Reynolds*, 2 Str. 915; Ord 118–19. So, if he sue for a pledge or security. *Fitzroy* v. *Gwillim*, 1 T. R. 153. So, in equity, before a party can get relief, he must pay the money and lawful interest. *Bosanquett* v. *Dashwood*, Cas. temp. Talb. 38. Cited also, Ord on Usury 141; *Barnard* v. *Langley*, Toth. 117; *Proof* v. *Hines*, Cas. temp. Talbot 111; *Scott* v. *Nesbitt*, 2 Bro. C. C. 641; Ord 143–6; *Taylor* v. *Bell*, 2 Vern. 170; *Barker* v. *Vansommer*, 1 Bro. C. C. 149. The rule is the same in Pennsylvania. The same principle has been established in this court. *Bank of the United States* v. *Fleckner*, 8 Wheat. 355. The cases to the contrary are against public morals, or against some great public policy, mostly involving a misdemeanor, and criminally offensive.

On either ground, the plaintiffs in error are entitled to have the judgment reversed.

*A printed argument, prepared by Messrs. *Crittenden* and *Monroe*, counsel for the defendants in the circuit court, was delivered to the [*391 court. They contended, that upon the case presented in the record, the only questions that can arise, relate to the propriety of the decision of the court, in giving the instruction asked on the part of the defendants and in refusing those asked on the part of the plaintiffs. All these questions depend on the proper construction and application of that part of the ninth section of the fundamental rules of the bank-charter, which declares that the bank shall not "take more than at the rate of six per centum per annum, for or upon its loans or discounts."

First, then, as to the propriety of the instruction given at the instance of the defendants. The usury laws of Kentucky, like the charter of the bank, forbid the taking of a greater interest than six per cent. per annum upon loans; and it has been repeatedly decided by the court of appeals of that state, that the lending of depreciated bank paper, and taking the bond or note of the borrower for its nominal amount in specie, with legal interest only, is usurious, and a plain and direct infraction of the statute forbidding the taking of more than six per centum per annum. *Freeman* v. *Brown*, 7 T. B. Monr. 263; *Rodes's Executors* v. *Bush*, 5 Ibid. 477; *Boswell* v. *Clarkson*, 1 J. J. Marsh 47. That court has invariably proceeded on the principle, that the current value of the depreciated paper, at the time of

lending and borrowing, was to be considered its real value ; and that if the payment stipulated for by the borrower, exceeded the amount of the current value of the depreciated paper at the time, and legal interest thereon, that it was against law, and usurious.

The lender who receives an interest of six per cent. upon a greater sum than he actually lends, is most clearly, we think, as much and as directly a violator of the law, as he who reserves more than six per cent. upon the sum actually loaned. The facts on which this instruction is predicated, are incontestably established by the evidence ; and the legal conclusions drawn from them, as stated in said instruction, are confidently believed to be correct, and to be maintained by the decision of this court, upon this case, when formerly before it. The *facts on which this instruction is founded *392] are the same, in effect, that were alleged in the plea that was then decided to be a good and sufficient bar to the action. We conclude, therefore, that this instruction is proper, and according to law.

Secondly, as to the instructions moved on the part of the plaintiffs, and refused by the court: we contend, that they are all either impertinent, as having no application to the case as it appears in proof; or that they are embraced and negatived by the considerations and authorities urged in support of the instruction given at the instance of the defendants. That the refusal of them was correct, and could not prejudice the plaintiffs.

The uncontested facts make an apparent case of usury. The application of Owens was for a loan—a loan was made to him of $5000, in Kentucky Bank paper, depreciated between thirty-three and forty per cent. And for the nominal amount of this paper, the note in question was taken, payable in lawful money of the United States, with six per centum interest thereon. About these facts, there can be no dispute. They make, *per se*, a case of usury, and "cannot by intendment have any other construction"—*res ipsa loquitur*. *Roberts* v. *Trenayne*, Cro. Jac. 508. Yet to give it some "other construction," by one "intendment" or other, is the object of all the instructions moved on the part of the plaintiffs, that are applicable to the case.

In the case above referred to in Croke, the distinction is taken between cases where usury is apparent from the circumstances, and where it is only "implied." Here, from indisputable facts stated, it is apparent, that the plaintiffs, by the note in suit, have attempted to secure to themselves a much greater amount than the value which they loaned, and six per centum interest thereon. This is not the evidence of usury, it is usury itself. And its legal character and effect cannot be changed or evaded, by any fairness of mere intention, that may be ascribed to the lender. It is manifest, that the plaintiffs did intend to do, and did in fact do, everything necessary to constitute an usurious loan ; that they did take more than at the rate of six per centum per annum upon this loan to Owens ; and did intend to do all *they did do ; it was, therefore, in vain for them to allege afterwards, *393] they did not intend to violate the law.

No error of the officers of the bank, as to the effect of the transaction under the law, can give validity to the paper taken in violation of the law. Their supposition, that the loan of depreciated paper, at its nominal amount, to be repaid in lawful money, with interest upon it, was authorized by their charter and lawful, could not make it so. Where there was a controversy

as to what the transaction was, in fact, the intention of the parties may have effect in determining its character; but when the fact, and intention to do what was acted, are manifest, the law is only to be appealed to, for the effect and consequences. Here, that the transaction was a loan is unquestionable; and the instruction given by the court is predicated on this, together with the other facts, to be found by the jury. The conclusion of law pronounced by the court was inevitable.

STORY, Justice, delivered the opinion of the court.—This is a writ of error to the circuit court of the district of Kentucky, to revise a judgment of that court, in a case where the plaintiffs in error were original plaintiffs in the suit. The suit was an action of debt brought upon a promissory note, dated the 7th of February 1822, whereby the defendants, on or before the 7th of February 1825, jointly and severally promised to pay the president, &c., of the Bank of the United States, at their office of discount and deposit, at Lexington, $5000, with interest thereon, after the rate of six per cent. per annum, until paid, for value received. And by a memorandum on the back of the note, the interest was to be charged only from the 21st of May 1822, that being the day on which the money was actually received by the makers of the note.

The plea of payment was put in, upon which issue was joined; and it was agreed between the parties, that either party, under the issue, might give in evidence any special matter which could be specially pleaded. At the trial, a verdict was rendered for the defendants, upon which, judgment passed in their favor; and the cause is now brought before us for revision, upon a bill of exceptions taken at the trial, and for matters of law therein stated.

*From the evidence at the trial, it appears, that prior to the time when the note was given, viz., in 1819, the Bank of Kentucky, which [*394 had previously been in high credit, suspended specie payments; and at that time, the institution was indebted to the plaintiffs, the Bank of the United States, in a large sum of money, for notes of the Bank of Kentucky, taken at par, in the usual course of business, and for government deposits transferred to the office at Lexington, from the Bank of Kentucky and its branches. The accounts had been settled between the two institutions, the balance ascertained and placed to the credit of the plaintiffs, on the books of the Bank of Kentucky, as a deposit; upon which the Bank of Kentucky agreed, upon consideration of forbearance, to pay interest at the rate of six per cent. per annum; and the interest, as it accrued, was carried, at stated intervals, to the credit of the plaintiffs, on the books of the bank. This agreement was punctually performed by the Bank of Kentucky, and the balance, which remained due to the plaintiffs, was finally settled and discharged in specie, or its equivalent, in about seven months after the negotiation, which will be immediately noticed.

In this state of things, Owens, one of the defendants, made repeated applications to the Lexington office of the Bank of the United States, for an accommodation of $5000, in Kentucky Bank notes, of which the office had a considerable sum on hand, stating that such notes would answer his purpose as well as gold or silver, and agreeing to receive them at their nominal amounts. These applications were rejected; and finally, at his

urgent suggestions, an application was made to the parent bank at Philadelphia, to permit the Lexington office to grant the application; and the parent bank accordingly gave the permission. The note now in suit was accordingly given, with a mortgage of real estate, as collateral security; and $1100 was received in Kentucky Bank notes, and the remaining $3900 was paid by a check drawn on the Bank of Kentucky, which was duly honored; the amount of the check was deducted from the balance due to the plaintiffs, and interest thereon immediately ceased.

It further appeared, at the trial, that the Bank of Kentucky was never insolvent, but had always sufficient effects to pay its debts; that it had been several times sued for its debts, which *had been always paid in *395] specie, or other arrangements had been made satisfactory to the creditors. It had discharged the greater part of its debts, and had distributed among its stockholders ten dollars in specie and seventy dollars in notes of the Commonwealth Bank of Kentucky (which were at a great depreciation), and that all its funds had not yet been distributed. The Bank of Kentucky never resumed specie payments, and at the time of the negotiation above stated, the notes were depreciated from thirty-three to forty per cent., and were current as a circulating medium at this rate of depreciation. They were, however, by law, receivable for state taxes and county levies at par, and had accordingly been so received. Upon this evidence, the plaintiffs moved the court to instruct the jury as follows:

1. That, if they believe from the evidence, that the consideration of the note sued on was $3900, paid in check on the Bank of Kentucky, and $1100 in Kentucky Bank notes; and that the contract was fairly made, without any intention to evade the laws against usury, but that the parties making the contract intended to exchange credits, for the accommodation of Owens, that the Bank of Kentucky was solvent, and so understood to be, and able to pay all its debts by coercion, that the contract is not void for usury, nor contrary to the fundamental law or charter of the bank, notwithstanding it was known to the parties that said bank did not pay specie for its notes without coercion, and that the difference in exchange between bank-notes of the Bank of Kentucky, and gold and silver, was from thirty-three to forty per cent., against the notes of the Bank of Kentucky.

2. To instruct the jury that, if they believe from the evidence, that the contract was made on the part of the bank fairly, and with no intention to avoid the prohibition of their charter, by taking a greater rate of interest than six per cent., or the statutes against usury, but at the instance, and for the accommodation and benefit, of the defendant Owens; and that at the time of the negotiation and contract for the check on the bank, and the $1100 in bank-notes of the Bank of Kentucky, the Bank of Kentucky was indebted to the Bank of the United States, at their office aforesaid, the sum of $10,000 or more, bearing an interest of six per cent.; which sum, *it was understood and believed by the parties to the contract, at and *396] before its execution, the Bank of Kentucky, with interest, was well able to pay, and which sum it did pay, after deducting the $3900 paid to the defendant Owens, with interest, in gold or silver, or its equivalent, that the contract was not usurious, unless they believe that the contract was a shift or device entered into to avoid the statute against usury, and the prohibition of the charter, notwithstanding the jury should find, that

the check and notes aforesaid were, in point of fact, of less value than gold and silver.

3. If the jury find from the evidence in the cause, that the defendants applied to the plaintiffs to obtain from them $5000 of the notes of the president, directors and company of the Bank of Kentucky, and in consideration of their delivering, or causing to be delivered, to the defendants, $5000 of such notes, and the said Bank of Kentucky was then solvent and able to pay the said notes, and has so continued up to this time; and that the holders thereof could, by reasonable diligence, have recovered the amount thereof, with six per centum per annum interest thereon, from the time of the delivery of them by plaintiffs to defendants, up to the time of such recovery, and that said arrangement and contract was not made under a device, or with the intent, to evade the statutes against usury, or to evade the law inhibiting the plaintiffs from receiving or reserving upon loans, interest at a greater rate than six per centum per annum; then the transaction was not in law usurious or unlawful, and the jury should find for the plaintiffs.

4. That unless the jury find, from the evidence in the cause, that the advance, sale or loan of the notes on the Bank of Kentucky, made by plaintiffs to defendants, was so made as a shift or device to avoid the statute against usury, or in avoidance of the clause of the act of congress, which inhibits the plaintiffs from taking or reserving more than at the rate of six per centum per annum for the loan, forbearance, or giving day of payment of money, the law is for the plaintiffs, and the jury would find accordingly.

5. That unless they believe, from the evidence in this cause, that there was a lending of money, and a reservation of a greater rate of interest than at the rate of six per centum per *annum, stipulated to be paid by defendants to plaintiffs, the law is for the plaintiffs, and the jury should find for them; unless they further find, that there was a shift or device resorted to by the parties, with the intent and for the purpose of avoiding the law, by which something other than money was advanced, and by which a greater rate of interest than six per cent. was allowed. [*397

6. That if the defendants applied to the plaintiffs for a loan of $5000 of the notes of the Bank of Kentucky, and agreed to give therefor their note for $5000, payable three years thereafter, with interest, and the Bank of Kentucky was then, and continued thereafter to be, solvent, and the said Bank of Kentucky, did thereafter pay and discharge to the holders thereof the said notes, the said contract was not unlawful, although the notes of the Bank of Kentucky would not then command, in gold or silver, their nominal amount, when offered for sale or exchange as a commodity or money.

7. That if they find from the evidence that the defendants obtained from the plaintiffs $5000 of the notes of the Bank of Kentucky, or $3900 in a check upon said bank, and $1100 of its notes, and in consideration thereof, made the note sued upon, the said transaction was not, therefore, unlawful or usurious, although the notes of the Bank of Kentucky were then at a depreciation in value of thirty-three per cent. in exchange for gold and silver.

8. That there is no evidence in this cause, conducing to prove, that there was a loan by the plaintiffs to the defendants, of notes on the president, directors and company of the Bank of Kentucky.

The court refused to give any of these instructions; and upon the prayer of the defendants, instructed the jury as follows: "That if they

find from the evidence, that the only consideration for the obligation declared upon was a loan made by the plaintiffs to Owens of $5000, in notes of the Bank of Kentucky, estimated at their nominal amounts, part paid in the notes themselves, and the residue in a check drawn by the plaintiffs on the Bank of Kentucky, on the understanding and agreement that the said Owens was to receive the notes on said bank in payment thereof, and he
*398] accordingly did so; that *the Bank of Kentucky had, before that time, suspended specie payments, and did not then pay its notes in lawful money; that the said notes then constituted a general currency in the state of Kentucky, commonly passing in business and in exchange, at a discount of between thirty and forty per cent. below their nominal amounts, and could not have been sold or passed at a higher price; that the said facts were known to the plaintiff and said Owens, yet the plaintiffs passed the said notes to the said Owens, the borrower, at their nominal amounts; then the transaction was in violation of the act of congress incorporating the plaintiffs, the obligation declared on is void, and the verdict ought to be for the defendants."

The statute of usury of Kentucky of 1798, declares, that no person shall hereafter contract, directly or indirectly, for the loan of any money, wares, merchandise or other commodity, above the value of six pounds for the forbearance of one hundred pounds for a year, and after that rate, for a greater or lesser sum, or for a longer or shorter time; and all bonds, contracts, &c., thereafter made for payment or delivery of any money or goods so lent, on which a higher interest is reserved or taken than is hereby allowed, shall be utterly void. This clause of the act is substantially a transcript of the statute of 12 Ann., stat. 2, c. 16, § 1, and therefore, the same construction will apply to each. In the present case, no interest at all has been taken by the plaintiffs on the $5000. There was no discount of the accruing interest from the face of the note, and the interest was payable only with the principal, at the termination of the three years mentioned in the note. If the case, therefore, can be brought within the statute, it must be, not as a taking, but as a reservation, of illegal interest.

The ninth article of the fundamental articles of the charter of the Bank of the United States (act of 1816, ch. 44, § 11) declares, among other things, that the bank "shall not be at liberty to purchase any public debt whatsoever; nor shall it take more than at the rate of six per centum per annum for or upon its loans or discounts." It is clear, that the present transaction does not fall within the prohibition of dealing or trading, in the preceding part of the same article, according to the interpretation thereof given by
*399] this court, in **Fleckner* v. *Bank of the United States*, 8 Wheat. 338, 351, to which we deliberately adhere.

It is observable, that the words of the article are, that the bank shall not take (not shall not reserve or take) more than at the rate of six per cent. In the construction of the statutes of usury, this distinction between the reservation, and taking of usurious interest, has been deemed very material; for the reservation of usurious interest makes the contract utterly void; but if usurious interest be not stipulated for, but only taken afterwards, then the contract is not void, but the party is only liable to the penalty for the excess. So it was held in *Floyer* v. *Edwards*, Cowp. 112. But in the case of the *Bank of the United States* v. *Owens*, 2 Pet. 527–8, it was said,

that in the charter, "reserving" must be implied in the word "taking." This expression of opinion was not called for by the certified question, which arose out of the plea; for it was expressly averred in the plea, that in pursuance of the corrupt and unlawful agreement therein stated, the bank advanced and loaned the whole consideration of the note, after deducting a large sum for discount, in the notes of the Bank of Kentucky, at their nominal value.

It is in reference to the usury act of Kentucky, and this article of the bank charter, that the various instructions asked or given are to be examined. But before proceeding to consider them, severally, it may be proper to remark, that in construing the usury laws, the uniform construction in England has been (and it is equally applicable here), that to constitute usury, within the prohibitions of the law, there must be an intention knowingly to contract for or to take usurious interest; for if neither party intend it, but act *bonâ fide* and innocently, the law will not infer a corrupt agreement. Where, indeed, the contract, upon its very face, imports usury, as by an express reservation of more than legal interest, there is no room for presumption, for the intent is apparent; *res ipsa loquitur*. But where the contract on its face is for legal interest only, there it must be proved, that there was some corrupt agreement, or device or shift, to cover usury; and that it was in the full contemplation of the parties. These distinctions are laid down and recognised as early as the cases of *Button* v. *Downham*, Cro. Eliz. 642; *Bedingfield* v. *Ashley*, Cro. Eliz. 741; *Roberts* *v. [*400
Trenayne, Cro. Jac. 507. The same doctrine has been acted upon in modern times, as in *Murray* v. *Harding*, 2 W. Bl. 859, where GOULD, Justice, said, that the ground and foundation of all usurious contracts, is the corrupt agreement; in *Floyer* v. *Edwards*, Cowp. 112; in *Hammet* v. *Yea*, 1 Bos. & Pul. 144; in *Doe* v. *Gooch*, 3 Barn. & Ald. 664; and in *Solarte* v. *Melville*, 7 Barn. & Cres. 431. The same principle would seem to apply to the prohibition in the charter of the bank. There must be an intent to take illegal interest, or, in the language of the law, a corrupt agreement to take it, in violation of the charter; and so it was stated in the plea, in the case of the *Bank of the United States* v. *Owens*, 2 Pet. 527. The *quo animo* is, therefore, an essential ingredient in all cases of this sort.

Now, it distinctly appears in the evidence, as has been already stated, that no interest or discount whatsoever was actually taken on the note; and on the face of the note, there was no reservation of any interest but legal interest. So that there has been no taking of usury, and no reservation of usury, on the face of the transaction. The case then resolves itself into this inquiry: whether, upon the evidence, there was any corrupt agreement, or device or shift, to reserve or take usury; and in this aspect of the case, the *quo animo*, as well as the act of the parties, is most important.

With these principles in view, let us now proceed to the examination of the instructions prayed by the plaintiffs. The substance of the first instruction is, that if the contract was fairly made by the parties, without any intention to evade the laws against usury, but that the parties making the contract intended to exchange credits, for the accommodation of Owens, that the Bank of Kentucky was solvent, and able to pay its debts by coercion, then the contract was not void for usury, nor contrary to the charter of the bank, notwithstanding the parties knew that the Bank of Kentucky

did not pay specie for its notes, without coercion, and that these notes were in exchange at a depreciation of from thirty-three to forty per cent. below par. We are of opinion, that this instruction ought to have been given. It excludes any intention of violating the laws against usury; and it puts the case as a *bonâ fide* exchange, of credits for the accommodation of Owens.

*401] Such an exchange is not, *per se*, illegal; though it may be so, if it is a mere shift or device to cover usury. If the application be not for a loan of money, but for an exchange of credits or commodities, which the parties *bonâ fide* estimate at equivalent values, it seems difficult to find any ground on which to rest a legal objection to the transaction. Because an article is depreciated in the market, it does not follow, that the owner is not entitled to demand or require a higher price for it, before he consents to part with it. He may possess bank-notes, which to him are of par value, because he can enforce payment thereof, and for many purposes, they may pass current at par, in payment of his own debts, or in payments of public taxes; and yet their marketable value may be far less. If he uses no disguise; if he seeks not to cover a loan of money, under the pretence of a sale or exchange of them; but the transaction is, *bonâ fide*, what it purports to be; the law will not set aside the contract, for it is no violation of any public policy against usury.

We are also of opinion, that the second instruction ought, for similar reasons, to have been given; and, indeed, it stands upon stronger grounds. It puts the case, that there was no intention to violate the charter or the statute against usury; that the contract was for the accommodation of Owens; that the Bank of Kentucky was indebted to the plaintiffs in a sum exceeding $10,000, bearing an interest of six per cent. (which the check would reduce *pro tanto*); that the Bank of Kentucky was able to pay the amount with interest, in gold or silver, and did pay it, after deducting the check of $3900; and then asserts, that under such circumstances, the contract was not usurious, unless the jury believe that the contract was a shift or device entered into to avoid the statute against usury, notwithstanding the check and the bank-notes were, in point of fact, of less value than gold and silver. So that, in fact, it puts the instruction upon the very point upon which the law itself puts transactions of this sort—the *quo animo* of the parties. Did they intend usury, and make use of any shift or device to cover a loan of money? Or did they, *bonâ fide*, intend a loan of bank-notes, which to the lender were of the full value of their numerical amount, and were so treated *bonâ fide* by the borrower? Unless the court were prepared to say (which we certainly are not), that all negotiations for

*402] *the sale or exchange of bank-notes, under any circumstances, must, to escape the imputation of usury, or the prohibition of the charter, be merely at their marketable value at the time, though worth more to both parties, the instruction was in its terms unexceptionable.

The third instruction is governed by the same reasoning. It puts the case, that the application was made for a loan, not of money, but for notes of the Kentucky Bank, to the amount of $5000, in consideration of the note sued on; that the Bank of Kentucky was solvent and able to pay its notes; that the holders thereof could, by reasonable diligence, have recovered the amount thereof, with interest at the rate of six per cent. per annum; and that there was no device or intent to evade the statute against usury, or the

prohibition of the charter; and then asserts, that under such circumstances, the transaction was not, in law, usurious. And here, it may be added, that if the case was as stated (and the evidence manifestly conduced to establish it), it is clear, that the plaintiffs could not, by the negotiation, entitle themselves to more interest than they were already entitled to against the Bank of Kentucky. It would be a mere exchange of securities, by which the plaintiffs did not reserve, and could not obtain, more than the legal rate of interest. If A. holds the note of B., for one hundred dollars and legal interest, and he exchange it with C., for his note for the same sum and legal interest, and B. and C. are both solvent, the transaction in no manner trenches upon the statute against usury.

The fourth instruction puts the case in a more general form; but the same principles apply to it.

The fifth instruction puts the case in the most pointed manner, whether there was an intended loan of money and a reservation of illegal interest, and a shift or device to cover it, and evade the law by advancing something other than money on the loan. If there was not, then it asserts (and in our judgment correctly) that the jury ought to find for the plaintiffs.

The sixth and seventh instructions fall under the same considerations, and are equally unexceptionable.

The eight instruction was properly refused, and ought not to have been given. The court could not judicially say, that there was no evidence conducing to prove, that there was a *loan by the plaintiffs of the notes of the Bank of Kentucky. There was evidence proper for the consideration of the jury; and the intent was to be gathered by them, from the whole circumstances of the transaction. [*403

In regard to the instruction given by the court upon the prayer of the defendants, it was probably given under the impression, that the case was governed by the decision of this court, in the *Bank of the United States* v. *Owens*, 2 Pet. 527. That case, however, in our opinion, turned upon considerations essentially different from those presented by the present record. The questions certified in that case arose upon a demurrer to a plea of usury, and the demurrer, in terms, admitted, that the agreement was unlawfully, usuriously and corruptly entered into; so that no questionas to the intention of the parties, or the nature of the transaction, was put. The transaction was usurious, and the agreement corrupt; and the question then was, whether, if so, it was contrary to the prohibitions of the charter, and the contract was void. In the present case, the questions are very different. Whether the agreement was corrupt and usurious, or *bonâ fide*, and without any intent to commit usury, or to violate the charter, are the very points, which the jury were called upon, under the instructions asked of the court, to decide. The decision in 2 Pet. 527, cannot, therefore, be admitted to govern this; for the *quo animo* of the act, as well as the act itself, constitute the gist of the controversy.

In our opinion, the instruction asked by the defendants, ought not to have been given. It excludes altogether any consideration of the *bona fides* of the transaction, and the intention of the parties, whether innocent or usurious; and puts the bar to the recovery (after selecting a few facts) substantially upon the ground, that the bank-notes loaned were a known depreciated currency, passing in exchange and business, at a discount of

from thirty to forty per cent., and were passed at their nominal amounts by the plaintiffs to the defendants; without any reference to the fact, whether there was any design to commit usury, or whether the notes were, in reality, of a higher intrinsic value, or of their full nominal value, to the parties; or whether there was, in the transaction, either a taking or a reser-
*404] vation of more than six per cent. *interest contemplated by the parties. From what has been already stated, these constituted the turning-points of the case; and the instruction could not properly be given, without making them a part of the inquiries before the jury, upon which their verdict was to turn.

Upon the whole, we are of opinion, that the first seven instructions prayed by the plaintiffs, ought to have been given to the jury; and the instructions given by the court, at the request of the defendants, ought to have been refused; and therefore, for these errors, the judgment ought to be reversed, and the cause remanded to the circuit court, with directions to award a *venire facias de novo.*

Judgment reversed.

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*405] *Robert Piatt, Appellant, *v.* Charles Vattier and others, and The Bank of the United States.

Statute of limitations.—Adverse possession.

A bill was filed in the circuit court of Ohio, for a conveyance of the legal title to certain real estate in the city of Cincinnati; and the statute of limitations of Ohio was relied on by the defendants; the complainant claimed the benefit of an exception in the statute, of non-residence and absence from the state; and evidence was given, tending to show that the person under whom he made his claim in equity was within the exception; the non-residence and absence were not charged in the bill, and, of course, were not denied or put in issue in the answer: *Held*, that the court could take no notice of the proofs; for the proofs, to be admissible, must be founded upon some allegations in the bill and answer. If the merits of the case were not otherwise clear, the court might remand the cause for the purpose of amending the pleadings.

There was in this case a clear adverse possession of thirty years, without the acknowledgment of any equity or trust estate in any one, and no circumstances were stated to the bill, or shown in evidence, which overcame the decisive influence of such an adverse possession. The established doctrine of the law of courts of equity, from its being a rule adopted by those courts, independent of any legislative limitations, is, that it will not entertain stale demands.[1]

Piatt *v.* Vattier, 1 McLean 146, affirmed.

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[1] Courts of equity, acting on their own inherent doctrine, of discouraging, for the peace of society, antiquated demands, refuse to interfere in attempts to establish a stale trust, except where the trust is clearly established, or where the facts have been fraudulently and successfully concealed by the trustee, from the knowledge of the *cestui que trust.* Relief, in such cases may be sought; but the rule is, that the *cestui que trust* should set forth in the bill, specifically, what were the impediments to an earlier prosecution of the claim, and how he came to be so long ignorant of his alleged rights, and the means used by the respondent to keep him or her in ignorance, and how he or she first come to the knowledge of their rights. Godden *v.* Kimmell, 99 U. S. 211; Badger *v.* Badger, 2 Wall. 87. Where a party appeals to the conscience of the chancellor, in support of the claim, where there has been *laches* in prosecuting it, or long acquiescence in the assertion of adverse right, he should set forth in his bill, specifically, what were the impediments to an earlier prosecution of the claim; and if he do not, the chancellor may justly refuse to consider his case, on his own showing, without inquiring whether there is a demurrer, or any formal plea of the statute of limitations, contained in the answer. Marsh *v.* Whitmore, 21 Wall. 185. And see Brown *v.* Buena Vesta County, 95 U. S. 161.

Piatt v. Vattier.

APPEAL from the Circuit Court of Ohio. On the 6th of December 1827, the appellant, a citizen and resident of the state of Kentucky, filed a bill in the circuit court of the United States for the district of Ohio, setting forth, that in the year 1789, when the city of Cincinnati was first laid out, the country being then a wilderness, and the town plat a forest of timber, certain lots in the said city were allotted, as donations, to those who should make certain improvements, within given periods of time; and the evidence of ownership, consisting of the certificate of the proprietors, was transferred from one person to another, by delivery, as evidence of title. That the lot No. 1, on the said plat, now occupied as the Cincinnati Hotel, was allotted to one Samuel Blackburn, who, before the conditions of the donation were fulfilled, transferred his right to one James Campbell, who soon thereafter transferred it to one John Bartle, who, in the summer of the year 1790, took possession of the same, and completed the *improvements required by the terms of the donation. That said Bartle continued [*406 to occupy said lot, and the building thereon erected, by himself, first, and subsequently, by his tenants Elliott and Williams, and by his tenant Abijah Hunt, for several years; having the certificate of the proprietors of the town as his evidence of title; and the said Bartle having become embarrassed in his circumstances, mortgaged the said lot to one Robert Barr, of Lexington, Kentucky, of whom, and his heirs, if deceased, nothing was known, for the sum of about $700, to the payment of which the rents reserved to said Bartle, from the tenants in possession, were to be, and a large amount was in fact appropriated and paid. That the said Bartle having been upset in crossing the Ohio river, and thrown into the same, lost his certificate for said lot, and this fact coming to the knowledge of one Charles Vattier, a citizen and resident of the state of Ohio, who, it was prayed, might be made defendant to the bill, and the said Bartle being then in very reduced circumstances, the said Vattier contriving and intending to defraud the said Bartle of the said lot, then become considerably valuable, went to Lexington and purchased of said Barr the mortgage given on said lot by said Bartle, which he took up; and having obtained from Abijah Hunt, then the tenant of said Bartle, the possession of the said lot, in the absence of said Bartle from the country, the said Vattier obtained from John Cleves Symmes, in whom the legal title was, a conveyance for said lot. That said Vattier having thus fraudulently obtained the possession of and title to said lot, afterwards sold the same to one John Smith, who had full notice and knowledge of the original and continued claim of said Bartle to the same, which said Smith was since deceased, and his heirs, if any were alive, were unknown to the complainant; and the said Smith, after occupying the same for a time, sold the same to one John H. Piatt, who had full notice and knowledge of Bartle's claim thereto; said John H. Piatt was since deceased, leaving Benjamin M. Piatt, and Philip Grandon and Hannah C. his wife, citizens and residents of the state of Ohio, his heirs-at-law, with others not citizens of this state, and who could not, therefore, be made defendants. And the said John H. Piatt, in his lifetime, mortgaged the same to the president, directors and company of the Bank of the United States, under *which mortgage, the said [*407 president, directors and company of the Bank of the United States had obtained possession and complete title, with full notice and knowledge of the claim of said Bartle. And the said president, directors and company

of the Bank of the United States had sold the same to one John Watson, a citizen and resident of this state, who, it was prayed, might be made defendant to the bill, the said Watson being in the actual possession of said premises, but had not paid the purchase-money nor obtained a deed therefor. The bill further showed, that the said Bartle asserted to the said Vattier, to the said Smith, and to the said Piatt, his right to said premises, at various and different times, but from poverty was unable to attempt enforcing the same in a court of equity or elsewhere; and the complainant had recently purchased from said Bartle his right to said lot, and obtained a conveyance from him for the same. The bill prayed, that the said president, directors and company of the Bank of the United States might be decreed to deliver possession of said premises to the complainant, and account for and pay the rents and profits thereof to him, and execute a quit-claim deed therefor to him; or in case the said president, directors and company of the Bank of the United States be protected in the possession thereof, that Charles Vattier be decreed to account for and pay to the complainant the value thereof, upon such principles as should be deemed just and equitable; and for other and further relief, &c.

The Bank of the United States filed an answer, denying any knowledge of the facts alleged in the bill, as to the title of Bartle to the property in question, and asserting a regular legal title to the same, in those under whom they hold the same. They asserted a possession of the property in Charles Vattier, from 1797, up to July 1806, when the property was purchased by John Smith, and was afterwards, in 1811, sold by the sheriff, by virtue of a *fieri facias*, as the property of John Smith, and bought by John H. Piatt; under whom, and whose heirs, the property was held by conveyances, commencing in 1820, by mortgage, by deed in fee-simple from the heirs of John H. Piatt, in 1823, and by a release of the dower of the widow of John H. Piatt, at the same time, for which release the bank paid to the said widow $11,000. Upon this lot of ground, John H. Piatt made extensive and
*408] *costly improvements, and in particular, erected the Cincinnati Hotel. The answer stated, that the bank, at the time of the purchase, knew nothing of the claim of the complainant, or of Bartle, and that they claimed a complete title to the lot, under John C. Symmes, Charles Vattier, John Smith and John H. Piatt, and his heirs and representatives, and widow, as above stated, and they alleged, that said Vattier took possession of said lot, about the year 1799, and that said Vattier, and those claiming under him, had continued in the uninterrupted possession of said premises ever since, being a period of more than twenty-eight years.

The answer of Charles Vattier denied all the allegations in the bill which asserted his knowledge of the title, said to have been held by Bartle to the property; and asserted a purchase of the property claimed, by Robert Piatt, from Robert Barr, of Lexington, Kentucky, and that a complete legal title to the same had been made to him by John Cleves Symmes, holding the said legal title. That he came fairly into the possession of this property, and at that time had not the least notice or knowledge of the supposed equitable claim of the said Bartle to the lot. He further stated, that, while he lived on said lot, he frequently saw Bartle, who was often in the house on the lot; that said Bartle never made known to him, nor intimated to him, that he had any claim or title to the lot; that while he was the owner of

the lot, he made improvements on the same, of which Bartle had knowledge. He did not believe or admit, that said Smith had any notice of the several matters and things set forth in the bill, at the time he received a conveyance for said lot from this defendant, as before stated, or that he knew or had heard anything of the supposed right or claim of said Bartle to said lot. He further stated, that, ever since he took possession of said lot, in the year 1797, there had been a continued possession of the same, under his title thus acquired from said Symmes, by the successive owners, as set forth in the bill. He knew nothing of the inability of said Bartle, on account of his poverty, to assert his title to said lot, if he had one; nor did he know that the said Robert Piatt had purchased from the said Bartle his right to said lot, and obtained a conveyance from him for the same, and therefore, he required full proof of the same. *The complainant filed a general replication. [*409

The depositions of a number of witnesses were taken and filed in the case; and on the 19th of December 1831, the circuit court made a decree, dismissing the bill, and stating that the equity of the case was with the defendants, and that the complainant was not entitled to the relief sought. The complainant appealed to this court.

The case was argued by *Ewing* and *Bibb*, for the appellant; and by *Sergeant* and *Webster*, for the appellees.

The decision of the court having been given on the bar which was interposed by time, to the right of the appellant to recover, the arguments of counsel on the other points in the case are omitted.

Upon the effect of the statutes of limitations of Ohio on the claim of the appellant, and of time on the same, the counsel for the appellant contended, that the length of time is no bar, according to the facts and circumstances of this case. The question is, whether the claim set up in the bill is barred by the statute of limitations of Ohio?

In *Aggas* v. *Pickerell*, 3 Atk. 222 (26th of June 1745), upon a bill for redemption of mortgaged premises, of which the defendant had possession more than twenty years, the defendant demurred. The chancellor expressed his opinion unfavorable to the demurrer; he said, "how is it possible to give greater allowance to length of time, than the statute of limitation does?" "The plaintiff may, by way of reply or amending his bill, make it appear, he is within the saving of the statute;" "or upon a plea, he may prove himself to be within the exceptions." In 3 Atk. 314, the same rule is observed, and redemption decreed in behalf of a "prowling assignee, who admitted he had purchased the equity of redemption for a very inconsiderable sum." The plaintiff was not barred by the statute of limitations; and although the chancellor was much disinclined towards the assignee, he did decree in his favor; declaring, "even in the case of an assignee of the equity of redemption, if the *circumstances would induce the court to decree redemption in favor of the mortgagor, the assignee, who stands in his [*410 place, will have the benefit of it." In *Higginson* v. *Mein*, 4 Cranch 415–20, the debt was enforced against the mortgaged premises, the presumption of payment from length of time being repelled by circumstances. But after the elaborate argument and decision of this court, on a full investigation of

the adjudged cases, in *Elmendorf* v. *Taylor*, 10 Wheat. 168, it is unnecessary to labor the principle. It is said, confidently, that, so far as the defendants below have relied upon length of time, the question is, whether there are such *laches* and non-claim of the rightful owner of this equity, for such a period as that he would have been barred by the statute of limitations of Ohio, supposing the plaintiff and those from whom he claims had held the legal estate.

The provisions of the act of limitations of the state of Ohio, of 1804, applicable to this case, are, the first section, which limits the action of ejectment, &c., or other possessory action for lands, to twenty years; and the third section, which contains the usual savings in favor of infants, *femes covert*, persons insane, imprisoned, "or beyond sea, at the time when such actions may or shall have accrued;" and allows the period of twenty years before limited, "after such disability shall have been removed." The sections of the act of 1810, are the second, which limits the time for writs of ejectment, or other possessory actions for lands, to twenty-one years; the third section, which contains the like saving as the act of 1804, for persons under disability of infancy, "beyond sea," &c., and allows the like period of twenty-one years "after such disability shall have been removed;" and the sixth section, which repeals the act of limitations of 1804; and declares, that this act (of 1810) shall take effect on the 1st day of June 1819.

The third statute of limitations, passed 25th of February 1824, to take effect from the 1st of June 1824, is "an act for the limitation of actions." 22 Laws of Ohio 325. Section 1st limits, "first, actions of ejectment, or any other action for recovery of the title or possession of lands, tenements or hereditaments," to twenty-one years; and then limits *personal
*411] actions to various shorter periods. Section 2d provides, that "if any person who shall be entitled to have or commence any action of ejectment," "shall be within the age of twenty-one years, insane, *feme covert*, imprisoned, or without the United States and territories thereof, at the time such cause of action shall have accrued; and if any person who shall be entitled to institute any other action limited by this act, shall be within age as aforesaid, insane, *feme covert*, imprisoned, or without this commonwealth, at the time such cause of action shall have accrued, every such person shall have a right to commence any such action, within the time hereinbefore limited, after such disability shall be removed."

The fourth and last act, passed 8th of February 1826, is "supplementary to the act entitled, an act for the limitation of actions." Session Acts, 60. This act recites, that doubts had arisen, whether the act passed 25th of February 1824, does not suspend the operation of all former acts of limitation on causes of action, prior to the 25th of February 1824, not barred by former acts, prior to that day; therefore, this act revives the acts of 1804 and 1810, for the purpose of limiting all actions, the cause of which may have accrued after the 4th day of January 1804, and before the 25th of January 1810; or after the 25th of January 1810, and before the 25th of February 1824; according to the provisions of those acts, "but for no other purpose whatever." It will be evident, from the repealing clause of 1824, which took effect June 1st, 1810, that as to causes of action theretofore accrued, but then barred, the limitation ceased. Upon such actions, no statute of limitation had any bearing, until the passage of the act of 1826; and no

bar can be invoked, unless the supplementary act of 1826 can produce such effect.

It has been decided, that "beyond sea" means out of the state. *Shelby* v. *Guy*, 11 Wheat. 361. The evidence in this case shows, that Bartle was absent from the state; and thus was fully entitled to the benefit of the exception. Courts of equity will apply the same rules as are established by statutes of limitation; but they will not go beyond them. They will give the benefit of the exceptions in the statute, when they adopt the rules of the statute. If it is necessary to set out specially, in the original bill, the exception of *the statute, as protecting the appellant, he should be allowed to amend his bill; and the court will remand the case, [*412 to give him an opportunity to supply the omission. But the complainant may, on authority, amend; or may prove that he is within the exception of the statute, by evidence (3 Atk. 226); and this is the usual course.

Sergeant and *Webster*, for the appellees.—The Bank of the United States are protected against the claim of the appellant by length of time. 1. This protection is derived from length of time, independent of all statutes of limitations. 2. From the express provision of the statutes of Ohio.

The protection is obtained by the general rules of equity. The bill has no date, and if the case was stated as it is made out by the evidence, it would be demurrable. It would be a case of a mortgagee in possession for upwards of twenty years, without payment of interest. This, in England, would be a demurrable bill. The possession of the mortgagee was for thirty-five years. Cases cited, upon this position, *Hughes* v. *Edwards*, 9 Wheat. 497, 648; *Willison* v. *Watkins*, 3 Pet. 43. It is no answer to say, that the person who claims title was out of the state of Ohio. The exception is one by statute, but the rule is one of courts of equity, which has no exception.

The plaintiff's case is completely barred by the statutes of Ohio, unless he can protect it by the exception in the statute in favor of a person "beyond seas." In this case, the appellant cannot avail himself of the exception in the statute. Vattier says, he went into possession in 1797, and this is a bar, unless the exception operates. The appellant says, he was out of the state. The question is one of law, not of evidence. The complainant having filed his bill in equity, against a person in possession upwards of thirty years, and the defendants asserting the protection of the general provisions of the statutes of limitation; until the complainant shall establish by proof, that the exception applies to him, he cannot avail himself of it. The exception should have been put in issue. *His protection by [*413 it should have been averred in his bill, or in an amended bill. Cooper's Chan. Pract. 6, 12, 329. How was it to be understood by the bill, that the material fact was, to prove that Bartle was on the other side of the Ohio?

In a court of common law, a party defendant pleads the statute of limitations; the plaintiff replies an exception, and he must raise a *primâ facie* case, by evidence. This will apply in equity. There is no evidence that the general residence of Bartle was out of the state. The case appears, on the proceedings, that the defendants are to prove that Bartle is not within the exception, before the plaintiff has proved the general absence of Bartle, to place him within the exception.

STORY, Justice, delivered the opinion of the court.—This is an appeal from the decree of the circuit court of the district of Ohio, in a suit in equity, in which the present appellant was original plaintiff. In June 1827, the plaintiff purchased of John Bartle, the lot of land in controversy (which is asserted to be worth from $50,000 to $70,000), for the consideration, as stated in the deed of conveyance, of $3000; and the present suit was brought in December of the same year. The bill states, that when the city of Cincinnati was laid out, in 1789, the country being then a wilderness, certain lots of the city were allotted, as donations, to those who should make certain improvements, and that the evidence of ownership of such lots was a certificate of the proprietors, which was transferrible from one person to another by delivery. That lot No. 1, on the plat of the city (the lot in controversy), was allotted to Samuel Blackburn, who transferred his right to one James Campbell, who transferred it to Bartle, in 1790, and the latter completed the improvements required by the terms of donation. That Bartle continued to occupy the lot, under this certificate of title, for several years, when, becoming embarrassed, he mortgaged the lot to one Robert Barr, of Lexington, Kentucky, of whom (the bill states) and his heirs, if deceased, the plaintiff knows nothing, for the sum of $700, for the payment of which the rents
*414] received by Bartle, from the *tenants in possession were to be appropriated and paid. The bill then alleges, that Bartle afterwards lost the certificate, in crossing the Ohio river; that Charles Vattier, one of the defendants, fraudulently purchased the mortgage of Barr, and obtained possession of the lot from the tenants, in the absence of Bartle from the country, and acquired the legal title from John C. Symmes, in whom it was vested. That Vattier afterwards sold the same to one John Smith, who is since deceased (and his heirs, if any are alive, are unknown to the plaintiff), and who had full notice of Bartle's title. That Smith afterwards sold the same to one John H. Piatt, since deceased (whose heirs are made defendants), who also had notice of Bartle's title; that Piatt, in his lifetime, mortgaged the same to the Bank of the United States, which has obtained possession and complete title, with the like notice. The bill further charges, that Bartle asserted his right to the premises to Vattier, Smith and Piatt, at various times, but from poverty was unable to attempt enforcing the same in a court of equity, or elsewhere; and that the plaintiff has recently, in December 1827, purchased Bartle's right, and obtained a conveyance thereof. The bill then states, that the plaintiff had hoped, that the bank would have surrendered the possession, or in case it refused so to do, that Vattier would have accounted with the plaintiff for the value thereof, taking an account of the mortgage-money paid to Barr, of the improvements, rents, profits, &c.; but that the bank has refused to surrender the possession, and Vattier has refused to account. And it then prays a decree against the bank, to surrender the possession, and account for the rents and profits, and to execute a quit-claim; or, if the bank is protected in the possession, that Vattier shall be decreed to account, and for general relief.

In the answers of Vattier and the Bank of the United States, they assert themselves to be *bonâ fide* purchasers, for a valuable consideration, of an absolute title to the premises, without notice of Bartle's title, and they rely on the lapse of time also as a defence. The bill, as to the heirs of J. H. Piatt, was taken *pro confesso*, they not having appeared in the cause.

From the evidence in the cause, it appears, that Vattier, and those claiming title under him, have been in possession of the premises, claiming an absolute title thereto, adverse to the title *of Bartle, ever since the 20th of March 1797, the day of the date of the conveyance from Symmes to Vattier. At the hearing in the circuit court, the bill was dismissed; and the cause now stands before this court upon an appeal taken from that decision. [*415

Various questions have been made at the argument made before us, as to the nature and character of Bartle's title; and, if he had any valid title, whether the purchasers under Barr had notice of it. With these and some other questions, we do not intermeddle; because in our view of the cause, they are not necessary to a correct decision of it.

The important question is, whether the plaintiff is barred by the lapse of time; for we do not understand, that the adverse possession presents, under the laws of Ohio, any objection to the transfer of Bartle's title to the plaintiff, if Bartle himself could assert it in a court of equity. This question has been argued at the bar, under a double aspect: first, upon the ground of the statute of limitations of Ohio; and secondly, upon the ground of an equitable bar, by mere lapse of time, independently of that statute.

In regard to the statute of limitations, it is clear, that the full time has elapsed, to give effect to that bar, upon the known analogy adopted by courts of equity, in regard to trusts of real estate, unless Bartle is within one of the exceptions of the statute, by his non-residence and absence from the state. It is said, that there is complete proof in the cause, to establish such non-residence and absence. But the difficulty is, that the non-residence and absence are not charged in the bill, and, of course, are not denied or put in issue by the answer; and unless they are so put in issue, the court can take no notice of the proofs; for the proofs, to be admissible, must be founded upon some allegations in the bill and answer. It has been supposed, that a different doctrine was held by Lord HARDWICKE, in *Aggas* v. *Pickerell*, 3 Atk. 228, and *Gregor* v. *Molesworth*, 2 Ves. jr. 109, and by Lord THURLOW, in *Deloraine* v. *Browne*, 3 Bro. C. C. 632. But these cases did not proceed upon the ground, that proofs were admissible to show the party, plaintiff, to be within the exception of the statute of limitations, when relied on by way of plea or answer, and the exception was not stated in the bill, or specially replied, but upon the ground, that the omission *in the bill to allege such exception could not be taken by way of demurrer. And even this doctrine is contrary to former decisions of the court;(a) and it has since been explicitly overruled, and particularly in *Beckford* v. *Close*, 4 Ves. 476; *Foster* v. *Hodgson*, 19 Ibid. 180, and *Hovenden* v. *Lord Annesley*, 2 Sch. & Lef. 637–8. And the doctrine is now clearly established, that if the statute of limitations is relied on as a bar, the plaintiff, if he would avoid it by any exception in the statute, must explicitly allege it in his bill, or specially reply it; or, what is the modern practice, amend his bill, if it contains no suitable allegation to meet the bar.(b) In the present case, if the merits were otherwise clear, the court might remand [*416

(a) See South Sea Company *v.* Wymondsell, 3 P. Wms. 143, 145, and Mr. Coxe's note; Cooper's Eq. Pl. 254–5; Smith *v.* Clay, 3 Bro. C. C. 640, note.

(b) See Belt's note to the case of Deloraine *v.* Browne, 3 Bro. C. C. 640, n. 1; Miller *v.* McIntyre, 6 Pet. 61, 64.

the cause, for the purpose of amending the pleadings, and supplying this defect. But, in truth, the answers, though they rely generally on the lapse of time, do not specially rely on the statute of limitations as a bar; and the case may, therefore, well be decided, upon the mere lapse of time, independently of the statute.

And we are of opinion, that the lapse of time is, upon the principles of a court of equity, a clear bar to the present suit, independently of the statute. There has been a clear adverse possession of thirty years, without the acknowledgment of any equity or trust estate in Bartle; and no circumstances are stated in the bill, or shown in the evidence, which overcome the decisive influence of such an adverse possession. The established doctrine, or, as Lord REDESDALE phrased it, in *Hovenden* v. *Annesley*, 2 Sch. & Lef. 637–8, "the law of courts of equity," from its being a rule adopted by those courts, independent of any positive legislative limitations, is, that it will not entertain stale demands. Lord CAMDEN, in *Smith* v. *Clay*, 3 Bro. C. C. 640 note, stated it in a very pointed manner. "A court of equity," said he, "which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, where the party has slept upon his rights, or acquiesced for a great length of time. Nothing *can call forth this court into activity, but conscience, good faith and reasonable diligence. Where these are wanting, the court is passive and does nothing; *laches* and neglect are always discountenanced; and therefore, from the beginning of this jurisdiction, there was always a limitation of suits in this court." The same doctrine has been repeatedly recognised in the British courts, as will abundantly appear from the cases already cited, as well as from the great case of *Cholmondeley* v. *Clinton*, 2 Jac. & Walk. 1.(*a*) It has also repeatedly received the sanction of the American courts, and was largely discussed in *Kane* v. *Bloodgood*, 7 Johns. Ch. 93, and *Decouche* v. *Savatier*, 3 Ibid. 190. And it has been acted on in the fullest manner by this court; especially, in the case of *Prevost* v. *Gratz*, 6 Wheat. 481; *Hughes* v. *Edwards*, 9 Ibid. 489; *Willison* v. *Watkins*, 3 Pet. 44; and *Miller* v. *McIntyre*, 6 Ibid. 61, 66.

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Without, therefore, going at large into the grounds upon which this doctrine is established, though it admits of the most ample vindication and support, we are all of opinion, that the lapse of time in the present case is a complete bar to the relief sought, and that the decree of the circuit court, dismissing the bill, ought to be affirmed, with costs.

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 Ohio, and was argued by counsel: On consideration whereof, it is decreed and ordered by this court, that the decree of the said circuit court in this cause be and the same is hereby affirmed, with costs.

(*a*) See also Beckford *v.* Wade, 17 Ves. 86; Bonney *v.* Ridgard, 1 Cox 145; Blennerhassett *v.* Day, 1 Ball & Beat. 104; Hardy *v.* Reeves, 4 Ves. 469; Harrington *v.* Smith, 1 Bro. P. C. 95.

*Charles Scott, Bailiff of William S. Moore, Plaintiff in Error, v. John Lloyd.[1]

Usury.—Exception.

Scholfield applied to Moore to raise or borrow $5000, securing him on an annuity, or ground-rent, on sufficient real estate, for one year; Moore proposed to let him have the money for ten years, on the same security; after much discussion, the parties agreed to divide the difference, and that S. should keep the money for five years; a deed for sufficient real property in Alexandria, in the district of Columbia, securing the annuity, was executed by S.; and the annuity or ground-rent was paid for some years. Scholfield, after the execution of the deed securing the annuity to Moore, sold and conveyed the estate, subject to the annuity or rent-charge, to Lloyd; and subsequent to the conveyance, he gave notice to Lloyd, not to pay the rents to Moore, on the allegation that there were fraud and usury in the transaction, and that the grant of the annuity was, therefore, void; at the time this notice was given, Scholfield agreed in writing, to indemnify and save Lloyd from loss, if a distress should be made for the rent; and he would resist the same by a writ of replevin; this was done by Lloyd. Lloyd and others, as creditors of Scholfield, became afterwards possessed, in absolute property, by releases from and agreements with Scholfield, of all his, Scholfield's, interest in the reversion of the estate on which the rent was secured, or any benefit or advantage from the suit, and he was discharged by the insolvent law of Virginia; but no release of Scholfield by Lloyd from his responsibility to save him harmless, for the resistance of the distress and the action of replevin, was executed. On the trial of the action of replevin, in the circuit court, Scholfield was examined as a witness, in favor of Lloyd, to show that the original contract between him and Moore was usurious: *Held*, that he was an interested and incompetent witness.

The statute against usury not only forbids the direct taking more than six per centum per annum for the loan or forbearance of any sum of money, but it forbids any shift or device by which this prohibition may be evaded, and a greater interest be, in fact, secured. If a larger sum than six per cent. be not expressly reserved, the instrument will not of itself expose the usury, but the real corruptness of the contract must be shown by extrinsic circumstances, which prove its character.

The court was requested to say to the jury, that the facts given in evidence on the trial of the case, did not import such a lending as would support the defence of usury. The court was asked to usurp the province of the jury, and to decide on the sufficiency of the testimony, in violation of the well-established principle, that the law is referred to the court, the fact to the jury.

The statute declares, "that no person shall, on any contract, take, directly or indirectly, for loan of any money," &c., "above the value of six dollars, for the forbearance of one hundred dollars for a year." It has been settled, that to constitute the offence, there must be a loan, upon which more than six per cent. interest is to be received; and it has been also settled, that where the *contract is, in truth, for the borrowing and lending of money, [*419 no form which can be given to it will free it from the taint of usury, if more than legal interest be secured.

The ingenuity of lenders has devised many contrivances by which, under forms sanctioned by law, the statute may be evaded; among the earliest and most common of these, is the purchase of annuities, secured upon real estate or otherwise. The statute does not reach these, not only because the principal may be put in hazard; but because it was not the intention of the legislature to interfere with individuals in their ordinary transactions of buying and selling, or other arrangements made with a view to convenience or profit; the purchase of an annuity or rent-charge, if a *bonâ fide* sale, has never been considered as usurious, though more than six per cent. profit be secured. Yet it is apparent, that if giving this form to the contract will afford a cover which conceals it from judicial investigation, the statute would become a dead letter; courts, therefore perceived the necessity of disregarding the form, and examining into the real nature of the transaction; if that be in fact a loan, no shift or device will protect it.

Though this principle may extracted from all the cases, yet as each depends on its own circumstances, and those circumstances are almost infinitely varied; it ought not to surprise, if there

[1] For a former decision in this case, see 4 Pet. 205.

should be some seeming conflict in the application of the rule by different judges; different minds allow a different degree of weight to the same circumstances.

The covenants in the deed from Scholfield, granting the annuity to Moore, secure the payment of ten per cent. for ever on the sum advanced; there is no hazard whatever in the contract: Moore must, in something more than twenty years, receive the money he has advanced, with the legal interest on it, unless the principal sum should be returned after five years; in which event, he will receive the principal, with ten per cent. interest; the deed is equivalent to a bond for $5000, amply secured by a mortgage on real estate, with interest at ten per cent. thereon; with liberty to repay the same in five years. If the real contract was for a loan of money, without any view to a purchase, it is plainly within the statute.

An instruction to the jury which would separate the circumstances of the case from each other, and the object of which is, to induce the court, after directing the jury that they ought to be considered together, to instruct them that, separately, no one in itself amounted to usury, ought not to have been given.

In the course of the trial of the cause in the circuit court, the counsel for the plaintiff objected to a question put by the defendant's counsel to a witness, as being a leading question. Although the plaintiff's counsel objected to his question, and said, that he excepted to the opinion of the court, no exception was actually prayed by the party and signed by the judge; this court cannot consider the exception as actually taken, and must suppose it was abandoned.

Lloyd *v.* Scott, 4 Cr. C. C. 206, reversed.

Error to the Circuit Court of the District of Columbia, and county of Washington. An action of replevin was instituted, in March 1825, by John *420] Lloyd, in the circuit court of the United States for the county *of Alexandria, against Charles Scott, bailiff of William S. Moore; and a declaration was filed in the common form, at September rules of the same year. In November 1827, the defendant filed the following avowry:

"Charles Scott, bailiff, &c., at suit John Lloyd. And the said Charles Scott, by Robert J. Taylor, his attorney, comes and defends the force and injury, when, &c., and as bailiff of William S. Moore, well acknowledges the taking the said goods and chattels in the said place, when, &c., and justly, &c., because, he says, that before the said time when the said the taking of the said goods and chattels is supposed to have been made, one Jonathan Scholfield was seised in his demesne in fee, of four brick tenements, and a lot of ground whereon they stood, on the east said of Washington street, and north side of Duke street, in the town of Alexandria, and county aforesaid, whereof the said place, when, &c., is, and at the said time, when, &c., was parcel, and being so seised, as aforesaid, of the said tenements and lot of ground, he, the said Jonathan, and Eleanor his wife, afterwards, and before the said time, when, &c., to wit, on the 11th day of June 1814, at the county aforesaid, by their certain indenture, dated on the said 11th day of June 1814, and here now to the court shown, in consideration of the sum of five thousand dollars by the said William paid to the said Jonathan, granted, bargained and sold to the said William, one certain annuity or yearly rent of the five hundred dollars, to be inuring out of, and charged upon the said four brick tenements and lot of ground, whereof the said place, when, &c., is parcel, to be paid to the said William, his heirs and assigns, by equal half-yearly payments of two hundred and fifty dollars each, on the 10th day of December, and on the 10th day of June, in every year for ever thereafter: to hold the said annuity or rent, so as aforesaid charged and payable, to the said William S. Moore, his heirs and assigns, to his and their only proper use for ever: And the said Jonathan Scholfield, for himself, his heirs and assigns, did, by the said indenture, among other things, covenant with the said William S. Moore, his heirs and assigns, that he, the

said Jonathan Scholfield, his heirs and assigns, would well and truly satisfy and pay to the said William S. Moore, his heirs and assigns, the said annual rent of five hundred dollars, by equal half-yearly payments, *as aforesaid, for ever, and that if the said rent should not be punctually paid [*421 as it became due, then that, on overy such default, it should be lawful for the said William S. Moore, his heirs and assigns, from time to time, to enter on the said four tenements and lot of ground, so as aforesaid charged, of which the said place, when, &c., is parcel, and to levy, by distress and sale of the goods and chattels there found, the rent in arrear, and the costs of distress and sale; of which said rent, so as aforesaid granted, the said William became and was seised under the said deed, and by the perception thereof, that is to say, on the 11th day of December, in the year 1814, at the county aforesaid, and has since remained, and yet is seised thereof. And afterwards, that is to say, on the 29th day of October, in the year 1816, at the county aforesaid, the said Jonathan Scholfield, and Eleanor his wife, by their certain deed of bargain and sale, under their seals, dated on the day and year last mentioned, bargained, sold and conveyed to the said John Lloyd, his heirs and assigns for ever, certain tenements and lots of ground, in the said town of Alexandria, whereof the said four brick tenements and lot of ground before mentioned, including the said place where, &c., is and was parcel, subject, by the terms of the said deed, to the payment of the said annuity or rent of five hundred dollars to the said William S. Moore, his heirs and assigns; under and in virtue of which said bargain, sale and conveyance to him, the said John entered upon the said tenements and lots of ground so to him bargained, sold and conveyed, of which the said place where, &c., is and was parcel, and became thereof seised and possessed, that is to say, on the said 29th day of October, in the year 1816, at the county aforesaid, and ever since has continued, and yet is, so seised and possessed: and because, after the said bargain, sale and conveyance to the said plaintiff as aforesaid, and after his entry, seisin and possession of the premises, including the said place where, &c., and whilst he so continued seised and possessed as aforesaid, the sum of two hundred and fifty dollars of the annuity or rent aforesaid, for the half-year ending on the 10th day of June, in the year 1824; and the further sum of two hundred and fifty dollars of the said annuity or rent, for the half-year ending on the 10th day of December, in the year 1824, became and remained in *arrear and unpaid to the said [*422 William S. Moore, he, the said Charles Scott, as bailiff of the said William, and by his command and authority, at the said time when, &c., entered on the said place where, &c., being parcel of the four brick tenements and lot of ground, so as aforesaid charged with the said annuity or rent, and liable to the distress of the said William, and took and carried away the said goods and chattels in the declaration mentioned, then and there being found in the said place where, &c., parcel of the said four tenements and lot of ground, as a distress for the said rent so in arrear as aforesaid, to the said William, as he lawfully might, and this he is ready to verify, &c.: wherefore, the said Charles prays judgment for the sum of one thousand dollars, being double the value of the said rent so in arrear and distrained as aforesaid, with full costs of suit, &c., according to the statute in that case provided."

The plaintiff's attorney thereupon filed four several pleas, the first of

which was: "And the said John, by Thomas Swann, his attorney, prays *oyer* of the said indenture from the said Jonathan Scholfield, and Eleanor his wife, to the said William S. Moore, in the said cognisance mentioned, and the same is read to him in these words, to wit: which being read and heard, the said John saith, that the said Charles, as bailiff of the said William S. Moore, for the reasons before alleged, ought not justly to acknowledge the taking of the goods and chattels aforesaid, in the said place, in which, &c., because he saith, that before the making of the said indenture, that is to say, on the 11th day of June, in the year 1814, at the county aforesaid, it was corruptly agreed between the said Jonathan Scholfield and the said William S. Moore, that the said William S. Moore should advance to him, the said Jonathan, the sum of five thousand dollars; and in consideration thereof, that he, the said Jonathan, and the said Eleanor his wife, should grant, by a deed of indenture, duly executed and delivered to him, the said William, his heirs and assigns for ever, a certain annuity or rent of five hundred dollars, to be issuing out of and charged upon a lot of ground and four brick tenements and appurtenances thereon erected, on the east side of Washington street, and on the north side of Duke street, in the town of Alexandria, bounded as follows, *beginning at the intersection
*423] of said streets; thence north on Washington street, eighty-seven feet, more or less, to the partition wall between the fourth and fifth tenements from Duke street; thence east, parallel to Duke street and with said partition wall, one hundred and twelve feet to an alley; thence with the line of the said alley, eighty-seven feet to Duke street; thence on Duke street, west, to the beginning; to be paid to the said William, his heirs and assigns, by equal half-yearly payments of two hundred and fifty dollars, on the 10th day of December, and on the 10th day of June, for ever thereafter. And it was further corruptly agreed, that he, the said Jonathan, in and by the said deed of indenture, should, for himself, his heirs, executors, administrators and assigns, covenant with the said William, his heirs and assigns, that he would well and truly pay to him, the said William, his heirs and assigns, the said annuity or rent of five hundred dollars, by equal half-yearly payments, on the 10th day of June, and 10th day of December, in each year for ever thereafter, as the same should become due; and that if the same should not be punctually paid, that then it should be lawful for the said William, his heirs and assigns, from time to time, on every such default, to enter on the premises charged, and to levy, by distress and sale of goods and chattels there found, the rent in arrear, and the costs of distress and sale; and if the same should remain in arrear and unpaid for the space of thirty days after any day of payment as aforesaid, and no distress sufficient to satisfy the same could be found on the premises, that then it should be lawful for the said William, his heirs and assigns, to enter upon the premises charged, and from thence to remove and expel the said Jonathan, his heirs and assigns, and to hold and enjoy the same, as his and their absolute estate, for ever thereafter; and it was further corruptly agreed between the said Jonathan, and him the said William, that he, the said Jonathan, should enter into these further covenants in the said indenture; that is to say, a covenant that he, the said Jonathan, at the time of the execution of the said indenture, was then, in his own right, seised in fee-simple in the premises charged, free from any condition or incumbrance, other than such

as were specified in a deed from the said Jonathan to Robert J. Taylor, dated the ——— day of ——— ; and that he, the said Jonathan, his heirs and assigns, would, for ever *thereafter, keep the buildings which then were, or thereafter might be, erected on the premises charged, [*424 fully insured against fire, in some incorporated insurance office, and would assign the policies of insurance to such trustee as the said William, his heirs or assigns, might appoint ; to the intent, that if any damage or destruction from fire should happen, that the money received on such policies might be applied to rebuilding or repairing the buildings destroyed or damaged ; and that he, the said Jonathan, his hers and assigns, wonld execute and deliver any further conveyance which might be necessary, more completely to charge the premises before mentioned with the annuity aforesaid, and to carry into full effect the intention of the said parties ; and lastly, that he and his heirs would for ever warrant and defend the annuity or rent, so agreed to be granted to the said William, his heirs and assigns, against any defalcations and deductions for, or on account of, any act of him, his heirs or assigns ; and the said William did further corruptly agree, that he would, in the said indenture, covenant for himself, his heirs and assigns, with the said Jonathan, his heirs and assigns, that if the said Jonathan, his heirs or assigns, should at any time thereafter, at the expiration of five years from the date of the said indenture, pay to the said William, his heirs or assigns, the sum of five thousand dollars, together with all arrears of rent, and ratable dividend of the rent for the time which should have elapsed between the half-year's day then next preceding, and the day on which such payment should be made, he, the said William, his heirs and assigns, would execute and deliver any deeds or instruments which might be necessary for releasing and extinguishing the rent or annuity thereby agreed to be created, which, on such payment being made, should for ever after cease to be payable. And the said John saith, that afterwards, to wit, on the same day and year aforesaid, at the county aforesaid, the said William, in pursuance and in prosecution of the said corrupt agreement, did advance to the said Jonathan the said sum of five thousand dollars; and the said Jonathan and Eleanor his wife, and the said William, did then and there make, seal and duly deliver to each other, respectively, the said deed of indenture, as their several acts and deeds, which said deed was duly acknowledged by the said Eleanor, and admitted to record. And *so [*425 the said John saith, that the said deed of indenture, in the said cognisance mentioned, was made in consideration of money advanced upon and for usury ; and that by the said indenture there has been reserved and taken above the rate of six dollars in the hundred, for the forbearance of the said sum of five thousand dollars, so advanced as aforesaid, for the term of one year, and that the said John is ready to verify : whereupon, he prays judgment, if he ought to be charged with the rent aforesaid, by virtue of the indenture aforesaid ; and forasmuch as the said Charles hath acknowledged the taking of the said goods and chattels, he, the said John, prays judgment and his damages, on occasion of the taking and unjust detaining of the said goods and chattels, to be adjudged to him, &c.

The second plea was in all respects like the first, except it stated, that the agreement was, that Moore should "lend" to Scholfield five thousand dollars. It then stated, that the parties agreed a deed should be made, con-

taining all the covenants set forth in the first plea. It then averred, that in pursuance and in prosecution of this corrupt agreement, Moore did advance to Scholfield the sum of five thousand dollars; and that Scholfield and wife, and Moore, made and executed the deed aforesaid, in pursuance of this corrupt agreement, which was duly acknowledged and admitted to record. And that the deed was made in consideration of "money lent upon and for usury;" and that by it there had been reserved and taken above the rate of six dollars in the hundred, for the forbearance of the sum of five thousand dollars so lent as aforesaid, for the term of one year. This plea concluded as the first did.

The third plea was more general than the first and second. It stated, that before the making of the indenture, that is to say, on the 11th of June 1814, it was corruptly agreed between Scholfield and Moore, that he Moore, should "advance" to him, Scholfield, the sum of five thousand dollars, upon the terms and conditions, and in consideration of the covenants and agreements in the indenture mentioned and contained; and that in pursuance of this corrupt agreement, and in the prosecution and fulfilment of the same, Moore did advance to Scholfield the sum of five thousand dollars, and they, Scholfield and Moore, did make, seal and duly deliver the deed to each party, respectively, as their act and deed. And that the deed was in consideration *of money advanced upon and for usury, and that by the indenture there had been taken and reserved above the rate of six dollars in one hundred, for the forbearance of the sum of five thousand dollars, so advanced as aforesaid for the term of one year. This plea concluded as the first did.

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The fourth plea was like the third, except it is stated, that the agreement was to "lend" five thousand dollars upon the same terms stated in the third plea. It then averred, that in pursuance and in execution of the corrupt agreement in the indenture mentioned, Moore did "lend" to Scholfield the sum of five thousand dollars; that the deed was duly executed by the parties, and recorded; that it was made in consideration of money lent upon and for usury; and that by the said deed there had been reserved and taken above the rate of six dollars in the hundred for the forbearance of the sum of five thousand dollars, so lent as aforesaid, for the term of one year. This plea concluded as the others did. To each of these pleas there was a special demurrer, and particular causes of demurrer assigned.

The circuit court, in November 1828, gave judgment for the defendant; and the plaintiff prosecuted a writ of error to this court. (4 Pet. 205.) At the January term 1830, of the supreme court, the judgment of the circuit court was reversed; and the case was remanded to the circuit court, with instructions to overrule the demurrers to the second and fourth pleas, and to permit the defendant to plead, and for further proceedings, &c. (4 Pet. 231.) On the coming of the mandate into the circuit court, in November 1830, the demurrers were withdrawn, and there was a general replication to the pleas filed, in November 1827. The case was then, on the application of the defendant, removed to Washington, and a transcript of the record of proceedings, with the original papers, was transmitted to the clerk of the circuit court for the county of Washington. At November term 1832, of the circuit court, the cause came on for trial, and a verdict and judgment were entered in favor of the plaintiff. The defendant sued out this writ of error.

On the trial, the counsel of the defendant filed four bills of exception. *These exceptions are set forth at large in the opinion of the court; and the evidence given on the trial of the cause, is particularly stated [*427 in the first exception.

The material parts of the deed from Jonathan Scholfield and wife, to William S. Moore, referred to in the pleas of the plaintiff in the circuit court, were:

"The indenture is dated the 11th of June 1814, and is from Scholfield and wife, of Alexandria, in the district of Colombia. It recites, that in consideration of five thousand dollars in hand paid by William S. Moore, of the same town, he grants, bargains and sells to the said William S. Moore, his heirs and assigns for ever, one certain annuity or rent of five hundred dollars, to be issuing out of and charged upon a lot of ground" (describing the premises), "to be paid to the said William S. Moore, his heirs and assigns, by equal half-yearly payments of two hundred and fifty dollars, on the 10th day of December, and on the 10th day of June, for ever hereafter: to hold the said annuity or rent, to the said William S. Moore, his heirs and assigns, to his and their own proper use, for ever. And the said Jonathan Scholfield, for himself, his heirs, executors, administrators and assigns, does hereby covenant with the said William S. Moore, his heirs and assigns, as follows, that is to say, that he, the said Jonathan Scholfield, his heirs and assigns, will well and truly pay to the said William S. Moore, his heirs and assigns, the said annuity or rent of five hundred dollars, by equal half-yearly payments, on the 10th day of June, and on the 10th day of December, in each year for ever hereafter, as the same shall become due, and that if the same be not punctually paid, then it shall be lawful for the said William S. Moore, his heirs and assigns, from time to time, on every such default, to enter on the premises charged, and to levy, by distress and sale of the goods and chattels there found, the rent in arrear, and the costs of distress and sale; and if the same shall remain in arrear and unpaid for the space of thirty days after any day of payment as aforesaid, and no distress sufficient to satisfy the same can be found on the premises charged, then it shall be lawful for the said William S. Moore, his heirs and assigns, to enter on the premises charged, and from thence to remove and expel the said Jonathan Scholfield, his heirs and assigns, and to hold *and enjoy the same, as his and their absolute estate, for ever thereafter. And further, that [*428 he the said Jonathan Scholfield is now in his own right seised in fee-simple in the premises charged aforesaid, free from any condition or incumbrance other than such as are specified and provided for in a deed from the said Jonathan Scholfield to Robert I. Taylor, dated the day before the date hereof; and that the said Jonathan Scholfield, his heirs and assigns, will for ever hereafter keep the buildings and improvements which now are or hereafter may be erected on the premises charged, fully insured against fire, in some incorporated insurance office, and will assign the policies of insurance to such trustees as the William S. Moore, his heirs or assigns, may appoint, to the intent, that if any damage or destruction from fire shall happen, the money may be applied to rebuilding or repairing the buildings destroyed or damaged. And that he, the said Jonathan Scholfield, his heirs and assigns, will deliver any further conveyance which may be necessary more completely to charge the premises before described with the annuity aforesaid, and to

carry into effect the intention of the parties hereto. And lastly, that he and his heirs will for ever warrant and defend the annuity or rent hereby granted to the said William S. Moore, his heirs and assigns, against any defalcation or deduction for or on account of any act of him, his heirs or assigns. And the said William S. Moore, for himself and his heirs and assigns, does hereby covenant with the said Jonathan Scholfield, his heirs and assigns, that if the said Jonathan Scholfield, his heirs or assigns, shall at any time after the expiration of five years from the date hereof, pay to the said William S. Moore, his heirs or assigns, the sum of five thousand dollars, together with all arrears of rent, and a ratable dividend of the rent for the time which shall have elapsed between the half-year's day then next preceding and the day on which such payment shall be made, he the said William S. Moore, his heirs or assigns, will execute and deliver any deed or instrument which may be necessary for releasing and extinguishing the rent or annuity hereby created, which, on such payments being made, shall for ever after cease to be payable."

*429] *The case was argued by *Coxe* and *Jones*, for the plaintiff in error; and by *Key* and *Swann*, for the defendant.

The counsel for the plaintiff in error presented a brief of the grounds on which they claimed that the judgment of the circuit court should be reversed. The brief stated:—On the trial which gives rise to this writ of error, various questions were presented, which appear in the several bills of exception annexed to the record.

The first was to the admissibility of Jonathan Scholfield as a witness. The ground on which this witness was objected to are apparent on the record. 1. He was a party to the instrument now sought to be impugned. 2. He was a party in interest. 3. His testimony was incompetent, because it went to vary and contradict the written contract between the parties. Various releases, &c., were adduced by the plaintiff to remove the objection arising from his interest.

The second exception presents a question for the decision of the supreme court, growing out of the refusal of the circuit court to instruct the jury, as prayed by the counsel for the defendant. The testimony before the jury was both written and parol. The written embraced the deed between Scholfield and Moore, which is incorporated into the pleas of plaintiff; and the parol testimony is that of the several witnesses whose evidence is given at length in the record. The court was asked to instruct the jury, that the contract between said Jonathan Scholfield and William S. Moore, such as it is evidenced by the deed from said Scholfield and wife to said Moore, was lawful, and free from the taint of usury. In order to impeach it of usury, and support the issues of fact joined in this cause, on the part of the plaintiff, it is necessary for the plaintiff to prove that, besides the contract imported by the terms of said deed, there was an actual contract between said Scholfield and Moore for the loan of $5000, at usurious interest; to wit,

*430] at the rate of ten per centum per annum, *to be disguised under the form and name of an annuity or rent-charge, and that such loan was actually lent by said Moore to said Scholfield, and said deed given, in pursuance and execution of such contract and loan, securing the said usurious interest, under the form and name of such annuity or rent-charge; that the

facts so given in evidence to the jury as aforesaid did not import such a lending of money by Moore to Scholfield at usurious interest, as was sufficient to support the issues joined on the part of the plaintiff in replevin upon the second and fourth pleas by the plaintiff in replevin, pleaded to the cognisance in this case. This instruction the court refused to give, and the defendants excepted, and will contend that such refusal was erroneous.

The plaintiff prayed the court, upon the same evidence, to instruct the jury, that the matters shown in evidence to the jury as aforesaid are proper for the consideration of the jury, to determine, from the whole evidence, under the instruction of the court as already given to them in this cause, whether the said contract so made between the said Moore and Scholfield, was in substance and effect a loan at usurious interest, or a *bonâ fide* contract for the bargain and sale of a rent-charge; and if the jury, from the said whole evidence, under the instruction as aforesaid, shall believe it to have been such a loan, they should find for the plaintiff; if otherwise, for the defendant. This prayer was granted; and the plaintiff in error contends, that the instruction should not have been given as prayed.

The counsel for the defendant then prayed the court to instruct the jury, that if they shall believe, from the evidence aforesaid, that the land out of which the said rent-charge mentioned in said deed from Scholfield to Moore was to issue, was, in itself, and independently of the buildings upon the same, wholly inadequate and insufficient security for the said rent, that then the jury cannot legally infer, from the clause in the said deed containing a covenant on the part of said Scholfield to keep the said houses insured, anything affecting said contract with usury or illegality; which instruction the courts refused to give. The defendant then prayed the court to instruct the jury, that if they shall believe, from the evidence aforesaid, that the *fair and customary price of annuities and rent-charges, at the date of said deed from Scholfield, was, in the market of Alexandria, ten [*431 years' purchase, and so continued for a period of years, then, from the circumstance of the rent being ten per centum on the amount advanced, the jury cannot legally infer any thing usurious or illegal in the contract. The court refused both the said instructions, and defendant excepted.

The counsel for the plaintiff in error contended: 1. That the testimony of Jonathan Scholfield was incompetent and inadmissible, and should have been excluded. 2. That the court erred in giving the instruction which was given at the instance of plaintiff. 3. That it erred in refusing to give the instructions prayed by the defendant.

Coxe, for the plaintiff in error, argued, that Scholfield was not a competent witness. He was the original grantor to Moore of the rent for which the distress was made; and he afterwards sold the property on which it was secured, to Lloyd. Up to a certain time, he was the real party to the suit—at its commencement, and for three years afterwards. The covenants in the deed bind him to pay the rent, which, by his testimony, he now seeks to extinguish, and to discharge himself from the obligation of those covenants. The notice of Scholfield to Lloyd, not to pay the rent, and his engagement, in that notice, to indemnify him for resisting the claim of Moore, and to protect him from costs, is in full force. Its obligation has not been impaired or released by the subsequent transactions between him

and Lloyd, by which Lloyd became the owner of the property. The part taken by Scholfield in this case, makes him a privy to the action ; the judgment in the case would be evidence for him, if Moore should resort to the personal covenants in the deed ; which are continuing covenants. Scholfield is a guarantor of the rent to Moore, and if Lloyd does not pay it, he must do so. 4 Binn. 352 ; 1 Stark. Evid. § 58, note 1 ; 3 Esp. 58–9.

*432] Scholfield is introduced to destroy his own contract. This *contract is assignable ; and this objection comes within the principles of the rule which excludes the party to a negotiable instrument, being a witness to destroy its validity ; as much so as a bill of lading, or a stock contract. 3 Dall. 505. The proceedings for the discharge of Scholfield under the insolvent laws of Virginia, passed to the assignees the possibility of interest in the property conveyed to Lloyd ; this interest would be important, if the rent payable to Moore was discharged, or ceased to be a lien on the real estate. The evidence of Scholfield was intended to destroy the lien of the rent, and thus to increase the fund for the discharge of his debts. 3 P. Wms. 132 ; Fearne on Contingent Remainders 549.

The second bill of exceptions embodies three propositions. 1. That the contract was not on its face usurious. 2. That besides the written evidence in the deed from Scholfield to Moore, there must be other evidence to show usury ; as, a separate usurious contract, on which the deed was given. 3. That the parol evidence was entirely insufficient to show usury.

This court has decided (4 Pet. 224), that the contract in the deed is not on its face usurious. This has also been decided at this term, in the case of the *Bank of the United States* v. *Waggener*. If a contract was made other than that in the deed, it should be proved ; and there is no evidence of it. The plea sets out a separate and substantial agreement of usury, other than the deed ; and this must be made out by evidence. There is no such evidence. If there be no stipulation to return the money to the purchaser, and the deed is not a cover for taking usurious interest, it is not a loan. It is essential to a loan, that the thing borrowed is to be returned. The communication of the purpose must be mutual. A meditated loan may be *bonâ fide* converted into the purchase of an annuity. 2 Lev. 7 ; 1 And. (new ed.) 47 ; Comyn on Usury, 43, 47–8 ; *Fuller's Case*, 4 Leon. 208 ; Noy 151 ; 2 W. Bl. 859 ; 3 Wils. 390 ; 1 Atk. 30 ; Ord on Usury 23.

The instructions required of the court, by the plaintiff in error, should have been given as asked. The third instruction asked of the court was,

*433] that the whole *matters in evidence, under the instructions already given, were proper for the jury to determine, whether the contract was, in substance and effect, a loan at usurious interest, or a contract for the bargain and sale of a rent-charge. The objection to this is, that it left to the jury the legal effect of the deed. It was not left to the jury, that it was incumbent on the party to show by any testimony, independent of the agreement, that there was a contract for a loan. Thus, the law, as well as the fact, was submitted to the jury. The attention of the jury was not directed to the true issue in the cause. The intention to take usury was essential. This the court have said in the case of the *Bank of the United States* v. *Waggener*. In the fourth exception, it appears, that the court refused to state the law to the jury.

Swann, for the defendant in error.—Scholfield was a competent witness. The record in this case could not be used for him; his interest is, that Lloyd shall be held liable for the rent. 3 Stark. Evid. 1063; 1 Munf. 348; 2 Hen. & Munf. 200. By his assignment under the insolvent laws, all his interest in the property, supposing it discharged from the rent by the usurious character of the incumbrance, passed to his creditors; nor is it admitted, that, under any circumstances, he could derive any benefit from any issue of this case. He stands released by all the parties, except the original lender; all others have discharged him, as appears by the record. By the purchase of the whole property from him, by Lloyd, there no longer existed anything for his agreement to indemnify him for the costs of suit, &c., to operate upon. Suppose, the decision in this case against Lloyd, and he were to sue Scholfield on that agreement, could he recover? Every contract, by parol, was merged in the contract of 1828, which was under seal. If tenant surrenders to landlord, the covenants of the tenant are merged in the deed. The deed from Scholfield to Moore cannot be viewed as a negotiable paper, and thus prevent Scholfield's evidence, as his name is to it. 3 T. R. 7; 7 Ibid. 56, 180. The objection goes rather to his credit, than to his competency.

*The object of both the parties to this suit is, to have the opinion of the court on the main question, of usury, or not usury? It is [*434 contended, that the contract between the parties contains evidence from which the jury might infer usury. A full examination of the evidence will satisfy the court, that the object of Scholfield, who was a necessitous man, was to borrow money, and that of Moore, who was a money-lender, was to obtain a larger rate of interest than was legal. The resort to this rent-charge was a cover to effect these purposes. While it is admitted, that an annuity may, if the transaction is in good faith, and for no other purpose but such purchase, be bought at any fair price; it is denied, that a negotiation originating in the desire of the owner of real estate to procure a loan of money, when, by the means of a rent-charge secured on his property, this money is obtained at an extravagant rate per annum, is freed from the taint of usury. The circumstances of this case are to be considered and taken together; and if they are, in fact, but a cover to evade the law, the contract is void. While cases may be found, and some have been cited, in which an annuity produced a greater interest than was legal, and which, although there was no opportunity of redemption, have not been considered usurious, yet the courts of England have, since those cases, examined the matters of the contract with more scrutiny, and have, on the contract, as set forth in the deed creating the annuity, adjudged it usurious, and considered it as a shift to escape from the statute. It is only the good faith of the transaction which will protect it.

Within the principles, that no machinery, however well devised; no form of conveyance, however well projected; no concealment, however ingenious—will permit the law prohibiting usury to be eluded, comes that now before the court. Inspection of the deed from Scholfield to Moore, even without the testimony of Scholfield and of the other witnesses, results in the irresistible conclusion, that the whole arrangement was one to secure a higher rate of compensation for forbearance than was legal. There was no hazard, no contingency. The property was ample; the subsequent sale

made by Scholfield to Lloyd proves this; the obligation to insure against fire, saved the grantee in the deed from the possibility of loss by fire.

*435] *In reference to the obligation to repay the money advanced, although it was not express, the high rate of interest made it an implied obligation, and a certain result. If a man should advance one thousand dollars for ten years, reserving a rent which would repay the amount, with ten per cent. interest, the contract would be usurious. This would be a shift to secure the repayment of the sum advanced, without any express stipulation for the payment. Courts look at the substance of the contract, and decide on its character, after such an examination. A personal obligation to redeem, does not make any difference as to the validity of the contract, if the redemption would be indispensable, as in the case before the court, where the property was worth more than the sum advanced. Cowp. 740, 775; 2 Doug. 740; *Conway's Executors* v. *Alexander*, 7 Cranch 236. The *dictum* of Lord HOLT, in the case cited by the counsel for the plaintiff in error, from 2 Lev., is not law, although the decision of the case may be right. In that case, there was a real purchase and sale. Had there been a power of redemption, it would have been a cause of suspicion. In 2 Atk. 278, it was held, that a covenant to repay the money was not indispensable; a power to redeem is suspicious, under circumstances. In 3 Bos. & Pul. 159, the same point was decided. Cited also, 4 Camp. 1; 3 Barn. & Ald. 664; 3 Har. & Johns. 109, 114; 4 Pet. 224. Scholfield not only bound the land for the rent, but he also covenanted personally to pay the amount, and to keep the property insured, and in good repair. This was more than the usual contract for an annuity. The witnesses in this case also prove that there was a bargain; viz., about the right of redemption; and the lender, Moore, insisted on its being postponed longer than Scholfield desired.

Key, also for the defendant in error, insisted on the competency of Scholfield as a witness. He cited, 1 Wheat. 6; 1 Phil. Evid. 33, 40, 245, 252; 2 Wash. 32. The promise to indemnify Lloyd, made him interested in the event of the suit; but the circumstances were afterwards altered. His

*436] interest became afterwards balanced. A *recovery against Lloyd would excuse him; and if against Moore, he might be liable. The rule in *Walton* v. *Shelley* has been overruled in *Jordaine* v. *Lashbrooke*. Cited, 15 Johns. 270; 8 Cow. 704; 18 Johns. 167; 3 Har. & Johns. 172; 3 W. C. C. 5; Comyn 206; 11 Mass. 498; 8 Pet. 35–6.

On the question of usury in the transaction, he contended, that, upon the face of the deed, there was enough to show its usurious character. The return of the money advanced was plainly contemplated, at the end of five years. The prayers on both sides presented no more than the purpose of submitting to the jury, whether the transaction was a fair and *bonâ fide* purchase of a rent-charge, or whether it was a cloak for usury. The former decision of this court, in the case, authorized the reference of the deed of Scholfield to Moore, to the jury, as an item for their consideration in examining the question of usury. Cited, 7 Cranch 239; 2 Pet. 150.

As to the fourth prayer of the defendant in the circuit court, it only singles out particular facts in evidence, and asks instructions to the jury upon them, when the court had already given instructions on the whole

evidence. No new question was presented by this prayer, and the action of the circuit court upon it was legal and proper.

Jones, in reply.—Scholfield was an incompetent witness. He was grantor of the rent-charge; and he became insolvent in 1822, was in confinement at the suit of creditors, and discharged under the insolvent laws of the state of Virginia. He sold the property, liable to the rent-charge, to the defendant in error, and the value of the same must have been deducted from the price paid by Lloyd; who will, therefore, be accountable to Scholfield or to his creditors, if the rent-charge is gotten rid of? The amount thus payable, in the event of success in this controversy, is held in trust for certain preferred creditors of Scholfield, and only a part of those creditors. It was part of the agreement made when Lloyd first resisted the claim of the rent, that Scholfield would indemnify him for all the costs and consequences of this resistance; and this *obligation is not affected in any way by any of the subsequent transactions between them; nor has he been released by Lloyd from this liability. This discharge, under the insolvent law of Virginia, was only extended to the plaintiff in the execution under which he was in confinement, and not to his liability to other creditors; unless the property assigned by him at the time of his discharge, will fully pay all his creditors. And this discharge did not in any manner affect his obligation of indemnity. A mere possibility passes to creditors under the bankrupt act; and if this rent-charge is extinguished, the benefit of the extinguishment will go to the creditors, and will go so far to satisfy the debts of Scholfield. [*437

Upon more general grounds, Scholfield is not legally a witness. Admitting he has no pecuniary interest in the result of this suit, he is inadmissible, by reason that he is a party to the alleged corrupt agreement with Moore, and is called upon to destroy his own deed. This case comes within the rule in *Walton* v. *Shelley*, which has been adopted and confirmed by this court. The principle in that case extends to all instruments. It is an estoppel, by general principles, that a man shall not be permitted to destroy his own deed. But, waiving this, Scholfield is substantially a party. This is not dependent on the result of the suit. It may not be a legal privity; whether equitable or legal, it is enough. Cited, 2 Ld. Raym. 730; Hardr. 472; 2 Stark. Ev. 193; Sch. & Lef. 410; 9 Ves. 316; 2 Doug. 517; Stark. Ev. 194, and the note of the cases cited. As to the verdict and judgment being used by Scolfield in a suit against him for the rent-charge: cited, Peake's Ev. 74, and cases referred to; 1 Wils. 257; 4 Camp. 201; 5 Esp. 121; 11 East 578; 1 Taunt. 104. If parties are substantially the same, the objection lies to their privity, and is not confined to blood. 2 Stark. Ev. 194; Phil. Ev. 74–5; 1 Bing. 45.

On the question of usury, Mr. Jones contended, that there was no evidence, which, if admitted, could have induced a jury to believe there was any usury in the transaction. There is no objection on the ground of dealing in annuities and rent-charges,* whatever may be the rates at which they may be purchased or sold. All the cases on this subject are collected in Comyn on Usury. Annuities are fair objects of purchase and sale. 1 Com. Dig. 621. It is admitted, that if there was any security given to return the money paid, it is enough to vitiate the contract; but [*438

this was not so. It was no more the case, than in any other purchase of an annuity or rent-charge, when the annual sum paid exceeds the legal interest of the purchase-money. The right to repay the money reserved in the deed from Scholfield to Moore, was not an obligation to repay it, and thus the case is unaffected by this feature in it.

The circuit court, by their instructions, referred the construction of the deed to the jury. As there was no evidence, out of the deed, from which a contract for usury could be inferred, the court ought to have told the jury that there was no evidence of any usury.

Marshall, Ch. J., delivered the opinion of the court.—This is an action of replevin, instituted in the circuit court for the county of Alexandria, and removed, for trial, to the county of Washington. The plaintiff in error, the original defendant, avowed as bailiff of William S. Moore, that the goods replevied were distrained for rent in arrear. The plaintiff in replevin, after craving *oyer* of the deed, by which the rent alleged to be in arrear was reserved, pleaded the statute of usury, in bar of the claim. The plea alleged, that the contract between the parties was a corrupt and usurious lending of the sum of $5000, upon an interest of ten per centum per annum. Other issues were joined in the cause, but they are not noticed, because they are of no importance.

On the trial, the plaintiff in replevin offered Jonathan Scholfield as a witness, who was objected to by the avowant, but admitted by the court, and to this admission, the avowant excepted. In support of his objection to the competency of the witness, the counsel for the avowant exhibited a deed, executed on the 11th of June 1814, by Scholfield and wife, to Wil-
*439] liam S. Moore, *by whose authority the distress was made; by which the said Scholfield and wife, in consideration of $5000 paid by the said Moore to the said Scholfield, granted to the said William S. Moore, his heirs and assigns for ever, one certain annuity or rent of $500, to be issuing out of, and charged upon, a lot of ground, and four brick tenements, and appurtenances thereon erected, lying in the town of Alexandria, and particularly described in the deed. Also, a deed between the said Scholfield and wife, of the first part, John Lloyd, the plaintiff in replevin, of the second part, and Andrew Scholfield, of the third part; conveying to the said John Lloyd the lot out of which the annuity or rent-charge of $500 had been granted to William S. Moore. This deed contains several covenants, and, among others, a stipulation that the lot shall remain subject to the annuity to William S. Moore. Also, the following letter from Scholfield to Lloyd.

"Alexandria, June 9th, 1824.

"Sir:—As you hold under me the property on which I granted a rent-charge of five hundred dollars a year to William S. Moore, I now give you notice, the contract by which that rent-charge was created I consider to be usurious, and that I shall take measures to set aside the same; and I hereby require you to withhold from William S. Moore the payment of any further money, on account of this rent-charge; and in case distress should be made upon you for the rent, I promise to save you harmless, if you will resist the payment, by writ of replevy. I wish you to understand, that if you make

any further payments, after receiving this notice, that you make them at your own risk. I am, with great respect, yours,

JONATHAN SCHOLFIELD."

"To Mr. John Lloyd."

This letter was delivered to Mr. Lloyd on the day of its date.

Also, a deed of the 18th of November 1826, from said Scholfield, making a conditional assignment of one-fifth of said annuity $500, to Thomas K. Beale, in which he recites and *acknowledges his responsibility to Lloyd, on account of the distress for rent made by William S. Moore. Also, an exemplification of the record of the proceedings in the county court of Fairfax, in the commonwealth of Virginia, upon the insolvency and discharge of the said Scholfield, as an insolvent debtor, in May 1822. [*440

Whereupon, the plaintiff in replevin, to support the competency of the said Scholfield, laid before the court the following documents. A release from said Scholfield to the plaintiff in replevin, dated the 13th day of June 1831, whereby said Scholfield, in consideration of $5000, released by him to the said Lloyd, out of a debt due by him to Lloyd, grants to said Lloyd all the right, title and interest, which he has or may have, from the decision of the suit depending for the annuity or rent-charge, granted to Moore, or which he has, or may have thereafter, to the brick buildings upon which the said annuity or rent-charge is secured. He also releases the said Lloyd from all covenants or obligations, expressed or implied, arising out of the deed of assignment from him to said Lloyd; and also from all claims, &c., which now exist, or may hereafter arise, out of the said deed, &c. Also, a release, from the same to the same, dated 25th April 1828, in which Scholfield releases to Lloyd all his right, &c., to the said suit, &c., and to all sums of money which may accrue, and from all actions, &c., on account of the said suit, &c. Also, a release of the same date from Thomas K. Beale and James M. McCrea, releasing the said Jonathan Scholfield from $950, part of a debt of $2000, due from him to them. Also, a release from Joseph Smith, of same date, releasing $1150, part of a debt of $3000, due to him from said Scholfield. Also, a release of William Veitch and Benoni Wheat, discharging the said Scholfield from $250, part of a debt of $800, due to them from him. Also, an engagement of John Lloyd, dated the 25th of April 1828, binding himself to the several persons who executed the foregoing releases, for the several sums released by them, in the *event of his succeeding in the suit then depending between himself and Charles Scott, bailiff of William S. Moore. Also, a release from John Lloyd, stating, that whereas, Jonathan Scholfield stood indebted to him in a large sum of money; he had agreed to release, and did thereby release, the said Scholfield from $5000, part of the said debt. [*441

In discussing the competency of the witness, some diversity of opinion prevailed, on the question whether he could be received to invalidate a paper executed by himself; but, without deciding this question, a majority of the court is of opinion, that he is interested in the event of the suit. His letter of the 9th of June, to John Lloyd, the tenant in possession, requiring him to withhold from William S. Moore the payment of any further sum of money, on account of this rent-charge, contains this declaration:

"And in case distress should be made upon you for the rent, I promise to save you harmless, if you will resist the payment, by writ of replevy. I wish you to understand, that if you make any further payments after receiving this notice, that you make them at your own risk." This is an explicit and absolute undertaking, to assume all the liabilities which Mr. Lloyd might incur, by suing out a writ of replevin, if an attempt should be made to levy the rent by distress. Mr. Scholfield, then, is responsible to Mr. Lloyd for the costs of this suit. This is a plain and substantial interest in the event of the suit, from which Mr. Lloyd alone can release him. This liability was incurred before the sale and release from Scholfield to Lloyd of the 13th of June 1831; and Mr. Scholfield's responsibility depended on the decision of the suit in which he was called as a witness, unless his release to, and contract with, Lloyd, of the 13th of June 1831, could discharge him from it. That contract transferred to Lloyd all the interest of Scholfield in the ground charged with the rent to Moore, but did not transfer with it his obligation to save Lloyd harmless, for resisting the claim of Moore to the rent in arrear. It produced a state of things which removed all motives, on the part of Scholfield, for incurring fresh liabilities, but did not discharge him from liabilities already incurred. It placed in his hands the entire management of the suit, but did not enable him to undo what was done, or to relieve himself from the claim of Moore to costs, should the suit terminate in his favor. *The responsibility of Lloyd to Moore continued, and the correlative responsibility of Scholfield to Lloyd still continued also, unless Lloyd had released him from it. Now, there is no expression in the contracts between the parties, which purports to be such a release. It has been inferred, as the result of the change in the situation of the parties, but we do not think the inference justified by the fact. The obligation is unequivocal; is expressed in plain and positive terms; is dependent on the event of the suit, and independent of the ownership of the property. The parties enter into a contract by which the property is transferred, without making any allusion to this obligation. It remains, we think, in full force; and, consequently, Jonathan Scholfield was an interested and incompetent witness.[1]

*442]

In the progress of the examination, the plaintiff's counsel put to the witness the following question—"Did you, in the course of your discussions as to the time you were to keep the money, state your object in the application to be, to have the use of $5000 for a limited time?" To which the defendant's counsel objected, as being a leading interrogatory. The plaintiff's counsel then varied the question, as follows: "Did you, or did you not, in the course of your discussions, &c." To which the defendant's counsel made the same objection; but the court overruled the objection, and permitted the question to be put; and the defendant excepts to that decision. Although the plaintiff's counsel objected to this question, and said, that he excepted to the opinion of the court, no exception is actually prayed by the party, or signed by the judge. This court, therefore, cannot consider the exception as actually taken, and must suppose it was abandoned.

[1] But see 12 Pet. 145.

Evidence was given by the plaintiff in replevin, conducing to prove, that the contract between Scholfield and Moore, under which the sum of $5000 was advanced by the latter to the former, originated in an application for a loan of money; not for the purchase and sale of a rent-charge or annuity. Scholfield applied to Moore to raise or borrow $5000, securing him on an annuity or ground-rent for one year; Moore proposed to let him have the money for ten years, on the same security. After much discussion, the parties agreed to split the *difference, and that Scholfield should keep the money five years. Scholfield says, his first proposition was [*443 to allow ten per cent., and to secure it by an annuity or ground-rent on the houses mentioned in the deed. No other interest but ten per cent. was mentioned; Scholfield had no intention of selling the property. It was also in evidence, that Moore was a money-lender, and was in the habit of advancing money, secured on ground-rents or annuities; and that Scholfield was a money borrower; and that the property was an ample security for the money lent, and for the annuity. On the part of the avowant, it was proved, that the usual value of those ground-rents or annuities, charged on lots in Alexandria, was such as to afford an interest of ten per cent. per annum on the principal sum advanced; and it was admitted by Scholfield, that he gave Moore no promise, stipulation or security for the return of the $5000, other than is contained in the deed itself. Many witnesses were examined, and a great deal of testimony, bearing more or less directly on the contract, was adduced.

The deed from Scholfield and wife to W. S. Moore, by which, in consideration of $5000, the annuity or rent-charge of $500 per annum was created, contains a covenant "that then the said J. Scholfield, his heirs and assigns, will well and truly pay to the said W. S. Moore, his heirs and assigns, the said annuity or rent-charge of $500, by equal half-yearly payments, on the 10th day of June and on the 10th day of December, in each year, for ever hereafter, as the same shall become due; and that if the same be not punctually paid, then it shall be lawful for the said W. S. Moore, his heirs and assigns, from time to time, on every such default, to enter on the premises charged, and to levy, by distress and sale of the goods and chattels there found, the rent in arrear, and the costs of distress and sale; and if the same shall remain in arrear and unpaid for the space of thirty days after any day of payment, as aforesaid, and no distress sufficient to satisfy the same can be found on the premises charged, then it shall be lawful for the said W. S. Moore, his heirs and assigns, to enter on the premises charged, and from thence to remove and expel the said J. Scholfield, his heirs and assigns, and to hold and enjoy *the same, as his and their absolute estate, for [*444 ever thereafter." "And that the said J. Scholfield, his heirs and assigns, will for ever hereafter keep the buildings and improvements which now are, or hereafter may be, erected on the premises charged, fully insured against fire, in some incorporated insurance office, and will assign the policies of insurance to such trustees as the said W. S. Moore, his heirs or assigns, may appoint; to the intent, that if any damage or destruction from fire shall happen, the money received on such policies may be applied to rebuilding or repairing the buildings destroyed or damaged. And lastly, that he and his heirs will for ever warrant and defend the annuity or rent-charge hereby granted to the said W. S. Moore, his heirs and assigns, against any defalca-

tion or deduction, for or on account of any act of him, his heirs or assigns." The deed contained a further covenant, that if, at any time after five years, the said J. Scholfield should pay to the said W. S. Moore the sum of $5000, with all arrears of rent, &c., then the said W. S. Moore will execute any deed releasing or extinguishing the said rent or annuity.

When the testimony was closed, the counsel for the defendant and avowant prayed the court to instruct the jury, "that the contract between said Jonathan Scholfield and William S. Moore, such as it is evidenced by the deed from said Scholfield and wife to said Moore, set out in the proceedings and given in evidence by the plaintiff as aforesaid, was lawful and free of the taint of usury; and in order to impeach it of usury, and support the issues of fact joined in this cause, on the part of the plaintiff, it is necessary for the plaintiff to prove, that besides the contract imported by the terms of said deed, there was an actual contract between said Scholfield and Moore, for the loan of $5000 at usurious interest, to wit, at the rate of ten per cent. per annum, to be disguised under the form and name of an annuity or rent-charge; and that such sum was actually lent by said Moore to said Scholfield, and said deed given in pursuance and execution of such contract and loan, securing the said usurious interest, under the form and name of such annuity or rent-charge; that the facts given in evidence to the jury as aforesaid, to support the issues above joined on the part *of the plaintiff, did not import such a lending of money by Moore to Scholfield, at usurious interest, as was sufficient to support the issues joined on the part of the plaintiff in replevin, upon the second and fourth pleas by the plaintiff in replevin, pleaded to the cognisance in this case." Which instruction the court refused to give; to which refusal, the defendant and avowant, by his counsel, prayed an exception, which was signed and sealed.

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The substantial merits of the case are involved in the subsequent instructions which the court actually gave; and it will be apparent, when we proceed to the consideration of those instructions, that if they ought to have been given, this ought to have been refused. There are, however, objections to the manner in which these instructions are framed; which ought not to have been overlooked by the court. The statute against usury not only forbids the direct taking of more than six per centum per annum, for the loan or forbearance of any sum of money, but it forbids any shift or device, by which this prohibition may be evaded, and a greater interest be in fact secured. If a larger sum than six per cent. be not expressly reserved, the instrument will not of itself expose the usury; but the real corruptness of the contract must be shown by extrinsic circumstances, which prove its character. Those circumstances must, of course, be viewed in connection with the contract. The counsel for the avowant asks the court to separate the instrument from its circumstances, and to inform the jury, that the instrument itself was lawful, and free from the taint of usury; and that to fix this taint upon it, the plaintiff in replevin must prove, besides the contract in the deed, an actual contract, stipulating interest at the rate of ten per centum per annum, for the loan of $5000. Had this instruction been given, circumstances which demonstrated the intention of the parties, and explained completely the contract actually made, if such existed, must have been disregarded by the jury. The court is next requested to say to the jury, that the facts given in evidence did not import such a lending as would

support the issue. The court is thus asked to usurp the province of the jury, and to decide on the sufficiency of the testimony, in violation of the well-established principle, that the law is referred to the court, *the fact to the jury. The court did not err, in refusing to give this instruction. [*446

"The plaintiff then prayed the court further to instruct the jury, that the matters shown in evidence to the jury as aforesaid, are proper for the consideration of the jury, to determine, from the whole evidence, under the instruction of the court, as already given to them in this cause, whether the said contract so made between the said Moore and Scholfield was, in substance and effect, a loan at usurious interest, or a *bonâ fide* contract for the bargain and sale of a rent-charge; and if the jury, from the said whole evidence under the instructions as aforesaid, shall believe it to have been such a loan, they should find for the plaintiff; if otherwise, for the defendant." The court gave this instruction, and the defendants excepted to it. Its correctness is now to be examined.

The statute declares, "that no person shall, upon any contract, take, directly or indirectly, for loan of any money," &c., "above the value of six dollars, for the forbearance of one hundred dollars for a year," &c. It has been settled, that to constitute the offence, there must be a loan, upon which more than six per cent. interest is to be received; and it is also settled, that where the contract is, in truth, for the borrowing and lending of money, no form which can be given to it, will free it from the taint of usury, if more than legal interest be secured. The ingenuity of lenders has devised many contrivances, by which, under forms sanctioned by law, the statute may be evaded. Among the earliest and most common of these, is the purchase of annuities, secured upon real estate or otherwise. The statute does not reach these, not only because the principal may be put in hazard, but because it was not the intention of the legislature to interfere with individuals, in their ordinary transactions of buying and selling, or other arrangements made with a view to convenience or profit. The purchase of an annuity, therefore, or rent-charge, if a *bonâ fide* sale, has never been considered as usurious, though more than six per cent. profit be secured. Yet, it is apparent, that if giving this form to the contract will afford a cover which conceals it from judicial investigation, the statute would become a dead letter. Courts, therefore, perceived the necessity of disregarding the *form, and examining into the real nature of the transaction. If that be, in fact, a loan, no shift or device will protect it. [*447

Though this principle may be extracted from all the cases, yet as each depends on its own circumstances, and those circumstances are almost infinitely varied, it ought not to surprise us, if there should be some seeming conflict in the application of the rule by different judges. Different minds allow a different degree of weight to the same circumstances. *The King* v. *Drury*, 2 Lev. 7, is a very strong case in favor of the avowant, and has been much pressed on the court by his counsel. Brown agreed to assign to Drue, a lease of a house for forty years, for the sum of 300*l.*; Drue not having the money, Drury, by agreement with Drue, paid the 300*l.*, took the assignment to himself, and then let the house to Drue for 39¾ years, at a rent, of which 30*l.* was payable to himself. Drury covenanted that if, at the end of four years, Drury paid the 300*l.*, he would convey the residue of the term to

Drue: *Per* HALE, C. J.—"This is not usury within the statute; for Drue was not bound to pay the 300*l.* to Drury." "It is no more in effect than a bargain for an annuity of 30*l.* yearly, for 39¾ years, for 300*l.* to be secured in this manner, determinable sooner, if the grantor pleases; but the grantee hath no remedy for his 300*l.*" "And so the acceptance of the 7*l.* 10*s.* is not usury. But if Drury had taken security for the repayment of the 300*l.*, or it had been, by any collateral agreement, to be repaid, and all this method of bargaining a contrivance to avoid the statute; this had been usury." This case has been cited, to prove that, without an express stipulation for the repayment of the money advanced, a contract cannot be usurious, whatever profit may be derived from it. It must be admitted, that although Lord HALE does not say so in terms, the case, as reported, countenances this construction. Bnt the accuracy of the report must be questioned; and it is believed, that such a principle would not now be acknowledged in the courts of England. Chief Justice HALE considers the transaction simply as a bargain for an annuity, not as a loan of money. Whether *the circumstances of the case warranted this conclusion or not, it is the conclusion he drew from them. The negotiation between Drue and Drury, by which the latter advanced the money, became the assignee of the term, and then leased it to the former, accompanied with a power of redemption, are totally overlooked by the judges. They had no influence on the case; they were not considered as affording any evidence, that the transaction was in reality a loan of money. The principle of law announced by the judge is, simply, that a bargain for an annuity, is not usury. He adds, that if the repayment of the 300*l.* had been secured, and all this method of bargaining a contrivance to avoid the statute, this had been usury." He connects the bargaining, being a contrivance to avoid the statute, with a security for the repayment of the sum advanced, as if he thought this security indispensable to the effect of the bargaining, without which the contract could not be usurious. It is obvious, that if this inference of law from the fact, be admitted, without qualification, it will entirely defeat the statute. If an express stipulation for the repayment of the sum advanced be indispensable to the existence of usury, he must be a bungler, indeed, who frames his contract on such terms as to expose himself to the penalties of the law. If a man purchases for $500, an annuity for $200 per annum, redeemable at the will of the grantor in ten years, without any express stipulation for the repayment of the $500; this, according to *Drury's Case*, as reported, would be no more than a bargain for an annuity; and yet the grantor would receive excessive usury, and the grantee would be compelled, by the very terms of the contract, to repay the $500, as certainly as if he had entered into a specific covenant for repayment, on which an action could be maintained. Lord HALE cannot have intended this. He has not said so in terms; and we must believe, that he did mean to require more than that the contract should not be such as, in effect, to secure the principal sum advanced, with usurious interest. It would be a very unusual stipulation, in the grant of an annuity, that the money should be returned, otherwise than by the annuity itself.

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So, in *Finch's Case*, reported in Comyn on Usury 43, Canfield secured to Finch more than the legal interest on the money *advanced, by a rent issuing out of land, and the court determined, that it was not usury, though Canfield had applied for a loan of money, which Finch

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refused, offering at the same time to let him have the sum by way of annuity or rent; this was held not to be usurious. "This," said the court, "is not a contract commenced upon a corrupt cause; but an agreement for a rent, which it is lawful for every one to make." But it was said, that if twelve pounds in the hundred had been offered to be paid (the legal interest was then ten per cent.), and the other had said that he would accept it, but that this would be in danger of the law, and therefore, he did not like to contract upon these terms; but that if the other party would assure him an annual rent for his money, then he would lend it; and upon this, an agreement for the rent had been made; this would have been within the statute." The same principle is decided in Cro. Jac. 252.

These cases turn on the evidence which shall be sufficient to prove a loan to be the foundation of the contract; but do not withdraw the case from the statute, if a loan be its foundation. They decide that a mere application for a loan does not convert a subsequent annuity, which yields a profit beyond legal interest, into a usurious contract; but that an actual contract for the loan, if converted into an annuity, in order to avoid the law, is within the statute. In these cases, the court decides upon the fact, and determines that a variation in it, the importance of which is not distinctly perceived, would bring the contract within the law. In all of them, we think it probable, that a court of the present day would leave it to the jury to say, whether the contract was a fair purchase or a loan, and would direct the jury to find for the plaintiff or defendant, as their opinion on that fact might be.

In *Fuller's Case*, 4 Leon. 208, and in *Symonds* v. *Cockerill*, Noy 151, and Brownl. 180, a distinction is taken between the purchase of an annuity, without any communication respecting a loan, and a purchase where the negotiation commences with an application to borrow money, though no contract of loan followed such application. In a case between *Murray* and *Harding*, reported in Comyn on Usury 51, Markham, an attorney, at the request of Robert Harding, rector of Grafton Regis, applied to Mrs. Mary Murray, to lay out 120*l.* in the purchase of an annuity *of 20*l.* a year, for the defendant's life, charged on his rectory of Grafton, [*450 redeemable by him at the end of the first five years, upon the payment of 109*l.* 10*s.* There was no communication with her about a loan, but merely about the purchase of such redeemable annuity; although Harding had mentioned to his attorney, Markham, a wish to borrow one hundred pounds or upwards. This case was brought before the court. In giving his opinion on it, Chief Justice De Grey said, "communication concerning a loan has sometimes infected the case, and turned the contract into usury, but then the communication must be mutual." "I know no case where even a meditated loan has been *bonâ fide* converted in a purchase, and afterwards held to be usurious. To be sure, it is a strong and suspicious circumstance; but if the purchase comes out to be clearly a *bonâ fide* purchase, it will notwithstanding be good." "If a power of redemption be given, though only to one side, it is a strong circumstance to show it a loan, as in *Lawley* v. *Hooper*; but that alone will not be conclusive." The Chief Justice added, "in the present case, the principal is precarious and secured only by the life of a clergyman, and his continuing to be beneficed."

In *Lawley* v. *Hooper*, 3 Atk. 278, Thomas Lawley, being entitled to an

annuity of 200*l.* a year for life ; sold 150*l.*, part thereof, to Rowland Davenant, for 1050*l.*, with power to repurchase, on giving six months' notice. After the death of Davenant, Lowry brought this bill against his executors for an account, and that upon payment of what should be due, the defendants might re-assign the annuity to the plaintiff. In giving his opinion, the chancellor said, "there has been a long struggle between the equity of this court, and persons who have made it their endeavor to find out schemes to get exorbitant interest, and to evade the statutes of usury. The court, very wisely, hath never laid down any general rule beyond which it will not go. In this case, there are two questions to be considered. 1. Whether this assignment is to be considered as an absolute sale, or security for a loan. *451] As to the first, I think, though there is no occasion to *determine it ; there is a strong foundation for considering it a loan of money ; and I really believe, in my conscience, that ninety-nine in a hundred of these bargains are nothing but loans, turned into this shape to avoid the statutes of usury." The chancellor then proceeds to state the circumstances under which the contract was made, and the character of the contract itself ; and although there was no treaty about a loan, he considers it as one. After enumerating the circumstances, he concludes with saying, "therefore, upon all the circumstances, I think it was, and is to be taken as, a loan of money, turned into this shape, only to avoid the statute of usury ; but I do not think I am under any absolute necessity to determine this point ; for I am of opinion, that this is such an agreement as this court ought not to suffer to stand, taking it as an absolute sale." The relief asked by the plaintiff in his bill, was granted.

In the noted case of *Chesterfield, Executor of Spencer*, v. *Janssen*, reported in 1 Atk. 352, and 1 Wils. 286, 5000*l.* was advanced by Janssen, on the bond of Mr. Spencer to pay 20,000*l.*, should he survive the Duchess of Marlborough. After the death of Mr. Spencer, this bond was contested by his executor ; and one of the points made was, that it was usurious. The cause was argued with great ability, and determined not to be within the statutes, because the principal was in hazard. In giving this opinion, the judges define usury in terms applicable to the present case. "To make this contract usurious," said Mr. Justice BURNET, "it must be either because it is within the express words, or an evasion or shift to keep out of the statutes." "Whatever shift is used for the forbearance or giving day of payment, will make an agreement usurious, and is, by a court and jury, esteemed a cover only. Suppose, a man purchase an annuity at ever such an under-price, if the bargain was really for an annuity, it is not usury. If on the foot of borrowing and lending money, it is otherwise ; for if the court are of opinion, the annuity is not the real contract, but a method of paying more money for the reward or interest than the law allows, it is a contrivance that shall not avoid the statute." The lord chancellor said, "if there has been a loan of money, and an insertion of a contingency which gives a higher rate *452] of interest than the statutes allow, and the contingency goes to *the interest only, though real and not colorable, and notwithstanding it be a hazard, yet it has been held usurious. Where the contingency has related to both principal and interest, and a higher interest taken than allowed by the statute, the courts have then inquired whether it was colorable or not." Wilson reports the chancellor to have said, "courts regard the sub-

stance, and not the mere words of contracts. Loans, on a fair contingency to risk the whole money, are not within the statute; a man may purchase an annuity as low as possible; but if the treaty be about borrowing and lending, and the annuity only colorable, the contract may be usurious, however disguised."

Richards qui tam v. *Brown*, Cowp. 770, was an action on the statute of usury. Richard Heighway applied to Brown for a loan of money, to which Brown assented, and advanced part of the money, promising to advance the residue, being 400*l.*, in a fortnight. After some delays, Brown said he could not raise the money himself, but would try to get it of a friend in the city, who was a hard man. Heighway said, he would give twenty or thirty guineas, rather than not have the money. Brown said, "that his friend never lent money but on an annuity at six years' purchase. However," he added, "if you will take the money on those terms, I will engage to furnish you with money to redeem, in three months' time." Heighway executed a bond and warrant of attorney, for conveying the annuity to one Waters. The money was really advanced by Brown, and the name of Waters was used by him. Heighway deposed, that Brown first proposed the annuity; he himself would not have granted one. Heighway pressed for the money to redeem, but Brown refused it. Lord MANSFIELD told the jury, that if they were satisfied, "that, in the true contemplation of the parties, this transaction was a purchase by the one, and a sale by the other, of a real annuity, how much soever they might disapprove of, or condemn, the defendant's conduct, they must find a verdict for him. But, on the contrary, if it appeared to them, to have been, in reality and truth, the intention of both parties, the one to borrow and the other to lend, and that the form of an annuity was only a mode forced on the necessity of the borrower by the lender, under color of which he might take an usurious and exorbitant *advantage, then they might find for the plaintiff, notwithstanding the contingency of the annuitant dying within three months." The [*453 jury found for the plaintiff. On a motion for a new trial, Lord MANSFIELD said, "the question is, what was the substance of the transaction, and the true intent and meaning of the parties; for they alone are to govern, and not the words used. The substance, here, was plainly a borrowing and lending; Heighway had no idea of selling an annuity, but his declared object was to borrow money." "It is true, there was a contingency during three months. It was that which occasioned the doubt, whether a contingency for three months is sufficient to take it out of the statute." The new trial was granted.

In the case of *Irnham* v. *Child*, 1 Bro. C. C. 93, Lord THURLOW is reported to have said (referring to the previous *dicta*), "all, therefore, that seems to be meant is this, that the annuity shall be absolutely sold, without any stipulation for the return of the principal; and that it shall not be intended as a means of paying interest, until such principal is returned. But where there is a sale, it is not usurious to make it redeemable."

In *Drew* v. *Power*, 1 Sch. & Lef. 182, the plaintiff being much embarrassed in his circumstances, communicated to the defendant his desire to raise money to extricate himself from his debts. After approving his purpose, and increasing sufficiently his anxiety for its accomplishment, the defendant informed him, that two of his estates, Poulagower and Knock-

avin, would shortly be out of lease; and that if he would make the defendant a lease of them for three lives, at the rent of 200*l.* per annum, he would, from friendship, advance him money sufficient to pay all his debts; the plaintiff assented to this proposition. The bill then proceeds to charge much unfairness and oppression on the part of the defendant, in making advances towards paying the debts of the plaintiff, and states, that he claimed a balance of 1015*l.* 15*s.*, for which he demanded the plaintiff's bond; this was given. The defendant then required a lease for Poulagower and Knockavin, which was executed, for three young lives, at the rent of 200*l.* per annum, which was greatly below their value. The defendant also obtained other
*454] leases from the plaintiff. *The bill details a great variety of other transactions between the parties, which are omitted, as being inapplicable to the case now before this court. The bill was brought for a full settlement of accounts; and that on payment of the balance fairly due to the defendant, the leases he had obtained from the plaintiff might be set aside. The defendant, in his answer, denied the charges of oppressive and iniquitous conduct set up in the bill, and insisted, that the lands called Poulagower and Knockavin having been advertised to be let, he agreed to take them at a valuation, and insisted, that he paid a fair rent for them. The cause came on to be heard before the master of the rolls, who directed several issues, to try whether the full and fair value of the lands were reserved on the leases granted by the plaintiff to the defendant; and whether either, and which, of them were executed, in consideration of any and what loan of money, and from whom. The case was carried before the lord chancellor, who disapproved the issues, and gave his opinion at large on the case. After commenting on the testimony respecting the leases, he says, "Hastings has distinctly proved, that the loan of money was the inducement to this lease; and if it was, it vitiates the whole transaction. I do not mean, advancing money by way of fine, or the like; but where it is a distinct loan of money, to a distressed man, for which security is to be taken, and he is still to continue a debtor for it. If I were to permit this to be considered as a transaction which ought to stand, I should permit a complete evasion of the statute of usury." The chancellor concluded a strong view of the testimony, showing a loan of money to be the consideration on which the leases were granted, with saying, "there is no reason to send this case to a jury." "There is sufficient to satisfy the conscience of the court that these leases ought not to stand."

The case of *Marsh* v. *Martindale*, 3 Bos. & Pul. 153, was a judgment on a bond for 5000*l.* The consideration on which the bond was given, was a bill drawn by Robert Wood, on Martindale, Filet & Co., for 5000*l.* payable three years after date. The bill was accepted, the interest discounted by
*455] Sir Charles Marsh, and the residue of the money paid to *Martindale, for the purpose of enabling him to discharge certain annuities for which he was liable. On a motion for a new trial, Lord Alvanley, Chief Justice, said, "it was contended, that the transaction was to all intents a purchase of an annuity; and this certainly was the strongest ground which the plaintiff could take; for it has been determined, in all the cases on the subject, that a purchase of an annuity, however exorbitant the terms may be, can never amount to usury. But if the transaction respecting the annuity be under cover for the advancement of money by way of loan, it will

not exempt the lender from the penalty of the statute, or prevent the securities from being void. Then, is this transaction the purchase of an annuity, or is it not?" After restating the transaction, the judge asked, "what is this but forbearing for three years to take the sum of 4250*l.* for which forbearance, he was to receive interest on 5000*l.*?" The judge referred to the case in Noy 151, as applicable to this. "There," he said, "a question having arisen, whether a deed securing a rent-charge were void for usury, the court agreed, that if the original contract were to have a rent-charge, that is not usury, but a good bargain; but if the party had come to borrow the money, and then such a bargain had ensued by security, then that is usury."

Doe, on the demise of Grimes et al., Assignees of Hammond, a Bankrupt, v. *Gooch*, was an ejectment. Hammond had taken ground on a building lease, at the rent of 108*l.* per annum; he assigned the premises to Roberts for 2300*l.* a sum considerably above their then value, and at the same time, took a lease from Roberts, at the increased rent of 395*l.* containing the same covenants for building as were in the original lease, together with a stipulation that he should be at liberty, on giving six months' notice, to repurchase the premises at the same price for which he had sold them to Roberts. Hammond completed the houses; and, having become a bankrupt, his assignees brought this action against the tenants of Roberts. The judge left it to the jury to say, whether the transaction between Hammond and Roberts was, substantially, a purchase or a loan; and told them, "that if they thought it was a loan, the deeds were void, the transaction being usurious." The jury found a verdict for the *plaintiff. On a motion for a new trial, counsel contended, that the deeds imported a purchase; that the principal money was altogether gone, unless Hammond chose to redeem; and, though it may be his interest so to do, this will not make it an usurious transaction; if a person have an annuity secured on a freehold estate, it may be clearly his interest to redeem it; but such a power will not make the bargain usurious. Here, Bailey, Justice, observed, "in that case, the principal is in hazard from the uncertain duration of life; here it is in the nature of an annuity for years, and there is no case in which an annuity for years has been held not to be usurious, where, on calculation, it appeared that more than the principal, together with legal interest, is to be received." The new trial was refused. [*456

In the case of *Lowe* v. *Waller*, 2 Doug. 736, Lord Mansfield told the jury, "that the statute of usury was made to protect men who act with their eyes open; to protect them against themselves." "They were to consider whether the transaction was not, in truth, a loan of money, and the sale of goods, a mere contrivance and evasion." The jury found the contract to be usurious. On a motion for a new trial, Lord Mansfield said, "the only question in all cases like the present, is, what is the real substance of the transaction, not what is the color and form."

Gibson v. *Fristoe*, 1 Call 62, was an action of debt brought by Gibson against Fristoe *et al.*, in the district court of Dumfries; issue was joined on the plea of the statute of usury; verdict and judgment for the defendant, and appeal to the court of appeals. The case was shortly this: John Fristoe being indebted to John Gibson, by bond, for 445*l.* 11*s.* 2*d.* sterling, on the 17th of December 1787, assigned him bonds of perfectly solvent obligors, for 780*l.* currency, at the agreed value of 382*l.* 8*s.* 2*d.* sterling, and gave a

new bond, with two sureties, for a balance of 106*l.* 17*s.* 2*d.* sterling, payable in March following. Mr. Washington, for the appellant, said, "in all these cases, the first inquiry is, if there be a loan. I admit, that if a real loan is endeavored to be covered under any disguise whatever, it is still usury." He contended, that here was no loan, "but a purchase of property; for bonds
*457] are property." *In giving his opinion, Mr. PENDLETON, the president of the court of appeals, said, "an agreement by which a man secures to himself, directly or indirectly, a higher premium than six per cent. for the loan of money, or the forbearance of a debt, is usury. If the principal, or any considerable part, be put in risk, it is not usury; because the excess in the premium is the consideration of that risk." "But if the bargain proceeds from, and is connected with, a treaty for the loan or forbearance of money, it is usury; because the vendor is supposed to have submitted to a disadvantageous price, under the influence of that necessity which the statute meant to protect him against." The judgment of the circuit court was affirmed.

Clarkson's Administrator v. *Garland and another*, reported in 1 Leigh 147, was a bill in chancery, brought by the plaintiff, to be relieved against several contracts, bonds and deeds of trust, alleged to be usurious. The bill states numerous usurious and oppressive transactions, which are generally and particularly denied in the answers. Testimony was taken, and the case, so far as it is applicable in principle to that under consideration, is thus stated: Clarkson, wanting to raise $2235, applied to Jacobs, and offered him as many slaves as would command that sum. Jacobs advanced him, on the 23d of March 1815, $2235, and took an absolute bill of sale for sixteen slaves. It was, at the same time, agreed, that the slaves should remain in Clarkson's possession, on hire, for one year, and if, at the end of the year, Clarkson shall pay Jacobs $2935, Jacobs shall, in consideration thereof, resell the slaves to him. The plaintiff charged, that his application to Jacobs was to borrow money, and that the substance of the transaction was a loan, reserving a higher interest than is allowed by law. On the 22d of May, Clarkson again applied to Jacobs, and obtained from him the further sum of $2666.26. For this sum, he also gave Jacobs a bill of sale for fourteen slaves, redeemable by the payment of $3394, on or before the 23d of March 1816. The plaintiff avers, that this also was a loan, and that the pretended sale of slaves was a device to cover the taking of usurious interest.
*458] *Jacobs, in his answer, avers that both contracts were, in truth, what they purported to be, *bonâ fide* agreements to purchase and resell the slaves therein mentioned. The slaves not being redeemed, Garland, with full knowledge of the usury, as the bill charges, became jointly interested with Jacobs in both contracts. In August 1816, they procured Clarkson's bond for $7000, being the aggregate of both debts, with further usury for forbearance. The court declared both contracts to be usurious.

Douglass v. *McChesney*, 2 Rand. 109, was a bill to be relieved from two bonds and a deed of trust, given by the plaintiff to the defendant. The bill states, that Douglass applied to McChesney to borrow $500; McChesney replied, that it was his practice, whenever he lent money, to sell a horse, which Douglass professed his willingness to purchase. Some time afterwards, the complainant went, by appointment, to the house of McChesney, who showed him a horse for which he asked $400. The plaintiff avers, that

the horse was not worth more than $80 or $100, but, urged by his necessities, and knowing that he could not get the $500 from McChesney, without giving his price for the horse, he assented to the proposal, and executed two bonds for the money, which were secured by a deed of trust. When the bonds became due, McChesney advertised the property for sale; and this bill was brought to enjoin further proceedings, and to be relieved. The testimony proved, that the horse was not worth more than $100, and that it was reported to be McChesney's practice, when he lent money, to sell a horse at an exorbitant price, to cover a usurious gain. The chancellor dissolved the injunction, and the plaintiff appealed. The court of appeals was of opinion, that a tacit understanding between the parties, founded on a known practice of the appellee to lend money at legal interest, if the borrower purchased of him a horse at an unreasonable price, would be a shift to evade the statute of usury. The decree was reversed; but the court being of opinion, that the questions of fact would be decided more understandingly by a jury, on *vivâ voce* testimony, remanded the cause *to the court of chancery, with directions to have issues tried to ascertain the value of the horse, and whether Douglass was induced to purchase him at the price of $400, by the expectation of a loan.[1] [*459

The covenants in the deed of the 11th of June 1814, granting the annuity have been stated. They secure the payment of ten per cent. for ever, on the sum advanced. There is no hazard whatever in the contract. Moore must, in something more than twenty years, receive the money which he advanced to Scholfield, with the legal interest on it, unless the principal sum should be returned after five years; in which event, he would receive the principal, with ten per cent. interest till repaid. The deed is equivalent to a bond for $5000, amply secured by a mortgage on real property, with interest thereon at ten per centum per annum, with liberty to repay the principal, in five years. If the real contract was for a loan of money, without any view to a purchase, it is plainly within the statute of usury; and this fact was very properly left to the jury. There is no error in this instruction.

The counsel for the defendant then prayed the court to instruct the jury, that if they shall believe from the evidence aforesaid, that the land out of which the said rent-charge mentioned in said deed from Scholfield to Moore was to issue, was, in itself, and independently of the buildings upon the same, wholly inadequate and insufficient security for said rent; that then the jury cannot legally infer, from the clause in said deed, containing a covenant on the part of said Scholfield to keep the said houses insured, anything affecting said contract with usury or illegality; which instruction the court refused; whereupon, the defendant prayed the court to instruct jury as follows, to wit, that if the jury shall believe, from the evidence, that the fair and customary price of annuities and rent-charges, at the date of the said deed from Scholfield, was, in the market of Alexandria, ten years' purchase, and so continued for a period of years, then, from the circumstances of the rent being ten per centum on the amount advanced, the jury cannot legally infer from such circumstance, any thing usurious or illegal in the contract. But the court refused to grant the said instructions,

[1] And see Starkweather *v.* Prince, 1 McArthur 144; Quackenboss *v.* Sayer, 62 N. Y. 344.

or either of them, as prayed by the counsel for the defendant; whereupon,
*460] *the said counsel excepted to the said opinion of the court, and its refusal to give either of the said instructions as prayed.

It is obvious, that the instructions given by the court, at the prayer of the plaintiff's counsel, cover the whole matter contained in this prayer of the defendant. It is, in truth, an effort to separate the circumstances of the case from each other, and to induce the court, after directing the jury that they ought to be considered together, to instruct them that, separately, no one of them amounted itself to usury. The court ought not to have given this instruction. It was proper to submit the case, with all its circumstances, to the consideration of the jury; and to leave the question whether the contract was, in truth, a loan, or the *bonâ fide* purchase of an annuity, to them.

There is no error in the opinion of the court, refusing the second and fourth instructions prayed by the defendant and avowant in the court below, nor in giving the instructions prayed by the plaintiff in replevin; but this court is of opinion, that the circuit court erred in deciding that Jonathan Scholfield was a competent witness for the plaintiff in that court. This court doth, therefore, determine, that the judgment of the circuit court be reversed and annulled, and that the cause be remanded to that court, with directions to set aside the verdict, and 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 Columbia, holden in and for the county of Washington, 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 annulled; and that this cause be and the same is hereby remanded to the said circuit court, with directions to set aside the verdict, and award a *venire facias de novo*.

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*461] *Robert Fenwick, Plaintiff in error, *v.* Eliza Chapman and Robert Chapman, by Kitty Chapman, their mother and next friend, Defendants in error.

Slavery.—Manumission.

By the Statute of Maryland, of 1796, ch. 67, § 13, manumissions of slaves, by will and testament, may be made to take effect at the death of the testator; the testator may devise or charge his real estate with the payment of debts, to make the manumission effective, and not in prejudice of creditors.

The right to freedom may be tried at law, in a suit against the executors, at the instance of the manumitted slaves; and the executor may, in such suit, admit the existence of a sufficiency of real assets or real estate to pay the debts of his testator.

A judgment at law in favor of manumitted slaves, in a suit against an executor, obtained on the admission by the executor of a sufficiency of assets, may be set aside in equity, if such admission was made, without foundation in fact, or in fraud or mistake. In such a proceeding in equity, to which the executor, the manumitted slaves, and all persons interested have been made parties, there may be an entire review of the administration of the estate, of the conduct of the executor, and that of the creditors, in regard to the estate, and in respect to the vigilance of the executor in paying, and of the creditors in the pursuit of their debts.

Fenwick v. Chapman.

The words in a will, "after my debts and funeral charges are paid, I devise and bequeath as follows," amount to a charge upon the real estate for the payment of debts.

When a testator manumits his slaves, by will and testament, and it clearly appears to have been his intention, that the manumission shall take place at all events, the manifest intention, without express words to charge the real estate, will charge the real estate for the payment of debts if there be not personal assets enough, without the manumitted slaves, to pay the debts of the testator.

In such a case, the creditors of the testator must look to the real estate for the payment of debts, which remain unpaid, after the personal estate, exclusive of the manumitted slaves, has been exhausted; and they may pursue their claims in equity, or according to the statutes of Maryland, subjecting real estate to the payment of debts.

When an executor permits manumitted slaves to go at large and free, under manumission to take effect at the death of the testator, he cannot recall such assent; nor can it be revoked, under an order of the orphans' court of Maryland, for the sale of all the personal estate of the testator; that court not having jurisdiction of the question of manumission.

It being admitted, that a testator left real estate to an amount in value more than sufficient to pay his debts, without the sale of slaves manumitted by his will, those persons are free, notwithstanding a deficiency of personal assets.

Chapman *v.* Fenwick, 4 Cr. C. C. 431, affirmed.

*Error to the Circuit Court of the District of Columbia, and county of Washington. The defendants in error instituted a suit in [*462 the circuit court, to recover their freedom, alleging that they were entitled to it, under the last will and testament of their late mistress, Frances Edelin, deceased, in the state of Maryland. The plaintiff in error claimed the petitioners as his slaves, having purchased them of the sole acting executor of the deceased, at a sale made by the order and authority of the orphans' court of Prince George's county, in Maryland; and by the consent of all parties to the suit, the executor was admitted to defend the same in the court below. It was proved in the circuit court, that the slaves were sold by the executor, with all the other personal estate of the deceased, by authority of the aforesaid orphans' court, as assets in the hands of the executor, to pay the debts of the deceased; there not being assets enough to pay the same, without the sale of said slaves, and without recourse to the real estate. It was contended, that the sale was a good one, and that the slaves were not entitled to their freedom. The following facts in the case were agreed, and submitted to the court, with the other evidence in the case, and making a part of the record now before this court.

It is agreed in this case: 1. That the petitioners are the same named in the will of Frances Edelin, deceased, to whom she gave their freedom, after her death, as appears by the said will, a copy whereof is hereto annexed. 2. That Edelin, the defendant, was the executor of the last will and testament of said deceased, and as such, sold, in the year 1833, said petitioners to the other defendant, Fenwick. 3. That the sale of the petitioners was made in Prince George's county aforesaid, where the deceased lived at the time of her death, and where the petitioners were; and that, from the time of deceased's death, to the time of their sale, they were permitted by the executor to go at large, as free, and that after the purchase made by Fenwick, he brought them to the district of Columbia, where the present suit was instituted; and that after the institution of the said suit, Fenwick transferred his claim to the petitioners, to the defendant, Edelin, who repaid him his money, and appears to defend the suit. 4. *That the deceased left [*463 real estate to an amount in value more than sufficient to pay her debts,

without the sale of the negroes emancipated by the will, as will appear by her will referred to, and made a part of this agreement; but not personal estate sufficient. 5. That the original copy of all the proceedings had in the orphans' court of Prince George's county, relative to the settlement of the deceased's estate, by her executors or administrators, may be filed as part of this case.

The will of Frances Edelin, the proceedings in the orphans' court of Prince George's county, and all the material facts in the case, are fully stated in the opinion of this court, delivered by Mr. Justice WAYNE. Upon a hearing in the circuit court, judgment was given in favor of the petitioners in that court, now defendants in error, and from that judgment a writ of error was sued out to this court.

The case was argued by *Brent*, for the plaintiff in error; and by *Key*, for the defendants.

Brent stated, that the only questions for the court to decide, are, whether the defendants in error are entitled to their freedom or not, under the circumstances of the case; and whether the plaintiff in error (the executor) had, or had not, the right to sell them, as assets, to pay the debts of the testator. After reading the petition, the answer, and the agreement as to the facts in the case, and the will of Frances Edelin, he referred to the proceedings in the orphans' court of Prince George's county; which showed that the personal estate of the testator was insufficient to pay the debts of the deceased; and that under these circumstances, the orphans' court ordered the sale of the negroes, and they were sold.

Prior to the year 1796, there could not be, under the laws of Maryland, a manumission of slaves by will. This act was, in 1796, repealed, under certain limitations; and among them, that no such manumission is available, if done in prejudice to creditors. The first ground for the reversal of the judgment of the circuit court, is, that this manumission was in prejudice
*464] of creditors. The fact of the insufficiency of the personal estate, *exclusive of those negroes, is established by the proceedings of the orphans' court, and the accounts of the executor. Creditors are not bound to resort to the real estate for the satisfaction of their claims, when personal estate can be found. Cited, 1 P. Wms. 294 n; 2 Ibid. 664; 1 Rob. on Wills 67; Kelty's Laws of Maryland, Act of 1798, ch. 101, sub-div. 7. This act declares what shall be assets for the payment of debts; among which are negroes. In a case in 1 Har. & Gill, the testator charges his land with the payment of debts, rather than that his negroes shall be sold, and deprived of their freedom, which is given to them. In this case, the question as to the construction of the act of 1796, was waived.

Key, contrà.—The testator died in 1825, and, by her will, she charges her whole estate with the payment of her debts, both real and personal, and gave freedom to the defendants in error. The executor assented to the bequest of freedom; they were at liberty for eight years; when, under an order of the orphans' court, to which they were not parties, and of the proceedings of which court they had no notice or knowledge, they were taken and sold. Over such a case, that court had no authority or jurisdiction. The court could not manumit. It will be found, on an examin-

ation of the proceedings of the orphans' court, that, in July 1833, the balance due the executor was $591, and the court did not specifically order the negroes sold. The order was general, to sell all the personal estate, and not to sell any particular part of it. This is shown by the acts agreed. By the 24th chapter of the law of Maryland of 1729, negroes are not to be sold, so long as there are other goods. In this case, the only debts are to the executor himself, for over-payments by him in his administration of the estate; and he is the residuary legatee.

All the legatees, on a deficiency of other assets, must contribute. 2 Vern. 708; 2 Madd. Ch. 109. 107; 2 Ves. jr. 415, 420. Where it may be collected from a will, that any particular legacy should be paid, and exempted from contribution, in the *event of a deficiency to pay debts, it shall be done. In the case of a bequest of freedom, there must, from its very nature, be such an intention. How could the negroes be made to contribute? The whole of the bequest is defeated, and its purpose destroyed, if the executor has a lien on the freedom of the negroes for contribution. Freedom cannot be parted, it cannot be enjoyed, nor does it exist, unless it is entire. Any restraint upon it, which puts in the power of another a right to sell a part of it, destroys it altogether. No inference can be drawn from the bequest of freedom, but that it was entire and unincumbered. It was fully, completely and irrevocably bestowed, when it was given at all. [*465

Nor does the law warrant the claim which is made by the counsel for the plaintiff in error; that because there is a deficiency of personal estate, when the real estate is also charged with the debts of the testator, personal estate, specially bequeathed, shall be taken from a legatee and sold, leaving the real estate free and unmolested.

It is also contended, that the executor, having consented to the freedom of the defendants in error, cannot afterwards withdraw this consent, and subject them to slavery. Once free, always free. By no law or proceeding, existing or authorized in any state of the United States, can they again be made slaves. Where a legacy has been assented to, or paid by an executor, it cannot be recovered back. This principle applies to the case before the court, as the freedom of the defendants was assented to by the executor. Cited, in support of the discharge of the legacy from reclamation, 1 Vern. 94; 2 Vent. 358; 2 Chan. Cas. 145; 1 Chitty's Dig. 630.

Brent, in reply, insisted, that real estate can be resorted to in no other case, but where there is a deficiency of personal estate; and even in such a case, by the law of Maryland, an application to make the real estate liable must be made to the chancellor.

The testatrix does not charge her whole estate with her debts. This is not the true interpretation of the will. When debts are charged by a testator on an estate, that portion of it which, *according to law, is first held liable to debts, is understood to be so charged in the first place. This is a just and legal execution of the will. In Roberts on Wills 175, it is laid down, that real estate will not be ordered for sale, to save a charity. Cited also, 1 P. Wms. 294. [*466

It is denied, that the executor could give the negroes their freedom, to the prejudice of creditors. Their rights could not be affected by any act of

the executor. Nor did he give them their freedom; he barely allowed them to go at large.

WAYNE, Justice, delivered the opinion of the court.—The object of this writ of error is, to reverse a judgment of the circuit court of the district of Columbia, for alleged error in having adjudged the defendants in error (colored persons) to be free and discharged of and from the service of the plaintiff in error. The judgment of the court was rendered upon a statement of facts entered into at the trial term of the court, signed by the counsel of the parties. It is necessary, however, to set out the facts in the case more in detail, as they appear by the record of the proceedings in the cause.

Eliza Chapman and Robert Chapman, infants and colored persons, by their mother and next friend, claiming to be free by the laws of the land, allege, that they are illegally detained and confined in custody, by one Robert Fenwick, who sets up some pretended claim or title to them, as his slaves for life. They pray that a *subpœna* may issue to the marshal of the district of Columbia, commanding him to summon the said Robert Fenwick to be and appear before the judges of the circuit court of the district of Columbia for the county of Washington, to answer the allegation of the petitioners in the premises. The *subpœna* was issued; and on the day of the return of it, the defendant appeared by his attorney, and in his plea denied that the petitioners were entitled to their freedom, as alleged; and put himself upon the country.

Before the trial of the issue, by consent of all parties, one Richard J. Edelin was admitted as a party defendant; he being the executor of the last will and testament of Frances Edelin, deceased, late of Prince George's
*467] county, Maryland; and having, *as such, sold the petitioners to the defendant, Robert Fenwick, as the executor contends, in virtue of an order of the orphans' court of Prince George's county, to sell all the personal estate of Frances Edelin. This order was made upon the petition of the executor, dated 16th July 1833; in which he states, that Frances Edelin, by her will, had directed that certain negroes should be free at her death; and that he had discovered there were not assets enough, independent of those negroes, to discharge the debts of the testatrix. The executor had included the negroes manumitted by the will, in an inventory and appraisement of the personal estate of the testatrix, returned by him to the orphans' court, on the 17th of January 1826. The will is dated the 2d day of November 1825. The testatrix died before the 8th day of December of the same year; and immediately after her death, the defendant, Richard J. Edelin, took upon himself the burden and execution of her will.

The testatrix begins her will in the following words: "In the name of God! Amen. I, Frances Edelin, of Prince George's county, in the state of Maryland, being of sound and disposing mind, memory and understanding, do make and publish this my last will and testament, in manner and form following. First, and principally, I commit my soul to the mercies of my dear Redeemer and Lord Jesus Christ, and my body to the earth, to be decently buried; and after my debts and funeral charges are paid, I devise and bequeath as follows:" Then follow sundry devises and specific legacies; and so much of the will relating to the freedom of the defendants in error, and to the other persons manumitted by the will, is in these words: "Item,

I give and bequeath to my nephew, Richard James Edelin, the small house and lot now occupied by Robert Frazer, which I give to him, his heirs and assigns for ever, with this proviso, that the negroes which are hereinafter mentioned to be free, to live in the back room of said house." "Item, negro woman Letty, her daughter Kitty, a mulatto, with her three children, to wit, Eliza, Robert and Kitty Jane, with their future increase, and an old woman named Lucy, I do hereby declare them free, at and after my death, and they shall have the right to live in and occupy the back room in the house and lot I give and bequeath to my nephew, Richard James *Edelin. To the two old negro women, I give them, and bequeath, ten dollars a year to each of them, as long as they live; and ten dollars a year, during two years after my death, exclusive of the year in which I die, to mulatto Kitty. Item, my three nephews, John Aloysius, Richard James and Walter Alexander Edelin, for and in consideration of the bequests I have made them, shall pay every year to negro woman Lucy, and to negro woman Letty, ten dollars for every year the said negro women may live, as mentioned in the foregoing item; and my nephew, John B. Edelin, for and in consideration of the bequests I have left him, shall pay, during the two years above mentioned, to mulatto Kitty, ten dollars for each year." [*468

The law of Maryland permitting the manumission of slaves by will is in these words (Act of 1796, ch. 67, § 13): "that from and after the passage of this act, it shall and may be lawful for every person or persons, capable in law to make a valid will and testament, to grant freedom to and effect the manumission of, any slave or slaves, belonging to such person or persons, by his, her or their last will and testament; and such manumission of any slave or slaves may be made to take effect at the death of the testator or testators or at such other periods as may be limited in such last will and testament; provided always, that no manumission hereafter to be made by last will and testament, shall be effectual to give freedom to any slave or slaves, if the same shall be in prejudice of creditors, nor unless the said slave or slaves shall be under the age of forty-five years, and able to work and gain a sufficient maintenance and livelihood, at the time the freedom given shall commence."

The agreement or statement of facts entered into between the counsel of the parties, at the trial term of the cause, and upon which the judgment of the court was given, is as follows: 1. That the petitioners are the same named in the will of Frances Edelin, deceased; to whom she gave their freedom, after her death, as appears by said will, a copy whereof is hereto annexed. 2. That Edelin, the defendant, was the executor of the last will and testament of said deceased, and as such, sold, in the year 1833, said petitioners, to the other defendant, Fenwick. 3. That the sale of the petitioners was made in Prince *George's county aforesaid, where the deceased lived at the time of her death, and where the petitioners were; and that, from the time of deceased's death, to the time of their sale, they were permitted by the executor to go at large as free; and that after the purchase made by Fenwick, he brought them to the district of Columbia, where the present suit was instituted; and that, after the institution of the said suit, Fenwick transferred his claim to the petitioners to the defendant, Edelin, who repaid him his money, and appears to defend the suit. 4. That the deceased left real estate to an amount in value more than suffi- [*469

cient to pay her debts, without the sale of the negroes emancipated by the will, as will appear by her will, referred to, and made a part of this agreement; but not personal estate sufficient. 5. That the original copy of all the proceedings had in the orphans' court of Prince George's county, relative to the settlement of deceased's estate, by her executors or administrators, may be filed as a part of this case.

Under the aforegoing circumstances, the statement of facts entered into by the counsel of the parties, and the law of Maryland permitting the testamentary manumission of slaves, when it is not done "in prejudice of creditors," the question to be decided is—were the defendants manumitted in prejudice of creditors? And we will first consider it, by inquiring what effect the words in the will, "and after my debts and funeral charges are paid, I devise and bequeath as follows," have to charge the real estate of the testator with the payment of debts, in the event of there not being a sufficiency of personal estate to pay them, without the manumitted slaves. Without any construction of our own upon these words, the effect of them to charge the real estate is settled by decisions which are uncontested, and cannot be controverted.

In the case of *Kidney* v. *Coussmaker* (Trin. 1793), 1 Ves. jr. 436, it is said, "after paying debts," amounts to a charge upon real estate; for which very little is sufficient. In *Newman* v. *Johnson* (East. 1682), 1 Vern. 45: "My debts and legacies being first deducted, I devise all my real and personal estate to J. S." These words were said to amount to a devise to sell for payment of debts. *A devise of land, after payment of debts, is a charge on the land; for, until debts paid, testator gives nothing. 3 Ves. 739. In the case of *Trott* v. *Vernon*, 2 Vern. 708, the testator willed and devised, that his debts, legacies and funerals should be paid in the first place, and then devised his land to his sister for life, with remainder to her issue, remainder over, and made the sister executrix; it was decreed, that the lands be charged with the debts. The lord chancellor said, it was but natural to suppose, that all persons would provide for the payment of their just debts; and directing them to be paid in the first place, imports, that before any devise by his will should take place, his debts, &c., should be paid. See cases, Cas. temp. Talb. 110; 3 P. Wms. 95; 1 Ves. sen. 499; 2 Johns. Ch. 614; for the same doctrine.

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And in the case of the *Earl of Godolphin* v. *Pennock*, 2 Ves. sen. 270, it was held, that real estate was charged for the payment of debts, under a general clause in a will that debts should be first paid and satisfied. Though cases both before and after it can be found of a contrary character, yet that such a general clause will charge real estate, has been always held. In the case before us, the word "after" implies, as strongly as any word in the English language can do, that the payment of debts is a condition precedent to the absoluteness of any entire devise in the will. A contrary doctrine seems to have been held in *Davis* v. *Gardiner*, 2 P. Wms. 189, and it was so held, under the devise in that case; but the lord chancellor, in his decision, admits, that the real estate would have been charged, in a case, which is, indeed, the case under the will of Frances Edelin. He says, "I admit, the portions might be charged on the real estate, had the devise of the land been to the son in fee, absolutely; for without such construction, the devise would have been void, and the son would have taken the land by descent.

So that the will must, in such a case, have signified nothing as to the land, unless it were to operate so as to charge the land with the legacies, and to intimate that the heir was not to take it, until after the legacies paid." And there is no difference, in the rule of construction, between legatees and creditors.

But leaving out of view the words in the will, "and after *my debts and funeral charges are paid, I devise and bequeath as follows," [*471 and the authorities which have been cited to show that they make a charge upon the real estate for the payment of debts, would there not be a charge upon the real estate for the payment of debts, if it be manifest from the will, that it was the intention of the testatrix, that the manumitting clause in her will was to take place, or to have effect at all events? The general rule is, that the personal estate of a testator shall, in all cases, be primarily applied in the discharge of his personal debts or general legacies, unless he, by express words or manifest intention, exempt it. Bac. Abr., tit. Executor and Administrator, L. 2. The testator may exempt a part of it, by making it a particular legacy; or the whole of it, either by express words, or plain manifest intention, or by giving it as a specific legacy. *Adams* v. *Meyrick*, 1 Eq. Cas. Abr. 271, pl. 13; *Bamfield* v. *Wyndham*, Prec. in Ch. 101; *Wainwright* v. *Bendlows*, Ibid. 451; Ambl. 581; *Stapleton* v. *Colville*, Cas. temp. Talb. 202; *Phipps* v. *Annesley*, 2 Atk. 58; *Ancaster* v. *Mayer*, 1 Bro. C. C. 454; *Webb* v. *Jones*, 2 Ibid. 60; *Burton* v. *Knowlton*, 3 Ves. 107; *Milnes* v. *Slater*, 8 Ibid. 305.

In *Jones* v. *Selby* (Hil. 1709), Prec. in Ch. 288, it is said, "where the testator's intention clearly appears, that a legacy should be paid at all events, the real estate is made liable, on a deficiency of personal assets." That such clear intention of the testator will charge the real estate, is also decided by authority. Was it clearly the intention of the testator that these defendants should be free, at all events, so far as she had power to make them so, under the law of Maryland? We think it was: and the conclusion is sustained by the words of the manumitting clause of the will, by the provision which she makes of a place for their residence, by the annuities which are bequeathed to some of them, the manner in which they are made, and, above all, we say, by the nature of manumission itself. After naming the slaves, her language is, "I do hereby declare them free, at and after my death; and they shall have the right to live in, and occupy the back room in the house and lot I give and bequeath to my nephew, Richard James Edelin." And the devise of that house and lot to Richard James Edelin (the now plaintiff in error) is made with "this proviso, that the negroes which are hereinafter mentioned to be free, *to live in the back room [*472 of said house." In confirmation, too, of its having been the intention of the testatrix, that these negroes were to be free, at all events, it is worthy of remark, that the effective words of manumission are in strict conformity with, or a repetition in part of these words in the statute of Maryland, "and such manumission of any slave or slaves may be made to take effect at the death of the testator." But the testatrix, after declaring these negroes to be free, at and after her death, provides for them a residence; and the measure of her benevolence being unexhausted, she bequeaths to some of them annuities or pecuniary legacies; two of them as charges upon her estate, and the rest she directs to be paid by her devisees and nephews,

in consideration of the bequests she had made to them. Can it be supposed by any one, that such provisions would have been made by the testatrix, for these manumitted slaves, if it had not been her intention that they should be free at her death, at all events? We think no one will answer the inquiry in the negative. But without such assistance from a will, to collect the intention of a testator, the nature of the thing directed to be done, may clearly show an intention that it is to be done at all events, so as to make real estate liable for payment of debts, on a deficiency of personal assets. As, for instance, when the thing to be done cannot be partially performed by the executors, without defeating altogether the intention which directs it, and the thing itself. Manumission, to take effect at the death of a testator, is of that character. What is manumission? It is the giving of liberty to one who has been in just servitude, with the power of acting, except as restrained by law. And when this liberty is given in absolute terms, by will, under the law of Maryland, it can only be defeated, by the person conferring it, having done it in prejudice of creditors, or by the slave standing in the other predicament of the law, of being over forty-five years of age, and being unable to work and gain a livelihood, at the time the freedom given shall commence.

But what meaning shall be given to the words of the statute of Maryland, "that no manumission hereafter to be made by last will and testament shall be effectual to give freedom to any slave or slaves, if the same shall be in prejudice of creditors?" It is, that the manumitter must not be insolvent; that a creditor of the testator shall not be deprived in reality of his *debt, by the manumission. Any other construction in favor of the creditor, from any right to personal assets for the payment of debts, of the executor's obligation so to apply the whole of them, or in favor of the creditor's remedy at law to have the personal assets applied to the payment of his debt, including manumitted slaves, when the other personal estate is not enough to pay all debts, or against his being carried into a court of equity, to make land liable for his debt, when the personal assets have been exhausted, exclusive of manumitted slaves—any other construction than that which has been given to the words "in prejudice of creditors"—would interfere with the right of a testator to make his real estate chargeable with the payment of debts, when he manumits a slave; and would, therefore, confine effective manumissions to those cases in which a testator leaves personal property enough, besides the manumitted slaves, for the payment of his debts, or when he dies owing no debts. It would also, so far as his creditor's remedy at law, or his not being carried into a court of equity are concerned, be equivalent to a denial of a testator's right to make a specific legacy of all his slaves, and to charge the payment of his debts exclusively upon his land. The first is not in conformity with the statute of Maryland; and the second, no one will deny to be a testator's right. The statute is a privilege to all persons, capable in law to make a valid will and testament, to grant freedom to, and effect the manumission of any slave or slaves, belonging to such person or persons, by will and testament; and it may be made to take effect at the death of the testator or testators, if the same shall not be "in prejudice of creditors." Now, can the construction of that statute be, that the testator is limited to the manumission of slaves, only in the event of his having other personal property sufficient to pay

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debts ; or to deny to him a right, when he manumits, to do what he could have done before the statute was passed, and what it must be admitted he can still do—to make all of his slaves a specific legacy, and to charge his land with the payment of his debts, even though he may have, at the time of his death, no other personal property than slaves. But in opposition to the protest against any interference with a creditor's right to have a remedy at law, to enforce the payment of his debt out of the personal assets, and against his being carried into a court of equity to make *the land liable, when, by the manumissson of slaves, the other personal assets [*474 shall be insufficient to pay his debts ; it is sufficient to say, that he holds this right in all cases at the will of a testator, and in many cases subject to the dubious expression of a testator's intention. The creditor may be carried into a court of equity, or voluntarily resort to it, to obtain his debt, either from the lands or the personalty, when the testator leaves it doubtful from what funds his debt are to be paid ; or when the executor doubts, from the will, or the indebtment of his testator, how assets are to be applied, or whether the land is not chargeable with the payment of debts, or when the whole of the personal estate has been left as a specific legacy ; or when the specific legatee of a part contends for the payment of debts out of the real estate ; and in many other instances, with this of manumission added to them, when the personal property, besides, is insufficient to pay debts; on account of its reasonableness, and because the legislative intendment of the statute of Maryland, allowing freedom to be given to slaves by will, might be defrauded in the greater number of cases, if a creditor was not required to go into equity to obtain his debt by a sale of the testator's land.

This construction, too, of the words "in prejudice of creditors," and of a creditor's obligation to go into a court of equity, is in exact conformity with that indisputable rule in equity ; that, where one claimant has more than one fund to resort to, and another claimant only one, the first claimant shall resort to that fund on which the second has no lien. *Lanoy* v. *Duke of Athol*, 2 Atk. 446; 1 Ves. 312 ; *Mogg* v. *Hodges*, 2 Ves. 53 ; *Trimmer* v. *Bayne*, 9 Ibid. 209. With this rule in view, see, by a course of short reasonings, how absolute its application is to sustain the correctness of our construction of the words in the statute, "in prejudice of creditors," and of a creditor's obligation to go into equity, in a case of manumission, after other personal assets are insufficient to pay debts.

Manumission is good by the act of Maryland, 1796, ch. 67, § 13, if it be not in prejudice of creditors. If ample funds exist, and they are accessible, by the laws of Maryland, to the creditors, they cannot be prejudiced. Lands devised for the payment of debts, or which have *become [*475 chargeable by implication, constitute a fund for the payment of debts ; and an ample and plain remedy is admitted to exist, in the laws of Maryland, so to apply them. How then are creditors prejudiced, if the land liable, in a case of manumission, is sufficient to pay all of a testator's debts ?

As to an executor's obligation to apply personal assets to the payment of debts, not specifically bequeathed or manumitted, an opposite construction to that which has been given to the words "in prejudice of creditors," would be to make him master of the rule directing the application of assets ; and in all cases of manumission, would place it in the executor's power to

postpone or defeat the testator's intention in that regard. The will is the executor's law, and he is no more than the testator's representative in all things lawful in the will. A specific legacy of all the personal property is a law to him. The manumission of all the slaves of his testator, if he leaves no other personal property to pay debts, and if it be made in a way to charge real estate with the payment of all debts, is equally his law. In a case of manumission and insufficiency of other personal assets to pay debts, it is the duty of an executor to file his bill against the creditors and all interested in the estate; placing the manumitted slaves in the guardianship of the chancellor, and praying that the lands may be made liable to the payment of debts; that equity may be done to all concerned, according to the law of equity. If an executor withholds freedom from manumitted slaves, the slaves may prefer their petition at law, against the executor, or against any person holding them under him, and they may recover their freedom by a judgment at law, though the question raised by the plea is, that the manumission has been made in prejudice of creditors. And the slaves may do this, upon the principle that a statute never gives a right without providing a remedy; or the absence of such provision, contemplating that there is a legal remedy to secure it. If an executor permits manumitted slaves to go at large and free, from the death of the testator, it is an assent to the manumission, which he cannot recall, any more than he can, after assenting to a legacy, withdraw that assent. Nor can he deprive the manumitted persons of their liberty by the order of an orphans' court in Maryland, for the sale of all the personal property of his testator; upon a suggestion that, *besides
*476] the manumitted slaves, there is not enough personal property to pay debts; that court having no jurisdiction, by the laws of Maryland, to try the question of freedom. And if, by such order, they have been sold by the executor, they may sue for their freedom in a suit at law, against the purchaser, or against any other person holding them in slavery.

The decision in the case of *Negro George et al.* v. *Corse's Administrator*, 2 Har. & Gill 1, was urged in argument, in opposition to the opinion just expressed. In that case, the petitioners claimed their freedom in virtue of the will and testament of their master, James Corse. The manumitting clause of the will gives freedom to some of the slaves, at the testator's death, and to others when they shall have arrived at particular ages; and the testator further says, if his personal estate, exclusive of the negroes, should not be sufficient to discharge all his just debts, "then my will is, that my executor or administrator, as the case may be, may sell so much of my real estate as will pay my debts, so as to have my negroes free, as before stated." The testator makes specific devises of real estate in fee to his son, and devises and bequeaths to his brother, Unit Corse, the residue of his estate, both real and personal, with the unexpired time of the negro girls and boys, as designated in the first clause of the will; and he appointed Unit Corse executor. The case was submitted to the jury, in the Kent county court, upon a statement of facts; and with instructions from the judge, that if the jury believed the facts, they must find a verdict for the defendant. The verdict and judgment being against the petitioners, they appealed. In the statement of facts, it is admitted, that the personal estate of the testator, either including or excluding his negroes, was not, at the time of the execution of his will, nor at any time after, sufficient to pay his

debts; but that his real estate, exclusive of the negroes, was sufficient to pay all his just debts and funeral charges. Upon the appeal, three judges decided to affirm the judgment, upon the ground, "that the question of the existence of a sufficiency of real assets to pay the debts of the testator, never can be tried on an issue between the executor or administrator only, without "prejudice" to creditors. That it was an issue to which the creditors were no party, and to protect whose interest *nobody appears." And the court further says, the admissions made by the appellee, he was [*477 unauthorized to make; and the court was incompetent to pass judgment upon the facts they contained, not being matters in issue in the cause. The court also say, "so far as relates to the personalty, the executor or administrator is competent to act for all concerned; but in trying the facts whether there be assets by descent in the hands of the heir, and what is the amount thereof, he has no interest, either personally or in right of representation." With all respect for the judges deciding that cause, these opinions cannot command our assent.

We think with Judge CRANCH, and use his language in regard to that decision, when he gave his opinion in the circuit court in this case. The judge says, "when lands are devised to the executor, to be sold for the payment of debts, or when the lands are charged with the payment of debts, and a power is given to the executor to sell them; the lands are as much a fund in his hands for that purpose, as the goods and chattels; and he represents the creditors in regard to the lands, so far as their interests are concerned, as much as he does in regard to the personal estate; and the creditors are as much a party in the issue in respect of the lands, as they are in respect of the goods and chattels. When he is charged with the sale of his testator's lands, for payment of debts; he is as much bound to inquire in regard to the lands, as he is in regard to the personal estate. For it is his duty to execute the whole of his testator's will; and, in such a case, the creditors have as good a right to look to the land through him, for the payment of those debts, as they have to look to the goods and chattels, through him." To these remarks, we add, it is well settled, that executors have power to sell the real estate, where such power is given to them, or necessarily to be implied from the produce being to pass through their hands in the execution of their office. *Bentham* v. *Wiltshire*, 4 Madd. 44; Jac. & Walk. 189. And in Vin. Abr. 920, *Hawker* v. *Buckland*, 2 Vern. 106, it is said, "if a man devise lands to be sold by one for payment of his debts and legacies, and make the same person his executor, the money made by such person, upon the sale of the land, shall be assets in his hands." Now if, in case of such a devise, the executor can sell, and does sell, *bonâ fide;* and by doing so, can *deprive the creditors of all claim upon the land; substituting [*478 the price of it as assets—doing this without in any way consulting the creditors, and in virtue of the devise for that purpose; why may not the executor admit, in a suit at law between himself and another, that the land devised is sufficient to pay debts, though such an admission may release a part of the personalty, by the judgment of a court, from any future liability at law for the debts of his testator? Why should it be, that the value of lands so devised for the payment of debts, can only be ascertained, when creditors are a party to the proceedings? when they have no legal concern in fixing the price for which the executor may sell the land; and when,

moreover, if it be necessary to obtain, as it is in some cases, an order of a court of equity to sell the land, the creditors need not be made parties to the application. Their claim is upon the assets made by the sale of the land. It is true, creditors may, for cause, enjoin the executor from selling; or, upon his application to sell, in a case where the intervention of a court of equity is asked to permit or direct a sale, creditors may be allowed to make themselves parties; but the difference between these last positions; and the executor's right to sell, and having sold, is all that there is between the action of the executor being restrained by a court of equity, and where his power to sell has not been restrained, and is executed.

Suppose, in a case of a devise to sell land for the payment of debts, as in the case of *George* v. *Corse*, that the administrator had admitted assets from the sale of the land, without stating the amount, but sufficient to pay debts, and without stating the amount of the debts due by the testator; could the court, in the face of the admission, have conjectured it might be in prejudice of creditors, and upon such conjecture or apprehension, have given judgment that it was in prejudice of creditors. Or suppose, the administrator had, in his admission, stated both the amount of the assets and of debts, the former being larger than the latter, would it not have given judgment, that the manumission had not been made in prejudice of creditors, and have done so upon the executor's admission? The court could not, in such an issue, have given to the creditors any more protection than they had by the administrator's admission; it could not have possessed itself of
*479] the assets, or in any way *have directed the distribution of them. It was powerless to call upon the executor for a schedule of debts, or upon the creditors to make an exhibition of their claims. But it may be said, the difference in the case supposed, and that which existed, is that in the first, the assets were in hand; and in the other, were to be made by a sale of the land. The difference makes nothing against the argument, for the value of the land can be as well ascertained by proof, as it can be by the executor's sale; and when he admits the value to be sufficient to pay debts, he does, in truth, do no more than is done when he admits the existence of a sufficiency of personal assets, but unsold, to pay debts. As between himself and another, his admission may surely bind him in that other's favor; as well in regard to assets to be made from land, as in regard to personal assets undisposed of. In the latter case, there is as much a question of the sufficiency of assets, as there is in the case when assets are to be made by the sale of land; and so far as creditors are concerned, in a case of manumission, the reason for not trying the issue between a petitioner and an executor, is as strong, in an inquiry of a sufficiency of personal assets, as in one of real assets. And the court, in the case under remark, only excludes an inquiry into the value of the latter; and if it did not intend to do so, then a manumitted slave can never show that the manumission was not made in prejudice of creditors.

The court thought it was an issue to the prejudice of creditors, as they were no party to the proceedings, and to protect whose interest no one appeared; and "thus the judgment of the court, having once given effect to the manumission, on the ground, that effects in the hands of the heir should be applied to the payment of the debts, the executor or administrator is absolved from all responsibility, except as to the residue of the personalty,

and the creditors would be left to seek, through a court of equity, real assets which perhaps never had existence." But the mistake is in stating the land devised to an executor to be sold for the payment of debts to be assets in the hands of the heir; and that the judgment between the then petitioners and administrator, would have been conclusive against creditors as well in equity as at law. The assets were not legally in the hands of the heir; nor would the judgment *have concluded the right of [*480
the creditors from showing, in a proceeding in equity, to which the manumitted slaves, the executors, and all persons interested had been made parties, that the admission of the executor had been made without any foundation in fact, or in fraud or mistake; and upon showing either, in an entire review of the administration, a court of equity would set aside the judgment at law, and decree that the manumission had been made in prejudice of creditors, and subject the slaves to the payment of debts, either by sale for life or for a term of years; according as the one or the other might be requisite to pay the creditors. Such a course would be in perfect harmony with the statute allowing manumissions to be made by will. They may be made, to take effect at the death of the testator, but shall not be effectual, if done to the prejudice of creditors. Upon whom does it lie, to show it to have been done in prejudice of creditors? Surely, upon the creditors; or the words of the statute, "to take effect at the death of the testator," can never be fulfilled in any case of manumission, if it can only take effect after the manumitted slaves have shown it had not been done in prejudice of creditors; or if, as a condition precedent to effective manumission, the slaves must carry executors, creditors, and all interested in the real estate, into a court of equity, to prove the manumission not to have been made in prejudice of creditors.

But the case before us is distinguishable from that in Harris & Gill, in other particulars which make that case inapplicable. The first difference is, that the record shows in this case, there were no creditors of the testatrix, Frances Edelin, at the time the suit was brought in the circuit court. The only sum which could then be charged upon the estate was the right of retaining, which the executor had, on account of his having overpaid beyond assets. He then is the only creditor, by his own admission; and when he admitted the sufficiency of real estate to pay himself, there was an end of all inquiry as to what was the value of the land. There was nothing due to any one else; consequently, no one could be prejudiced: and the words of the statute, "in prejudice of creditors," cannot be construed to apply to any other than the testator's creditors at the time of his death, and such as might become so for funeral charges; not to such as the executor might make his creditors, **virtute officii;* and much less to defeat a manu- [*481
mission, in favor of an executor, because he has carelessly, though *bonâ fide*, paid debts beyond assets.

Upon the whole, then, our opinions are, that, by the statute of Maryland, 1796, ch. 67, § 13, manumissions of slaves by will and testament, may be made to take effect at the death of the testator; that the testator may devise or charge his real estate with the payment of debts, to make the manumission effective, and not in prejudice of creditors; that the right to freedom may be tried in a suit at law, against the executor, at the instance of the manumitted slaves; and that the executor may, in such suit, admit

the existence of a sufficiency of real assets, or real estate, to pay the debts of his testator; that a judgment at law in favor of slaves manumitted by will, in a suit between them and an executor, upon his admission of a sufficiency of real estate to pay creditors, may be set aside in equity, if such admission was made without foundation in fact, or in fraud or mistake, upon the creditors' showing either, in a proceeding in equity to which the manumitted slaves, the executors, and all persons interested have been made parties—in which there may be a review of the entire administration of the estate, of the conduct of the executor, and that of creditors in regard to the estate, and in regard to the vigilance of the one in paying, and of the others in pursuit of their debts. That the words in this will, "and after my debts and funeral charges are paid, I devise and bequeath as follows," amount to a charge upon the real estate, for the payment of debts. That when a testator manumits his slaves by will and testament, and it clearly appears to have been his intention, that the manumission shall take place at all events, the manifest intention, without express words, to charge the real estate, will charge the real estate for the payment of debts, if there be not personal assets enough, without the manumitted slaves, to pay the debts of the testator. That in such a case, the creditors of the testator must look to the real estate for the payment of debts which may remain unpaid, after the personal assets, exclusive of the manumitted slaves, have been exhausted; and that they must pursue their *claims in equity, *482] or according to the statutes of Maryland, subjecting real estate to the payment of debts, to make their debts out of the land. That when an executor permits manumitted slaves to go at large and free, under a manumission to take effect at the death of the testator, he cannot recall such assent by his own act: nor can it be revoked under the order of an orphans' court in Maryland, for the sale of all the personal estate of a testator, that court not having jurisdiction of the question of manumission. That in this case, it being admitted that the testatrix left real estate to an amount in value more than sufficient to pay her debts, without the sale of the negroes emancipated by the will, the defendants in error are entitled to freedom. The judgment of the circuit court is, therefore, affirmed.

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 Columbia, holden in and for the county of Washington, 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 affirmed, with costs.

*George Harrison, Thomas H. White and others, Appellants, *v.* Henry Nixon, surviving Executor of Matthias Aspden, deceased.

Bill in equity.

A bill was filed in the circuit court of the United States for the district of Pennsylvania, stating that one Matthias Aspden, a citizen of Pennsylvania, made his will, dated in Philadelphia, on the 6th of December 1791, and bequeathed all his estate "to his heir-at-law," and died in April 1829; that letters testamentary were taken out in Pennsylvania, by the executor; that large sums of money were received by him; and the bill prayed for a decree in favor of the complainant, who asserted himself to be the true and only heir-at-law of the testator, and that he was solely entitled to the bequest. The answer of the executor stated, that from information and belief, the testator was born in Philadelphia, which was the residence of his parents, about 1756; that he continued to reside there, doing business as a merchant, before he was twenty-one, and before the breaking out of the war with Great Britain in 1776; being still a minor, he went to England, under a belief that Great Britain would soon prevail in the contest; that he subsequently come back to the United States, and invested large sums in government stocks; but, whether he afterwards went back to England as his home, or only for the purpose of superintending his property; and whether the testator did, in fact, change his domicil, the executor (save and except as appeared by the facts) did not know; he believed that the testator, when in England, considered himself as an alien, and he died in King street, Holborn, London; that letters testamentary were taken out in England, and the will was proved there, and proceedings were instituted in England, by a person claiming to be the heir-at-law. Various proceedings took place in the circuit court of Pennsylvania; a reference was made to a master, to examine and state the heirs and next of kin of the testator, and a report made by him, which was afterwards confirmed; and thereupon, a final decree was made in favor of John Apsden, of Lancashire, England, one of the claimants before the master, as entitled to the personal estate of the testator as "heir-at-law." The cause having come by appeal before this court for argument, a question occurred, whether the frame of the bill, taken by itself, or taken in connection with the answer, contained sufficient matter upon which the court could proceed to dispose of the merits of the cause, and make a final decision.

The bill contains no averment of the actual domicil of the testator, at the time of the making of his will, or at the time of his death, or at any intermediate period: nor does the answer contain any averments of domicil, which supply these defects in the bill, even if it could so do; but in point of law, it could not.

Every bill must contain in itself sufficient matter of fact, *per se*, to maintain the case of the plaintiff; the proofs must be according to the allegations of the parties, and if the proofs go to matters not within the allegations, the court cannot judicially act upon them as a ground for decision; for the pleadings do not put them in contestation.

*This is the case of a will, and so far as the matter of the bill is concerned, is exclusively confined to personalty bequeathed by that will; and the court are called upon to [*484 give a construction to the terms of the will, and in an especial manner, to ascertain who is meant by the words "heirs-at-law," in the leading bequest in the will. The language of wills is not of universal interpretation, having the same import in all countries and under all circumstances; they are supposed to speak the sense of the testator, according to the received laws and usages of the country where he is domiciled, by a sort of tacit reference to them; unless there is something in the language which repels or controls such a conclusion. In regard to personalty, in an especial manner, the law of the place of the testator's domicil governs the distribution thereof, unless it is manifest, that the testator had the laws of some other country in view.

No one can doubt, if a testator, born and domiciled in England during his life, by his will gives his personal estate to his heir-at-law, that the *descriptio personæ* would have reference to and be governed by the import of the terms, in the sense of the laws of England. The import of them might be very different, if the testator were born and domiciled in France, in Louisiana, or Massachusetts.

A will of personalty speaks according to the testator's domicil, when there are no other circumstances to contract the application; to raise the question what the testator meant, it must first be ascertained where was his domicil, and whether he had reference to the laws of that place, or to the laws of a foreign country.

The bill in this case should allege the material facts upon which the plaintiff's title depends, and the final judgment of the court must be given, so as to put them in contestation in a proper and regular manner; and the court cannot dispose of this cause, without ascertaining where the testator's domicil was, at the time of his making his will, and at the time of his death; and there ought to be suitable averments in the bill to put those matters in issue. The case ought to be remanded to the circuit court for the purpose of having suitable amendments made, in reference to the domicil of the testator; and averments made of his domicil at the time of making the will, and at the time of his death, and at the intermediate period, if any change took place.

Upon motions made to the court, and from proceedings in the circuit court, laid before the court, it appeared, that there were certain claimants of the bequest, asserting themselves to be "heirs-at-law," whose claims where not adjudicated upon in that court, on account of their having been presented at too late a period. As the cause is to go back again for further proceedings and must be opened there for new allegations and proofs, the claimants will have a full opportunity of presenting and proving their claims; and they ought to be let into the cause for that purpose.

No persons but those appearing to be parties on the record, can be permitted to be heard on an appeal or writ of error.

APPEAL from the Circuit Court for the Eastern District of Pennsylvania. Matthias Aspden, on the 6th day of December 1791, made his will, with the codicils annexed thereto, as follows:

*485] *"These are to certify, that I do hereby annul and revoke all my former wills, giving and bequeathing my estate, real and personal, to my heir-at-law, first paying all my just debts and funeral expenses, and the following legacies: first, to each of the children of my half-brother, Benjamin Hartley, deceased, that may be alive at my death, the sum of 100 pounds to each, Pennsylvania currency; and to my half-sister, Bersheba Zane, wife of Elnathan Zane, the sum of 400 pounds, Pensylvania currency, both the above, living or did live, at or near Haddonfield; and to my half-brother, Roger Hartley, living at present in Lancaster county, the sum of 300 pounds of the like currency. Witness my hand, this 6th day of December 1791, Philadelphie. MATTHIAS ASPDEN."

"Lest any question should arise about the legitimacy of my birth. It is my will, that my estate, real and personal, should go to the party who would be my lawful heir, in case there might arise any doubts on that head. It is firmly believed by, from the best information, that my birth was after marriage. Philedelphie, December 6th, 1791.

"I do further give 100 pounds, Pensylvania currency, to each of the children of my deceased half-sister, Ann Henchman, that may be living at my death. December 6th, 1791.

"Note, my property on England is as follows: 12,500 pounds in the four per cent. stock; 3000 pounds in the five per cent. stock; 1800 pounds in the three per cent. stock."

Indorsement.—"The last of will of Matthias Aspden. I do hereby appoint my friends, Mr. George Roberts and Mr. Abraham Lidden, with the president of the old bank, at the time being, to be my executors to this my last will. MATTHIAS ASPDEN."

At April sessions 1821, of the circuit court of the Eastern District of Pennsylvania, the following bill was filed:

"Samuel Packer, a citizen of the state of New Jersey v. Henry Nixon, Esquire, a citizen of the state of Pennsylvania, executor of the last will and

testament of Matthias Aspden, Esquire, late a citizen of the same state. In equity.

"To the honorable the judges of the circuit court of the *United States of the third circuit, in and for the eastern district of Pennsylvania. Humbly complaining, showeth unto your honors, your orator, Samuel Packer, a citizen of the state of New Jersey, that on the 6th day of December, in the year of our Lord 1791, one Matthias Aspden, Esquire, a citizen of the state of Pennsylvania, made and executed his last will and testament, bearing date the same day and year, wherein and whereby he gave and bequeathed all his estate, real and personal, to his heir-at-law; and of the said will, appointed his friends, George Roberts, Abraham Lidden, and the president of the old bank, at the time being, executors, as by the said will, a true copy whereof is to this bill annexed, and which your orator prays may be taken as part thereof, will more fully appear; after which, to wit, on the —— day of August, in the year of our Lord 1824, the said Matthias Aspden departed this life, not having altered, cancelled or revoked his said will; and the said George Roberts and Abraham Lidden being then deceased, and Henry Nixon, Esquire, a citizen of the state of Pennsylvania, being then president of the Bank of North America, which bank the testator meant and intended by the description of the old bank, the said Henry Nixon caused the said will to be duly proved according to the laws of Pennsylvania, and having received letters testamentary thereon, took upon himself the burden of the execution thereof, and hath possessed himself of all the goods, chattels and other personal estate of the said testator, to a very large amount. And your orator expressly charges, that he is the true and only heir-at-law of the said Matthias Aspden, and that no other person than himself is entitled to claim or receive the benefit of the said devise and bequest. And he hath repeatedly applied to the said Henry Nixon, to have an account of all and singular the personal estate of the said Matthias Aspden, and where and how the same is situated, and what is the true and exact amount thereof, and to have the amount thereof paid to him, deducting therefrom the just and reasonable charges of the said executor. But now, so it is, may it please your honors, that the said Henry Nixon, combining and confederating with others, to your orator unknown, whose names, when discovered, he prays leave to insert with apt words to charge them as parties, denies that your orator is *the heir-at-law of said Matthias Aspden, or that he is in any way entitled to the benefit of any of the testamentary dispositions of the said Matthias Aspden, and refuses to render him any account of the assets, and to pay him any part thereof. In tender consideration whereof, and forasmuch as your orator cannot have plain, adequate and complete remedy at law, to the end therefore, that the said Henry Nixon, and his confederates, when discovered, on their oaths or affirmations, full, direct and true answers may make to all and singular the matters and things herein-before set forth, as if they had been particularly interrogated thereon; and that the said Henry Nixon may render and set forth a just and true account of all and singular the personal estate of the said Matthias Aspden, and where and how the same is situate, and whether there are any and what debts due, or claimed to be due therefrom, and may be decreed to pay to your orator the balance of the said moneys in his hands belonging to the said estate, to which your orator is justly entitled, and

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your orator may have such further relief in the premises, as is consistent with equity and good conscience, and to this honorable court shall seem meet."

To this, bill the executor filed an answer as follows: "The answer of Henry Nixon, the defendant, to the bill of complaint of Samuel Packer, complainant.

"This defendant says, that he believes and admits, that Matthias Aspden, the testator in the said bill named, at Philadelphia, duly made and executed his last will and testament in writing, and three codicils thereto; all bearing date the 6th day of December 1791; and that such will and codicils are in the words and figures, or to the purport and effect in the paper annexed to the said bill set forth; but for greater certainty as to the date and contents of said will and codicils, this defendant craves leave to refer thereto. And this defendant says, that the said testator deposited his said will and codicils, for safe custody, in the cashier's vault of the Bank of North America, at Philadelphia, known as the old bank, where the same were found after his decease. And the defendant believes it to be true, that the said testator departed *this life, on or about the 9th day of August 1824, in the city of London, without having revoked or altered his said will and codicils. And the defendant further answering, says, that George Roberts and Abraham Lidden, in the said will respectively named, both died in the lifetime of the said testator; that the defendant, at the time of the death of the said testator, was the president of the Bank of North America, at Philadelphia, known as the old bank. And the defendant admits it to be true, that soon after the death of the said testator, to wit, on the 19th day of November 1824, this defendant duly proved the said will and codicils, in the office of the register for the probate of wills and granting letters of administration for the city and county of Philadelphia, and received letters testamentary thereon. And that the defendant also duly proved the said will and codicils in the Prerogative Court of Canterbury, in England, and obtained probate thereto from that court. And this defendant admits it to be true, that as executor as aforesaid, he has possessed himself of all the personal estate and effects of the said testator in the United States, or of so much thereof, as has come to his knowledge; a true account of which is in the schedule hereto annexed. And this defendant has paid the charges of proving the said will, at Philadelphia, and other charges incident thereto, and six of the legacies, the others having not yet been claimed, bequeathed by the said will, a true account of which payments is in the schedule hereto annexed, and that as executor, other charges must be incurred in managing and settling the estate; the amount of which cannot now be ascertained; and that this defendant, as executor, will be entitled to a commission for his services. And this defendant, further answering, says, that he believes it to be true, that the said testator was, at the time of his death (among other descriptions of property), possessed of property in the English funds, that is to say, four thousand pounds bank-stock; ten thousand pounds three per cent. consolidated bank annuities; twelve thousand five hundred pounds reduced three and a half per cent. bank annuities; and three thousand five hundred pounds new four per cent. bank annuities; and that the testator also was

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possessed of East India stock, and also South Sea stock to a considerable amount, that is to say, three thousand pounds East India stock, and five thousand pounds South Sea stock. And this defendant believes that the said *testator died possessed of other personal property to a consid- [*489
erable amount; and particularly of the sum of seven hundred and ninety pounds, three shillings and five pence, in the hands of his bankers, Messrs. Hoare, of London; but that no part of the property of the said testator, except that in the United States of America, as before stated, has come to the hands or possession of this defendant. That the whole of the property of the said testator, in England, is claimed by John Aspden, of London, as entitled thereto, under the devise of the said testator, as his heir-at-law; and that the said John Aspden has filed a bill in the court of chancery, in England, against this defendant, as executor of the said testator; and has, by the injunction of the said court, restrained and prevented this defendant and his agents from obtaining possession of any part of the property in England, of which the said testator died possessed, further than that his attorneys, S. Williams and J. Sterling, received the sum of three hundred pounds, being one-half year's dividend on three thousand pounds, East India stock, belonging to the testator. That the expenses of proving the will of the said testator, in England, amounted to seven hundred and fifteen pounds, seventeen shillings and ten pence, to pay which, in part, the said sum of three hundred pounds was applied by Messrs. Williams and Sterling, and the residue, four hundred and fifteen pounds, seventeen shillings and ten pence, was paid out of the sum in the hands of Messrs. Hoare, the testator's bankers. The said suit in chancery, by the said John Aspden, is yet pending and undetermined. This defendant has annexed to this, his answer, a copy of the bill filed by said John Aspden. And this defendant, further answering says, he does not know, and is unable to answer, from his belief or otherwise, whether the said testator left the complainant his heir-at-law, or whom he left his heir-at-law. But this defendant, further answering, says, that the said John Aspden, of London, claims to be heir-at-law; and as such, entitled to the residue of the said testator's property; and that there are many persons residing in the United States of America, who claim to be next of kin to the said testator, and as such, to be entitled to distributive shares of the estate. That this defendant is not able, from his own knowledge, to name all the persons who so claim to be next of kin, but that he has annexed to this his answer, a schedule, which he prays may be taken as a part of his answer, *containing the names of some of [*490
the persons so claiming to be next of kin, and the manner in which they, or some of them, have alleged to this defendant, they are connected with the said testator. This defendant, further answering, says, that three suits have been instituted against him, as executor of the said testator, in the district court of the city and county of Philadelphia, by persons claiming to be next of kin to the said testator, to wit, one to December term 1826, by Stacy Kirkbridge, and Sarah his wife, late Sarah Hammett; another to the same term, by James Packer; and the third to September term 1827, by Job Packer; which suits are still pending and undetermined.

"And this defendant, further answering, says, that he can neither admit nor deny that the said testator was a citizen of Pennsylvania, as alleged in the said bill. That from information, he believes, that the said Matthias

Aspden, the testator, was born in or about the year 1756, at Philadelphia, then being the place of residence of his parents; that he continued to reside there, and afterwards was engaged in business at Philadelphia, as a merchant, with some success, before he was twenty-one years of age. Upon the breaking out of the war between Great Britain and America, in the year 1776, or some time in that year, being still a minor, he went to England, with what view, this defendant, from his own knowledge, is not able to say; but he believes, that he went with an impression that the power of Great Britain must soon prevail in putting down the resistance made in America. That the said testator subsequently came several times to the United States of America, and invested large sums there in the public or government stock, or in other securities; that he made his will and the codicils thereto, at Philadelphia, the place of his birth, and deposited them in the bank there; but whether, after so returning to the United States of America, the testator went back to England as his home, or only for the purpose of superintending his property; and whether the testator did, in fact, change his domicil, this defendant (save and except as appears by the facts) doth not know, and is unable to answer. But this defendant believes, that the said testator, when in England, considered himself as an alien, and as such, claimed to have returned the tax taken from his dividends, while
*491] he was absent from England, according to the provisions of the *law exempting aliens from the tax, if not resident in England. That he died in King street, Holborn, London. And this defendant says, that he submits to the judgment of the court, whether, upon the true construction of the said will of the said testator, the next kin of the said testator are entitled, under the same, to take the residue of the personal estate and effects of the said testator, or whether the complainant, if he be the heir-at-law, and if not, whether any other person, as heir-at-law of the said testator, is entitled to take the same, under the said will, as such heir-at-law. And this defendant submits to act as this honorable court shall direct, being indemnified and paid his costs, charges and expenses therein. And this defendant denies all combination and confederacy with which he is charged in and by the said bill, without this, that, &c.

HENRY NIXON."

Petitions were filed in the circuit court by persons who claimed to have distribution among them of the estate of the testator, as the party contemplated by the will; each petition setting forth the relationship between the persons presenting the same, and the testator, and praying to be admitted as parties to the suit, for the purpose of claiming the fund admitted by the executor to be in his hands; and that the court would direct inquiries to be made as to their respective claims. George Harrison and the other appellants were among those who filed petitions. Upon the reading and filing of the petitions of George Harrison, the court made an order, according to the prayer of the same. Job Packer and John Zane were, by order of the court, on their application, made defendants; and Isaac Zane was entered as one of the complainants in the case. The record contained no order or action of the court on the other petitions, except an entry in reference to each petition, "read and filed," or "filed."

The circuit court ordered that it be referred to a master, to examine and

state the next of kin of the testator, Matthias Aspden; and commissions were ordered to take the depositions of distant witnesses. After the coming in of the master's report, in which was *contained a list of the heirs and kindred of the whole and half-blood of Matthias Aspden the testator; and in which he reported that John Aspden was "heir at common law," the circuit court made the following decree: [*492

"And now, this 26th day of December, A. D. 1833, this cause coming on to be heard, on the bill, answer, petitions, exhibits, proofs and master's report, and the several parties having been fully heard by their counsel, and the court having taken time to consider of the same till this day, do order, adjudge and decree, that the defendant, Henry Nixon, surviving executor of Matthias Aspden, deceased, do account for, pay over, transfer and deliver to John Aspden, of Lancashire, in England, one of the said parties, the heir-at-law of the said Matthias Aspden, the entire balance of the personal estate of the said Matthias Aspden, which has come to his hands to be administered, after paying the debts and legacies of the said Matthias Aspden, and the costs of this suit (which are hereby ordered to be paid out of the said fund). And the court do further order, adjudge and decree, that the bill and petitions, so far as they relate to the other complainants and petitions, who are claimants before the court, and all other claimants before the court, however appearing, be dismissed, without costs. As to all parties who are claimants before the court by bill, petition or otherwise, their complaint, petition and proceedings are dismissed, without costs."

From this decree, George Harrison, and Thomas H. White, Ann Emily Bronson, Elizabeth White Bronson, Hetta Atwater Bronson, and William White Bronson, minors, by their guardian, the said Thomas H. White, Mary Harrison, a minor, by her guardian, Elizabeth Harrison, Esther McPherson, and Elizabeth McPherson, children of Elizabeth McPherson, deceased, John Zane and Isaac Zane, prosecuted an appeal to this court.

Before the argument of the case, *James S. Smith* stated to the court, that he, with Mr. *Coxe*, appeared before the court either as *amici curiæ*, or as the court would permit them to appear, in behalf of the heirs of John Aspden, late of Old street, *London, who claimed to be the heirs-at-law of Matthias Aspden, the testator; and who had no notice of the proceedings in the circuit court of Pennsylvania. It is the wish of the counsel for these claimants, to be permitted to show irregularities in the proceedings, and to have the case remanded to the circuit court, in order that they may be allowed to come in and substantiate their claims to the whole estate, as the heirs-at-law. John Aspden, whose heirs they represent, prosecuted a claim to the estate of the testator, by a bill in the court of chancery in England, which bill is referred to, and annexed to the answer of the executor, filed in the circuit court, and forms part of the record now before this court. [*493

Sergeant, for the appellees, objected.—The heirs of John Aspden made an application to the circuit court for a bill of review, for the purpose of obtaining admission into the case. The court refused to give them the permission asked, and they then obtained a citation from the orphans' court of the county of Philadelphia, directed to Henry Nixon, as executor of Matthias Aspden, returnable on the 16th of January 1835, four days after the meeting of this court; thus seeking to maintain their claims in that court. They

have since filed an original bill in the circuit court of Pennsylvania, against the executor.

Coxe, in support of the application.—The case now before the court, is that of a bill filed by Samuel Packer, asserting himself to be the heir-at-law of the testator, *ex parte maternâ*, against the executor. These were the original parties to the proceedings; other persons came in by petition, which petitions were filed, but no amendments were made to the bill; and on the filing of some of the petitions no order was made by the circuit court, directing the petitioners to be admitted as parties. The appeal from the circuit court is not made by Samuel Packer, who was the only party who could appeal. The counsel who present this application, desire that the court will look at the record; and they trust, that the court, seeing its imperfections, will remand the case to the circuit court. The proper parties are not before the court.

*494] At the last sessions of this court, the Chesapeake and Ohio *Canal Company were permitted to appear in the case of *Mumma* v. *Potomac Company*, and take upon themselves the whole argument of the case. (8 Pet. 281.)

Story, Justice, stated, that it appeared by the charter of the Chesapeake and Ohio Canal Company, that the Potomac Company had been merged in the former company, and had vested in them all their property, and were subjected to the responsibilities of the Potomac Company.

Marshall, Chief Justice.—The only parties the court can know, are those in the record. They cannot permit counsel who represent parties who may think themselves interested, not in the record, to come in and interfere. Let the argument proceed, and if the court see that the proper parties are not before the court, they will act as may be required.

Ingersoll, representing the executor, handed to the court the proceedings of the circuit court of the district of Pennsylvania, on a bill of review filed by the heirs of John Aspden, of Old street, London; against the executor, and the citation issued to the executor at their instance, in the orphans' court of the county of Philadelphia.

At a subsequent day of the term, when the cause came on for argument upon the merits, a question was presented by *Webster*, who, with *Tilghman* and *Newbold*, was the counsel for the appellants; whether the bill, taken by itself, or in connection with the answer, contained sufficient matter upon which the court could proceed, and finally dispose of the cause. It was submitted, that the bill contained no averment of the actual domicil of the testator, at the time he made his will, or at any intermediate period, before, or at his death. The court directed this question to be argued, before the argument should proceed on the merits.(*a*)

(*a*) The following extracts from the opinion of the circuit court, delivered on the 26th December 1833, will exhibit the views of the learned judge on the effect of the domicil of Matthias Aspden, the testator, on the construction of his will.

Baldwin, Justice.—The same principle is the rule in Pennsylvania, in all cases to which the common law had been applied by adoption; and it remains the law of descent of both real and personal estate, if the provisions of an act of assembly do

Harrison v. Nixon.

*W. *Rawle, Jun.*, for John Aspden.—The motion to remand this cause is founded on a suggestion that its decision will turn upon the question of the testator's domicil; and that this fact, not being averred in the pleadings, the

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not in their words embrace the very case in controversy. This must be taken to be a point conclusively settled as the law of the state, by the authorative decisions of the high court of errors and appeals, in *Johnson* v. *Haines*, 4 Dall. 64, and of the supreme court, in *Cresoe* v. *Laidley*, 2 Binn. 279, 284, and no longer open to discussion; that there is, in this state, such a person as an heir at common law, distinct from the statutory heir, to whom the real estate of a person, dying seised and intestate, shall descend by the general course of the law, in right of blood and inheritance. That the common law of both countries is the same, designating the same person, by the same rules and courses of descent, as the heir to an ancestor, in all cases, and the heir to his estates of inheritance, unless in the particular event which has happened, an act of assembly has substituted some other person or persons to take the place of the ancestor, for its enjoyment and disposition, as a special law for the case, like to the law of custom, which breaks the course of descent, according to the general course of descent, according to the general course of the common law. This was the law of the province, from its first settlement, it was expressly declared so, by the eighth section of the act of 1705, and the heir was referred to as the heir, in the abstract, according to the meaning of the word as given by Hobart. The said lands and tenements shall descend and come to the intestate's heir-at-law, according to the course of the common law aforesaid. 3 Sm. Laws 153, 158 n.; 1 Dall. Laws app'x 45.

That heir-at-law, or heir simply, does not mean heirs by custom in England, or statutory heirs in Pennsylvania, is the evident meaning of Judge YEATES. The observation of Chief Justice MCKEAN, in the same case (2 Yeates 61; 2 Dall. 245), "Thomas could not in this case be considered as heir-at-law in Pennsylvania, where, if, at that time, a person died intestate, leaving divers children, his real estate descended to all his children equally; the eldest son having only a double portion or share, and therefore, the devise may even be considered a condition," draws us irresistibly to the same conclusion. The eldest son could not take as heir-at-law, by the course of descent, in a case to which the act of assembly applied, and by superseding the common law, established a special course of descent; but he could be, and is, by the existing law, heir-at-law, in this state, according to the opinion of the court, delivered by the Chief Justice, in *Johnson* v. *Haines*, and of Judge YEATES, in *Findley* v. *Riddle*, in a case not embraced in any act of assembly, which accords precisely with the principle they laid down in *Ruston* v. *Ruston*. Taking these three cases in conjunction with *Cresoe* v. *Laidley*, they completely negative the proposition, that there is any difference between an heir-at-law here, and in England, except such as is made by custom or act of assembly. This becomes a negative pregnant, with important consequences as to the legal meaning of the word heir-at-law, that it not only is that, which the common law gives it, but that it is not to be taken to refer to the customary or statutory heirs. "The term heir-at-law, conveys no idea, with us, they are all his co-heirs," it is thus a term of contradistinction, and of designation, denoting the person who has and can have no co-heirs, the sole inheritor of the estate of the ancestor by right, in its nature necessarily exclusive; the law of both countries recognises *heirs* as a class, or a number of persons having equal rights by special law, and the *heir* as one person entitled by common law to the whole estate, by right of blood alone. This necessarily follows, from the opinions of the judges in *Ruston* v. *Ruston*, in accordance with the rule laid down in all the cases, from *Counden* v. *Clerke*, to *Findley* v. *Riddle;* that customary or statutory heirs cannot take by a deed or devise to the heir-at-law, the heir, or right heir, of the grantor or devisor, because they are different persons, claiming in different characters and capacities, and the words are incapable of substitution as convertible terms, without uprooting the whole course of descent, and every settled rule of inheritance and construction. See Gilb. Dev. 16, 162; 3 Salk. 336.

court cannot decide it. If it can be shown, either that the fact is not material, or that it is sufficiently averred, the motion cannot be sustained. In the court below, the question of domicil, though it was made a point in the cause, was little relied upon. The argument went mainly on the ground that the law of England and that of Pennsylvania, as to the construction of the will in question, was the same ; and if this position be correct, it is manifest, that the question of domicil is wholly immaterial. The establishment of this

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In all the cases which have arisen on the construction of wills, the supreme court have given to the word *heirs*, in all the modes of expression, the same effect which they have by the common law, whether as a word of purchase or limitation, as conveying an estate for life, in fee, or in tail. Whenever it operates as a word of limitation, the estates descend to the heir at common law, or in tail, as the case may be, and not the special or statutory heirs, according to the act of assembly, the operation of which is confined to cases where an intestate is seised in his own right, both at law and in equity, of an estate of inheritance, descendible to his heirs general.

We do not deem it necessary to examine in detail the various cases which have been decided in this state, on the subject of the descent of lands; the very accurate and valuable digest of Mr. Wharton furnishes, under the appropriate heads, a host of authorities, which fully establish the position of Judge DUNCAN, in the case of *Lyle* v. *Richards* (9 S. & R. 358). It is plain, that from the date of the charter, until laws were made to alter the succession, lands descended according to the course of the common law; and not only descent, but enjoyment and purchase, including every other mode of acquisition, were governed by that law, acquired and lost by the course of the same common law."

Assuming it, then, to be the settled law of both countries, that the word heir, right heir, or heir at common law, without any qualifying or explanatory words, in a will, are to be taken as words of limitation, it remains to take a view of the cases in which they are words of purchase, or a designation of the person to take by the will, as purchasers and not by the descent. Fearne 79 *a*, 149, 158, &c. Whether, therefore, this case is to be dicided by the law of England or of this state, the result must be the same, as settling the law of the case, which we will now apply to the will in question.

Nothing is left for presumption or construction, in face of this solemn certificate, and repeated declaration of intention; it negatives all belief that he meant to leave his estate to be disposed of by the will of any one but himself, or that any one was intended to be his heir, but the one who was made so by the law in right of blood. Nor can we be convinced, that it was his intention, that while his will remained unaltered for thirty-three years, his own disposition of his estate should be subject to the changes in the law of the state, from time to time. But had this been in his mind, it would make no difference, for in 1824, he had no half-brothers and sisters alive, and the act of 1797 making no provision for such case, his heir-at-law, his lawful heir by the common law of Pennsylvania, was John Aspden, of Lancashire, England, who would have inherited his real estate, and his personal property would have been vested in the administrator appointed by the register, in trust for the next of kin, according to the law of England. The effect of his will is, to leave the real estate to descend to his devisee, as if no will had been made, and as to the surplus, to appoint an executor, with directions to pay it over to the person whom by his will he had substituted as his benficiary, in place of his next of kin; this person was designated by a well-known and understood term, which the law of both countries fastens on John Aspden, as indissolubly as if he had been especially described by name, birth, residence and occupation. From all these cases, we are abundantly satisfied, that the law of this case is definitely settled, both in England and this state, and we can have no hesitation in expressing our most decided opinion, that John Aspden, the heir-at-law of the testator, is entitled to the whole of his estate, by the fixed rules of law, which we are not at liberty to question.

position, however, belongs to the main argument. To discuss the principal question in the cause, upon a preliminary question, whether or not the cause shall come on, would derange the whole order of the argument, and place the appellee under great disadvantages. The proper course seems to be, for the court to hear the cause argued ; and if the decree of the circuit court can be affirmed, without touching the question of domicil, it will be unnecessary to consider whether the pleadings raise that question or not. If, on the other hand, it be found to be material, and the record does not present it properly to the court, it will be time enough to remand the cause, in order to have the pleadings amended.

But the question of domicil, if it be material, is before the court. The rules of equity pleading, though they call for certainty and precision to a reasonable extent, are not so rigorous in their requirements, as those which govern the proceedings of courts of law. From the nature and objects of its jurisdiction, the rules of a court of chancery must possess a more liberal character. 2 Madd. Ch. 168 ; Coop. Eq. Pl. 340. Testing the record of this cause by the rules of pleading in equity, fairly construed, the question of domicil is distinctly raised. The proper place for the averment of such a fact is the bill ; but if that be defective, the defect may be cured by the subsequent pleadings. If a material fact be not averred in the bill, it is not a good bill. To constitute a good bill, it must set forth such a case as will, upon its face, entitle the complainant to a decree in its favor. He must state his title *in such a manner as to give the court to understand the character in which he claims, and the nature and extent of his interest. Mitf. [*496 Pl. 41, 42, 156 ; 2 Madd. 168 ; Coop. 5–7. If, however, these matters be stated in general terms, it is sufficient; all the subordinate facts in the evidence intended to be given, need not be stated. Every subordinate fact is substantially averred by the averment of a general fact, which embraces them. If the bill, on its face, shows an equity in the complainant ; if it exhibit him in a character possessing a right to sue, and having an interest which he has a right to claim, it is a good bill, and the defendant must plead to it, or answer it. If it be defective, a demurrer may at once be opposed to it. Mitf. Pl. 13 ; Coop. 109, 118. The criterion of the soundness of a bill, is its capacity to bear the test of a demurrer. By this test, let the bill in this case be tried. It sets out the will of the testator, &c., and avers, that the complainant is his heir-at-law, within the meaning of the will, and as such, entitled to the property disposed of by it. It does not set out the details of his title. It does not say, whether he is heir by the law of England, or by that of Pennsylvania, nor does it state how he is heir, so as to show under which law he claimed ; and it would have been highly imprudent, if he had done so. If he had stated his title in such a manner as to show that he claimed under the law of England alone, or under that of Pennsylvania alone, he might have been confined to proof of his title as stated ; but by asserting his claim as heir-at-law, generally, he may show that he is so by any law which may govern the case.

If the law of England and that of Pennsylvania be the same, it is clear, that it is of no consequence where the domicil was. If, on the other hand, he was the heir-at-law intended by the will, only because the testator's domicil was in England, then the fact of domicil was a subordinate fact—one of the constituent parts of the character of heir, the averment of which

is embraced by the averment of the general fact of his being the heir-at-law described by the testator. When he avers that he is the heir, he avers all the facts which make him so; the whole embraces all the parts. Applying to this bill the test of a demurrer, does it show *title in the complainant? If it had been demurred to, what would have been the result? The will gives the estate of the testator to his heir-at-law; the plaintiff avers that he is the testator's heir-at-law; the demurrer admits that he is so; and, as a necessary consequence, the decree must be in his favor; or the defendant must plead or answer. The fact of domicil, therefore, if it be material, is substantially averred in the bill.

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But if the bill be defective, it is cured by the answer; which distinctly presents to the court the question of domicil. An answer not only meets the case set forth by the bill, but may set forth new matter essential to the defendant's case, either to add to, or qualify, the case exhibited by the bill, or to make out a new and independent case for himself. If the new facts stated in the answer are denied by the plaintiff's replication, they are put in issue; if they are not denied, they are submitted to the court, by whom their legal effect is determined. Mitf. Pl. 15, 315, 314; Coop. 324; 2 Madd. 334. If, then, facts necessary to make out the plaintiff's case are not found in the bill, but the defendant introduces them into the answer, and submits the whole matter to the court, it is regularly before them. This rule has a peculiar application to a suit against a trustee, such as the defendant in this cause. Mitf. Pl. 11. In the present instance, the whole matter is presented by the answer. The defendant answers what he considers the interrogatories propounded by the bill. He does not aver that the testator's domicil was either in England or Pennsylvania, but he states distinctly all the facts within his knowledge, upon which the question of domicil depends; and being incapable of drawing the conclusion of law from the facts, he submits the decision of the question to the court, to whom it properly belongs. If he had answered otherwise, he must have done so with great latitude of conscience; for how could he undertake to swear to a conclusion of law?

The reason of the law is its life. The reason why averments are required is, that the parties may be apprised of what they are to meet, and to prevent surprise. Coop. 5, 7. If, then, the plaintiff omits to state his case in such a manner as to apprise his adversary of a material fact in dispute; and the defendant shows, not only by his answer, but by his *evidence, that he is fully aware of it; how can it be alleged, that he is taken by surprise; and how can the court be at a loss for the means of deciding the question raised by it? After such an answer, no reasonable objection could be made to any evidence on the subject of domicil, offered by the plaintiff; for the question having been raised by the answer, if not by the bill, either party was at liberty to give his proofs in relation to it; neither party could object to the evidence, for want of an averment. But the answer to the present motion derives additional force from the circumstance, that not only no objection was made to evidence offered by the plaintiff, but the real defendant in the cause, by whom the present motion is made, themselves gave the only evidence that was given on the subject of the testator's domicil. The parties went to a hearing upon that evidence, and the court passed upon it. Can it then be tolerated, that the party who raised the question, who gave all the evidence he could collect in reference

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to it, who went to a hearing upon it, and had a decree against him, shall, in an appellate court, move to remand the cause for want of a technical averment in the bill? To permit him to do so, would be to sacrifice reason and justice to the merest and most unsubstantial form. It would be vain to say, that courts of equity act on the broad principles of justice, and that rules are devised as instruments for the promotion of its ends. To grant the present motion, the court must go beyond a court of law in its adherence to technicality.

Tilghman, for the appellants.—It is the wish of all the parties interested in this case, that all the questions involved in it shall be fully presented, and a full discussion of them take place, before this court shall decide upon the interests affected by these questions. To the executor, this is most important for his protection. But a decree of this court, in the present state of the pleadings, will not be a final termination of the controversy. The fact of the domicil of Matthias Aspden, does not appear in the pleadings, nor on the evidence in the case. It is not averred in the bill; nor is it brought forward in the answer. The bill alleges, that the will was made by a citizen of Pennsylvania; the answer admits this, and that the testator died in *London. Neither the assertion of citizenship, nor the admission of the place of death, sets forth the fact of domicil. [*499

The fact of the testator's domicil has always been considered as most important in the case; whether in England, or in Pennsylvania, will, as the appellants believe, have a positive and decisive influence on the rights of the claimants. If the domicil is now conceded by the appellees to have been in Pennsylvania, the appellants are ready to proceed in the argument on all the other questions in this cause. In England, proceedings to establish the claims of certain persons who live there, were instituted, for the purpose of obtaining the property of the testator in that kingdom; and the proceedings were dismissed, on the ground that the domicil of the testator was in America; and the whole of the questions in the case, and all the claims of those who made claims, were properly to be litigated in Pennsylvania.

The executor has not undertaken to represent the interest of any one, but he stands independent. He asks, that the case shall be so disposed of, that he shall be protected from all further claims. If the record shall be certified, after the case shall be decided, without containing an explicit averment of domicil, and that the fact of domicil was not inquired into, it will not appear that the fact of domicil is decided. This would expose the executor to a claim in another state, resting or asserted to rest on the domicil, and claimed to be essential to the full decision of the right of parties under the will.

It is not the purpose of the counsel for the appellants, to refer the court to the elementary rules on this point; as it is conceded by the counsel for the appellees, that the allegation of domicil must appear in the pleadings. The only question, therefore, is, does this appear? or was it so made, as that it was investigated, and decided by the circuit court?

It is known to the court, that there is another party claiming the whole of the property of the testator, and who is not in the proceedings before the circuit court. He is a formidable party, on the principles decided in the

circuit court. This party was, in the opinion of that court, on a bill for a review, which was presented to the court, admitted to be of this char-
*500] acter.(a) *It is thus shown, that the record is defective, and that there is such a party. But to the next of kin, the appellants, this party is of no importance; his claim does not affect their claims. They deny his rights as heir-at-law; although they maintain that his rights, and those of all others, shall be presented in the case before its final disposition.

Sergeant, in reply.—Is the question of domicil open, on the pleadings? Does it appear important? If the want of an essential averment is not taken notice of by the party claiming it as necessary, when he has a full opportunity to do so; his right and opportunity to do so may be lost. If the point is not sufficiently before the court, the party complaining should have moved to suppress the evidence on it. If he does not do this, and goes into the investigation, can he afterwards avail himself of it? having taken the opportunity of an examination and discussion of the case, and this, after a decree. Those who were parties in the circuit court are precluded from taking this exception. Is there not, in the pleadings, sufficient to have introduced evidence as to the domicil of the testator? And if there was not; should not those who consider an averment essential have moved to suppress all evidence on it?

Is it necessary to allege domicil? The law settles, that every man has a domicil. The answer of the executor shows, that the domicil was brought forward. But in this case, the domicil of the testator was unimportant, as the law of England and Pennsylvania, by which this case must be decided, is alike. There is enough in the case, for the decision of all the claims on the estate of the testator; and the executor will be entirely safe, under the decision of this court. He has done all that could or can be required of him. It is denied, that any persons but those in the record have any right to interpose in this court; nor should the proceedings in the circuit court, after the appeal, have been referred to. Certainly, no reference should have been
*501] made to the opinion of the *court, in a case subsequently brought before that court, by a person not a party in the case here. Nor would the opinion of the presiding judge in the circuit court sustain the reference to it, if that opinion were fully examined.

Ingersoll, counsel for the executor, offered to the court the proceedings in the circuit court of Pennsylvania, on a bill of review filed in that court against the executor. He stated, that if the court shall think proper to take those proceedings into their consideration, the counsel for the executor, and those who represent the parties to the bill of review, are prepared and ready to act as may be considered proper, and may be permitted.

Sergeant desired, that the principal question before the court shall be first decided, and after this shall be disposed of, any other matters which may properly be considered may be examined.

Story, Justice, delivered the opinion of the court.—This is the case of an appeal from a decree of the circuit court of the district of Pennsylvania,

(a) The opinion of the circuit court, denying leave to file a bill of review, will be found in the appendix to this volume.

in a suit in equity. The bill was filed by Samuel Packer, and asserts, that one Matthias Aspden, a citizen of Pennsylvania, made his will, dated in Philadelphia, on the 6th of December 1791 ; and thereby bequeathed all his estate, real and personal, to his heir-at-law, and afterwards died, in August 1824 ; and his will was proved and letters testamentary were taken out in Pennsylvania, by the appellee, under which he has received large sums of money ; and the bill then asks for a decree in favor of Packer, who asserts himself to be the true and only heir-at-law of Matthias Aspden, and that he is solely entitled under the bequest. The answer of the executor states, from information and belief, that the testator was born in Philadelphia, which was the residence of his parents, about 1756 ; that he continued to reside there, doing business as a merchant, with some success, before he was twenty-one years of age ; that before the breaking out of the war between Great Britain and America, in 1776, being still a minor, he went to England, with what view, the executor is not, from his own knowledge, able to say, but he believes that he went with an *impression that the power of Great Britain must soon prevail in putting down resistance in America ; that the testator subsequently came several times to the United States, and invested large sums in government stocks and other securities ; but whether, after so returning to the United States, the testator went back to England as his home, or only for the purpose of superintending his property, and whether the testator did in fact change his domicil, the executor (save and except as appears from the facts) doth not know, and is unable to answer ; but he believes, that the testator, when in England, considered himself as an alien, &c.; and he died in King street, Holborn, London. The answer also states, that the executor proved the will, and took out letters testamentary in England ; and states certain proceedings had upon a bill in chancery in England, against him, by one John Aspden, there claiming to be the heir-at-law of the testator ; and annexes to his answer a copy of the bill. He also alleges, that several other persons have made claims to the same property, as next of kin of the testator, of whose names, &c., he annexes a schedule. [*502

Various proceedings were had in the circuit court of Pennsylvania ; and a reference was made to a master to examine and state, who were all the heirs and next of kin of the testator. The master made a report, which was afterwards confirmed ; and thereupon, a final decree was made by the court, in favor of John Aspden, of Lancashire, in England, one of the persons who made claim before the master, as entitled, as heir-at-law, to the personal estate in the hands of the executor ; and the claims of the other persons claiming as heirs-at-law, were dismissed ; and the present appeal has been taken by several of these claimants.

The cause having come before this court for argument upon the merits, a question occurred, whether the frame of the bill, taken by itself, or taken in connection with the answer, contained sufficient matter upon which the court could proceed to dispose of the merits of the cause, and make a final decision. The bill contains no averment of the actual domicil of the testator, at the time of the making of his will, or at the time of his death, or at any intermediate period. Nor does the answer contain any averments of domicil, which supply these *defects in the bill, even if it could do so, as we are of opinion, in point of law, it could not. Every bill must [*503

contain in itself sufficient matters of fact, *per se*, to maintain the case of the plaintiff; so that the same may be put in issue by the answer, and established by the proofs. The proofs must be according to the allegations of the parties; and if the proofs go to matters not within the allegations, the court cannot judicially act upon them as a ground for its decision; for the pleadings do not put them in contestation. The *allegata* and the *probata* must reciprocally meet to conform to each other. The case cited at the bar, of *Matthew* v. *Hanbury*, 2 Vern. 187, does not in any manner contradict this doctrine. The proofs there offered were founded upon allegations in the bill, and went directly to overthrow the consideration of the bonds, set up in the answer, in opposition to the allegations of the bill, the latter having asserted, that the bonds were obtained by threats and undue means, and not for any real debt, or other good consideration. Is, then, any averment of the actual domicil of the testator, under the circumstances of the present case, proper and necessary to be made in the bill, in order to enable the court to come to a final decision upon the merits? We think that it is, for the reasons which will be presently stated.

The point was never brought before the circuit court for consideration; and, consequently, was not acted on by that court. It did not attract attention (at least as far as we know) on either side, in the argument there made; and it was probably passed over (as we all know matters of a similar nature are, everywhere else), from the mutual understanding, that the merits were to be tried, and without any minute inquiry, whether the merits were fully spread upon the record. It is undoubtedly an inconvenience, that the mistake has occurred; but we do not see, how the court can, on this account, dispense with what, in their judgment, the law will otherwise require.

The present is the case of a will; and so far, at least, as the matter of the bill is concerned, is exclusively confined to personalty bequeathed by that will. And the court are called upon to give a construction to the terms of the will; and, in an especial manner, to ascertain, who is meant by the words "heir-at-law," in the leading bequest in the will. The language of
*504] wills is *not of universal interpretation, having the same precise import in all countries, and under all circumstances. They are supposed to speak the sense of the testator, according to the received laws or usages of the country where he is domiciled, by a sort of tacit reference, unless there is something in the language, which repels or controls such a conclusion. In regard to personalty, in an especial manner, the law of the place of the testator's domicil governs in the distribution thereof, and will govern in the interpretation of wills thereof, unless it is manifest, that the testator had the laws of some other country in his own view.[1]

No one can doubt, if a testator born and domiciled in England during his whole life, should, by his will, give his personal estate to his heir-at-law, that the *descriptio personæ* would have reference to, and be governed by, the import of the terms in the sense of the laws of England. The import of them might be very different, if the testator were born and domiciled in France, in Louisiana, in Pennsylvania or in Massachusetts. In short, a will of per-

[1] See Harrall *v.* Wallie, 29 Alb. L. J. 170; s. c. 37 N. J. Eq.

sonalty speaks according to the laws of the testator's domicil, where there are no other circumstances to control their application; and to raise the question, what the testator means, we must first ascertain, what was his domicil, and whether he had reference to the laws of that place, or to the laws of any foreign country. Now, the very gist of the present controversy turns upon the point, who were the person or persons, intended to be designated by the testator, under the appellation of "heir-at-law." If, at the time of making his will, and at his death, he was domiciled in England, and had a reference to its laws, the designation might indicate a very different person or persons, from what might be the case (we do not say what is the case), if, at the time of making his will, and of his death, he was domiciled in Pennsylvania. In order to raise the question of the true interpretation and designation, it seems to us indispensable, that the country by whose laws his will is to be interpreted, should be first ascertained; and then the inquiry is naturally presented, what the provisions of those laws are.

If this be the true posture of the present case, then the bill should allege all the material facts, upon which the plaintiff's title depends; and the final judgment of the court must be given, so as to put them in contestation in a proper and regular *manner. And we do not perceive, how the court [*505
can dispose of this cause, without ascertaining, where the testator's domicil was, at the time of his making his will, and at the time of his death; and if so, then there ought to be suitable averments in the bill to put these matters in issue.

In order to avoid any misconception, it is proper to state, that we do not mean, in this stage of the cause, to express any opinion, what would be the effect upon the interpretation of the will, if the domicil of the testator was in one country, at the time of his making his will, and in another country, at the time of his death. This point may well be left open for future consideration. But being of opinion, that an averment of the testator's domicil is indispensable in the bill, we think the case ought to be remanded to the circuit court, for the purpose of having suitable amendments made in this particular; and that it will be proper to aver the domicil, at the time of making the will, and at the time of the death of the testator, and during the intermediate period (if there be any change), so that the elements of a full decision may be finally brought before the court. The petitions of the claimants should contain similar averments.

It appears, from the motions which have been made to this court, as well as from certain proceedings in the court below, which have been laid before us in support thereof, that there are certain claimants of this bequest, asserting themselves to be heirs-at-law, whose claims have not been adjudicated upon in the court below, on account of their having been presented at too late a period. As the cause is to go back again for further proceedings, and must be again opened there, for new allegations and proofs, these claimants will have a full opportunity of presenting and proving their claims in the cause; and we are of opinion, that they ought to be let into the cause for this purpose. In drawing up the decree, remanding the cause, leave will be given to them accordingly. The decree of the circuit court is, therefore, reversed; and the cause is remanded to the circuit court for further proceedings, in conformity to this opinion.

*Baldwin, Justice. (*Dissenting.*)—The preliminary question which has been decided by this court, is one of the deepest interest to all suitors in the inferior courts of the United States, the judges thereof, and the profession generally. The nature of the objection to hearing the cause on its merits, or to even examine the evidence or the decree; the time at which it was made, with its attendant circumstances; make this case a precedent of infinite importance, as a rule for future proceedings in a court of the last resort, in the exercise of a jurisdiction exclusively appellate.

A final decree of a circuit court, rendered in a long-pending and zealously contested cause, after the fullest consideration, has not only been reversed, but all its proceedings so completely annulled as to open the case to new parties, new bills, pleadings, issues and evidence; and to make it necessary to begin *de novo*, in the same manner as if the court had never acted on any question which could arise. This has been done, too, on an objection not taken by counsel, either in the circuit court, or assigned for error here, in the printed brief of their points, presented to this court as the ground of a reversal of the decree of which the appellants complain; nor did either of their counsel think proper to avail themselves of the suggestion, after it fell from the bench, until the one who opened the argument had closed his view of the first ground assigned in the brief for error. And when, on the next day, another of the counsel of the appellants drew the attention of the court to the objection, it was not to reverse the decree, as erroneous in law or fact, but as a reason for considering it as so merely and utterly void, as to make it improper to examine into the errors assigned by himself and colleagues; and proper to suspend the argument on the merits, till the consideration of the question thus raised, the decision of which leaves the law, justice and equity of the case untouched, while every proceeding had in it is utterly prostrated; leaving the parties, at the end of a seven years' litigation, to begin anew. To them, it is no consolation, that these effects have been produced by an objection of mere form, not deemed by the counsel of either party worthy of being noticed or guarded against; for the action of an appellate court on a judgment at law, or a decree in equity, can be of no middle character. A reversal annuls it to all intents and purposes; it can no longer be given in evidence in support of any right, or as a proof of any
*507] fact, in favor *of the party in whose favor it was rendered, or against the opposite party; no one thing remains a *res adjudicata*, but every question of law and fact is as entirely open, as if the court had never given a judgment or decree. It is inconsistent with the constitution of appellate courts in England, or the states of this Union, to modify a general reversal of a judgment or decree; it is absolute, and must be attended with all legal consequences, which no court can avert by any salvo or declaration that it is reversed only *pro formâ;* the decree or judgment cannot be, in any part, carried into effect in the court below, or come again into an appellate court, till a new one is rendered. The same principles prevail in the courts of the United States, by force of the judiciary and process acts, and the seventh rule of this court, which regulate all proceedings by those of the king's bench and courts of equity in England, unless otherwise provided for by law, subject to such alterations and additions as this court may prescribe to the circuit courts, or as they may make, not inconsistent therewith. (1 Story's Laws 67, 257.) This court has uniformly acted by the rules thus

prescribed, which regulate not only its own proceedings, but its adjudication on those of inferior courts which are brought within its appellate power; they must, therefore, be considered as the tests of the conformity of the decision now made, with the established principles of courts of original or appellate jurisdiction by the course of the law of equity, the rules of this court, and the acts of congress which regulate its exercise on appeals.

In the circuit court, George Harrison and others were claimants of a fund in the hands of Mr. Nixon, as executor; their petitions having been dismissed, on a final decree against them, they now, on an appeal, ask for its reversal for the reasons assigned in the brief of their counsel, which relate entirely to the merits of their claim; but at the same time contend, that the whole proceedings in the circuit court are mere nullities; because the appellants themselves, as well as the other claimants, omitted to insert in their petitions a direct averment of the domicil of the testator, under whose will they all claim. As this objection is not aimed at the decree, or the right of any party who claims the fund, it must be considered as applicable solely to the form and frame of the original bill and petitions; *intended to present, not a cause of reversal of the decree for error in law or fact, but the broad question of jurisdiction. First, [*508 whether it was competent for the circuit court, to make any decree in the case before them; and next, whether the decree rendered is such, that this court, in virtue of its appellate power, can hear and determine the matter appealed from. It must have occurred at once to the mind of the learned judge who first suggested the objection, and cannot have escaped the observation of the counsel who has availed himself of it, that if the case was within the judicial cognisance of the circuit court, no decree rendered by them could be treated as a nullity; however erroneous, it is binding on the parties till an appeal, and becomes final, if none is taken within five years. It could not be declared a void act, for any cause which did not affect the original jurisdiction, without any reference to the decree rendered by the circuit court. To justify such a course, it must be in a case where this court would be bound to reverse at all events, and where its affirmance would not cure the defect; but would leave the original decree without any effect upon the rights of the parties, and prevent it from being received as evidence in any court, state, federal or foreign.

An appeal, upon any ground short of this, must affect the decree as erroneous merely, on some matter injurious to the appellant; who had his remedy under the 22d section of the judiciary act, by an appeal from a "final decree in a suit in equity," which it declares may "be re-examined, and reversed or affirmed, in the supreme court." It follows, that there is a discretion to reverse or affirm, according to the right of the case; and, surely, it cannot be contended, that if a decree can be affirmed on appeal, it can be considered as a mere nullity, after affirmance, if the question arising on the appeal was one of merely error, not of jurisdiction. Nor can it be doubted, that if the merits of the case were cognisable by the court below, they are equally so on appeal; and that a final decree of affirmance binds all parties, in all courts, as to the matters decreed, which must be done on a re-examination of the final decree.

Such is the general course prescribed to this court by the 22d section, in all cases coming before them by appeal; the 24th is still more explicit.

"That when a judgment or decree shall be reversed in a circuit court, such
*509] *court shall proceed to render such judgment, or pass such decree as the district court should have rendered or passed; and the supreme court shall do the same, on reversals therein, except where the reversal is in favor of the plaintiff or petitioner in the original suit, and the damages to be assessed or the matter to be decreed are uncertain, in which case they shall remand the cause for a final decision."

The second clause of the second section of the third article of the constitution declares, "that in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the supreme court shall have original jurisdiction. In all the other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the congress shall make." The 22d and 24th sections of the judiciary act, are the execution by congress of an express constitutional power, which makes these provisions as imperative on the supreme court, as if they had been detailed in the body of the constitution; they form its constitution as an appellate court, defining its powers, and prescribing their exercise, in re-examining, reversing or affirming the final judgment and decrees of all courts which may be brought within its appellate jurisdiction.

The 22d limits the appellate power to the revision of final decrees in cases in equity, herein departing from the course of appellate courts in England and in New York; there, an appeal lies to the house of lords or court of errors, from the interlocutory orders and decrees of the chancellor; the other regulations prescribed by the judiciary act are in conformity to the uniform course of all appellate courts, as long settled by uniform practice, adopted by the rules, and followed in the decisions of this court. This course cannot be better defined than in the words of Chancellor KENT. "It is the acknowledged doctrine of courts of review, to give such decree as the court below ought to have given; and when the plaintiff below brings the appeal, the court above not only reverses what is wrong, but decrees what is right; and models the relief according to its own view of the ends of justice, and the exigencies of the case. The court above acts, therefore, on
*510] *appeals, in the given case, with all the plenitude of a court of equity of original jurisdiction, and the special terms of the decree, whatever they may be, becomes to this court the law of that case, and no other or further relief can be administered to the party." 1 Johns. Ch. 194–5.

This doctrine, then, is the law of this court, not only by the acknowledged principles of the law of equity, but as an injunction of the supreme law of the land; from the observance of which, the court can be absolved by no rule or practice contrariant thereto. If its authority rested alone on either the recognised rules of appellate courts, or their settled practice, it might be varied at the discretion of the court, by their power to make rules respecting practice, proceedings and process; but they can have no discretion to alter or depart from those "principles and usages of law" which congress have adopted as regulations of, and exceptions to the appellate power of all the courts of the United States, pursuant to the provisions of the constitution.

It must, therefore, be taken as a rule of constitutional law, binding on this court, that if it takes cognisance of a cause on appeal, under the 22d

section, it must be by re-examining the decree, reversing or affirming it; and by the 24th, on reversal, to give such decree as the circuit court ought to have rendered, or remanding it for final decision, as the case may be. There can be no other course pursued; for, as the appellate power is confined to those cases to which it has been extended by congress, and must be exercised within the limits and by the regulations prescribed, it can have no inherent powers, in virtue of which it can review of revise the decrees of the inferior courts, by any general superintending authority, such as appellate courts may have, whose jurisdiction has neither been conferred nor regulated by a constitution or statute. No principle has been better settled, or more steadily adhered to, than that this is a court of special jurisdiction, whether original or appellate, which the constitution has defined and separated by a line which congress cannot pass, by extending that which is original, to cases which are appellate, or *é converso*. 1 Cranch 164, &c. As the present is an unquestioned case of appellate jurisdiction, it must be exercised according to the regulations prescribed by congress; by an examination *of the final decree on its merits, if the court takes judicial cognis- [*511
ance of the record. Any other course is wholly unknown in an appellate court of equity; unless there is such a fatal defect in the record, as affects the jurisdiction of the court below, and prevents the court above from acting judicially upon it, by hearing and determining the matters in controversy; in which case, the decree will be reversed, the cause remanded, and the circuit court be directed to dismiss the bill, or make the amendments necessary to give it jurisdiction.

It is not pretended, that the circuit court has not jurisdiction of this case, as one between proper parties, touching a proper subject-matter of controversy; nor can it be doubted, that the jurisdiction of this court is equally clear. A final decree has been rendered, an appeal regularly taken, by parties affected by the decree; who, having given the requisite security, have a right to be heard on all matters appealed from, to ask a reversal and a decree in their favor. The party in whose favor the decree has been rendered, appears here, pursuant to the citation, with an equal right to defend his interests, to demand an affirmance of the decree, with a mandate for its execution.

This court, then, cannot refuse to hear the appeal, on the ground of a want of power to hear and finally determine all matters appealed from, which are properly and fully cognisable by both courts; and this objection does not profess to be founded on the want of competent parties to a controversy in the federal courts, or a subject-matter cognisable in equity. As it avoids these questions, the objection defeats itself; for it must necessarily apply to the course of the circuit court in the progress of the cause, and their final adjudication on the matters submitted by the parties; the revision of which is the ordinary exercise of the jurisdiction of an appellate court, in conformity with the acknowledged doctrine of such courts and the positive injunctions of the judiciary act; which it is the direct object of this motion to prevent, and which has been effected by the judgment now rendered. There being no doubt of the jurisdiction of either court, the only questions which can arise are, whether any of the petitioners have, on this record, shown a right in equity to demand from the respondent, Nixon, the fund which he holds in his hands, subject to the order of the court,

*he claiming no interest in it, except his commissions and proper credits. The case is, therefore, one of ordinary occurrence; a bill in equity filed by one claimant, and petitions by others, for the surplus of an estate in the hands of an executor; who, in his answer, interpleads, submits to any order the court may make, and prays their protection by such a decree as will save him from future litigation.

Whether a bill in equity contains any ground for relief, or, what is called in the language of its courts, "equity," is not a question of jurisdiction, but of merits; the inquiry is, has the petitioner set forth a cause of action in his complaint? has he averred any matter which, if true, entitles him to the relief prayed for, or any relief? or set it forth in the manner required by the rules of equity? If he has, the respondent must plead some new matter in avoidance; or in his answer give some reason why he does not do, or ought not to be decreed to do, the thing required of him. If the complainant's petition contains no equity, or sets it out defectively, it is good cause for demurrer, generally, or for cause; or the respondent may object in his answer, or at the hearing, to the want of equity in the bill; and it is a good ground for the reversal of a decree, on appeal. So if a question arises whether the allegations of the bill are made out by the proofs in the cause, it is a proper subject of consideration, before rendering a decree in the court below, as well as review in the appellate court; not as a question of jurisdiction, but one which arises in its exercise. "It is well settled, that the decree must conform to the allegations of the parties" (11 Wheat. 120); and be sustained by them as well as by the proofs in the cause (10 Ibid. 189); but whether it does so conform, and is so sustained, is determined by the appellate court; on the inspection of the whole record and proceedings before them; as was done by this court in *Carneal* v. *Banks*, and *Harding* v. *Handy*, above cited. In examining the allegations of a declaration in a court of law, a court of error examines only whether the plaintiff has set out a title or cause of action. "If," in the language of this court, "it is defectively or inaccurately set forth, it is cured by a verdict; because, to entitle the plaintiff to recover, all circumstances necessary to make out his cause of action, so imperfectly stated, must be proved at the trial; but, *513] when no *cause of action is stated, none can be presumed to have been proved. The case is not to be considered as if before us on a demurrer to the declaration. The want of an averment, so as to let in the proof of usage, cannot now be objected to the record. The evidence was admitted, without objection, and now forms a part of the record, as contained in the bill of exceptions. Had an objection been made to the admission of the evidence of usage, for the want of a proper averment in the declaration, and the evidence had, notwithstanding, been received, it would have presented a very different question." 9 Wheat. 594–5. This is the settled rule of this court, in cases at law, that they will not reverse a judgment for any defective averment in a declaration, not demurred to, if the plaintiff has substantially set out a cause of action. Such, too, is the established principle in cases in equity; as, where a bill was filed to set aside a conveyance, on account of the mental incompetency of the grantor, which contained no direct or positive averment of his incapacity; yet the court took cognisance of the case, examined the bill and proofs, and decided that, "although a more direct and positive allegation that C. H. was incapable

of transacting business, would have been more satisfactory than the detail of circumstances from which the conclusion is drawn; yet we think that the averment of his incompetency is sufficiently explicit to make it a question in the cause. The defendant has met the charge, and we cannot doubt, that his answer is sufficiently responsive to give him all the benefit which the rules of equity allow to an answer in such cases." 11 Wheat. 121. In that case, the whole gravamen of the bill, the whole equity of the case, was in the averment of the incompetency of the grantor to make a contract; yet it was held sufficient, to aver the circumstances from which the conclusion could be drawn, that it was enough, if the bill made it a question in the cause, that the defendant had met the charge, and his answer was sufficiently responsive. The court proceeded to look into the proofs in the cause; inquired whether the testimony established the incompetency of C. H.; and examined the immense mass of contradictory evidence which the record contained, with attention; and affirmed the decree of the circuit court of the first circuit, annulling the contract, on the ground of *incom- [*514
petency.

It is, therefore, a settled point, that an objection to the sufficiency of the averments of the bill, must be considered by the appellate court as one directly involving the merits of the case; it is the statement of the complainant's cause of action, to which the defendant must demur, if he relies on the want of form, manner or circumstance, or he loses the benefit of the objection. If he relies on an objection to the substance of the averment, or its variance from the proofs in the case, he must make it appear to the satisfaction of the court, that the bill contains no equity on its face, that no cause of action is set forth, nor any circumstances from which the conclusion of an averment of one, could be drawn conformable to the evidence adduced. The application of these cases to the record of the circuit court, presents only this difference; by the substitution of the word domicil for usage, in *Renner* v. *Bank of Columbia*, and citizenship, for incompetency, in *Harding* v. *Handy*, the rule and principles of both are identical in point of law.

In applying these maxims of this court to the objection made by the appellants to the re-examination of this case, the record shows, that the gravamen of the original bill and all the petitions is, that Matthias Aspden made a will, devising his real and personal estate to his heir-at-law, and died, leaving Henry Nixon, the respondent, his executor, who has in his hands a large surplus of personal property, to which the several parties aver themselves to be entitled by the terms of the will, but which the executor refuses to pay over, though bound in equity so to do. If these averments are true, if they are made out by the proofs and exhibits in the cause, there is certainly equity in the bill, sufficient to entitle the devisee or legatee to a decree against the executor, for the surplus of the estate in his hands. Had he demurred to the bill, he would have been adjudged to answer over, for there could have been no clearer case for the interposition of a court of equity; or if he had insisted on the objection at the hearing, it could not have been doubted, that there was a substantial averment of a ground of relief.

The execution of the will was duly proved, the sanity of the testator was admitted, the fund was in the hands of the respondent, who admitted the

trusts, submitted to the *jurisdiction of the court, ready to abide their decree; he held the money for such person as they should decree to be the person entitled under the will, which was an exhibit in the case. The only question depending was, who was the person that filled the description of the devisee or legatee; when that was ascertained, the whole controversy was ended. Had the will named Samuel Packer, of New Jersey, the original complainant, George Harrison, of Philadelphia, or John Aspden, of Lancashire, England, two of the petitioners, parties to this appeal, as the favored objects of this testator's bounty; the executor would have stood without an excuse, for not paying him the surplus of the estate. It could not be a material averment, where the testator's domicil was; his executor was bound to obey the directions of his will, be his domicil where it might. This proposition admits of no doubt. But as the will names no person, it must be ascertained, from its terms, who was intended to be the devisee, or whom the law designated as such, by the legal intendment of the words used in the will. When that is done, the rights of the person or persons thus designated, and the duties of the executor, become the same as if he had been expressly named as the person entitled, on which the question of the domicil of the testator could have no direct bearing.

The only direct question on the construction of the will, was the intention of the testator as to who should enjoy his estate after his death; all other questions were collateral to this, and the only effect of his domicil could be, as the ground of an inference of his intention being to give it to such person as should be his heir by the local law. But this is only a circumstance from which to draw an inference of intention, and before such inference could be drawn, it must be made to appear, that the law of England designated one person, and the law of Pennsylvania a different one. If the law of both countries is the same in this respect, the averment of domicil in the bill would not put in issue even a circumstance, from which any conclusion could be drawn; and so far from being matter of substance affecting a final decree, it would not be a ground of special demurrer. If it once becomes the established rule of this court, that the decree of a circuit court shall be annulled on a motion, without an examination of the record,
*516] because it *does not set out an averment of a collateral fact or circumstance, bearing on the intention of the testator, by inference merely, then every such fact or circumstance must be averred distinctly, of which domicil is but one of many. The state of a testator's family and property is always referred to, to ascertain the devisee or thing devised; evidence of other collateral facts may be introduced, in many cases, to aid in the construction of a will, or to show the intention of the testator; but no court of equity ever held it necessary to aver those matters in a bill brought to enforce the trusts of the will, in favor of a devisee or legatee. In this case, however, the original bill alleges the testator to have been a citizen of Pennsylvania, at the time of his death; this is done in direct and positive terms; it is only necessary, therefore, to apply to this averment the principle laid down by this court, in *Harding* v. *Handy*. Is citizenship a circumstance from which the conclusion of domicil may be drawn? Is it sufficiently explicit, to make domicil a question in the cause? and has the respondent met this part of the bill? These questions are of easy solution. The domicil of a citizen of Pennsylvania is certainly not presumed by law

to be in England, without some proof of his residence there, but is presumed to be in Pennsylvania, till the contrary is proved. The respondent has considered the averment of domicil as made, for he has answered it; the parties in the cause have deemed it a question raised, by taking testimony touching it; each of the ten counsel who argued the case in the court below, made it a point, except one, who did not deem it material; and the court thought it proper to take it into their consideration, and express an opinion upon it, as a point which had been argued—not whether the domicil had been properly averred, but where it appeared by the evidence to have been in fact, and its bearing on the will and cause. It was the most deliberate opinion of both the judges of the circuit court, that the law of both countries pointed to the same person as the devisee; and that the fact of domicil had no bearing on the intention of the testator, or the construction of his will. As this was a question of local law, arising directly in the case, it was deemed necessary to examine it thoroughly, before rendering a final decree; and if it is now one vital to the case, it would seem proper, at least, to consider whether the conclusion of the circuit court was so clearly wrong, on the law *of Pennsylvania, as to justify this court in annulling their final decree, without an argument on the point. [*517

In this opinion, the circuit court were supported by the counsel of the appellants, in their printed brief, presented for the argument of the cause in this court. Their third point is, "that the law of Pennsylvania is to govern this case, and that by that law they are entitled." Their fourth point is: "but that if the case is to be decided by the law of England, still the appellants are entitled." Thus, most distinctly admitting the identity of the law of both countries in its application to this will, which was also asserted by the counsel of the appellees. Nor have the appellants' counsel, in their argument of this motion, even contended, that there is any difference between the respective laws, as to the person who is the heir-at-law of the testator, or who are his next of kin, by the statutes of distribution. In this union of opinion between the judges of the circuit court, and the counsel of all parties, thus apparent to this court, it was not an unreasonable expectation, that they would, at least, have looked at the record, the evidence, the law, and decree, before they would authoritatively decide, that there was nothing deserving an argument, without the averment of domicil.

The whole case turned upon a question of local law, which had long been settled by the highest judicial tribunals of Pennsylvania, and sanctioned by the legislature, as firmly an any one principle of her jurisprudence—that the common law of England, as to the descent of property, had, from the charter of Pennsylvania, been adopted in all cases not specially provided for by act of assembly. It remained only to examine the legislation of the state, to ascertain whether the present case was embraced within the provisions of any law, had it been a case of intestacy; if it was not, then it was an admitted rule, that the common law governed it. But as the present is not a case of intestacy, the range of inquiry is still more narrowed; it turns upon the words of the will, which is the law of the case, paramount to any other. Local laws can have no other effect on its construction, than by their presumed operation on the mind of the testator, when he made his will, as an indication of his intention to refer to the law of his domicil, defining its terms. Yet, before such *in- [*518

tention can be inferred, it is a settled maxim of the law, that it must stand well with the words of the will; it cannot be admitted, to vary its plain words, or their settled legal signification.

If these considerations afforded no ground for inducing the court to give the record an appellate inspection, there are others which may serve as some apology for the court below, and the counsel there, as well as here, for overlooking the indispensable necessity of an averment of domicil, in order to give to either court jurisdiction over the subject-matter of the cause. In the first place, no such rule is laid down in any book of equity practice, or any adjudged case, in any court of equity, in England or this country, and it forms no part of their practice, as adopted by the acts of congress and the seventh rule of this court. In the next place, if such averment had been required by the ordinary rules of equity practice, it was necessarily dispensed with, by the adjudication of this court on the subject of domicil, in a case of intestacy, which is much stronger than the one under the will; for in the former case, the local law applies directly to the estate of an intestate, as the rule by which it shall be distributed. The law of the *situs* of the property, the domicil of the intestate, or of the place of administration, must govern; but which should be adopted by this court, was elaborately argued, in 1831, in the case of *Smith, Administrator of Robinson*, v. *Union Bank of Georgetown*, 5 Pet. 518, 523. In that case, the intestate was born in Maryland; domiciled in Virginia; died in Pennsylvania; had personal property in this district, being a claim upon the government, on which administration was had here; he died insolvent. The question arose, by what law his estate should be distributed among his creditors; on which this court decided, that it should be the law of the place of administration, and not of the domicil, which was the point directly adjudged, and from which only one judge dissented. The question of distribution among the next of kin, was not directly before the court, but was noticed in their opinion, from which the same judge dissented also. In alluding to the latter question, the words of the court are: "With regard to the first class of cases, we expect to be understood as not intending to dispose of them, directly or incidentally. Whenever a case arises upon the distribution of
*519] an *intestate's effects, exhibiting a conflict between the laws of the domicil and those of the *situs*, it will be time enough to give the views of this court on the law of that case. That personal property has no *situs*, seems rather a metaphysical position, than a practical and legal truth."

In noticing the provisions of treaties on this subject, the court say, "It would seem, that such a provision would be wholly unnecessary, if there existed any international law, by which the law of the domicil could be enforced in that regard, in the country of the *situs;* or if the fact of locality did not subject the goods to the laws of the government under which they were found at the party's death. In point of fact, it cannot be questioned, that goods thus found within the limits of a sovereign's jurisdiction, are subject to his laws; it would be an absurdity in terms, to affirm the contrary." "This necessity of administering, where the debt is to be recovered, effectually places the application of the proceeds under the control of the laws of the state of the administration. And if, in any instances, the rule is deviated from, it forms, *pro hâc*, an exception, a voluntary relinquishment

of a right countenanced by universal practice, and is of the character of the treaty stipulations already remarked upon, by which foreign nations surrender virtually a right, which locality certainly puts in their power."

Against these doctrines, the dissenting judge most earnestly, but in vain, remonstrated, insisting, that it was settled by the international law of the civilized world, that personal property had no *situs;* that it was distributable by the law of the domical, and that if these principles were shaken by this court, or declared to be unsettled, irremediable and utter confusion would ensue. For it was a subject on which congress could not legislate out of this district; nor the states of this Union, or foreign nations, beyond their respective territorial limits; the inevitable result of which would be, that the law of distribution of an intestate's estate would be different in every state and country, in which he owned any *bona notabilia.* That the court having decided, that a pecuniary claim on the government of the United States, was *bona notabilia* in this district, subject to distribution by the local law; it followed, that if the intestate had debts due to him in different states, or owned a part of the funded debt of different governments, or of the stocks of local *corporations, there could be no uniform rule of distribution, either among creditors or distributees. [*520

But the result of the most deliberate consideration of this court, is, that which has been solemnly adjudicated and promulgated as the rule and guide for all the inferior tribunals of the United States. It would not have comported with the judicial duty of the dissenting judge, presiding in the circuit court of Pennsylvania, to have declared to the profession and suitors, that his overruled opinion must be taken as the law of the case. Had the counsel of the parties complainants moved that court to dismiss the bill, or petitions filed by themselves, or, after a final decree, had asked that it should be declared to be an extra-judicial act, because the domicil of a testator (not of an intestate) had been averred only as a conclusion to be drawn from an express averment of citizenship, the circuit court would have been bound to have decided, that it was unnecessary, according to the decision in *Robinson* v. *The Bank;* for having settled that domicil was wholly immaterial in distribution among creditors, and when they declared, that "we expect to be understood as not disposing, directly or incidentally," of the question of distribution among next of kin; the dissenting judge would have felt it his duty not to have disappointed an expectation, not only so reasonable, but which he would have obeyed as a mandate of paramount authority. The more especially, as the whole reasoning of the court of the last resort went to negative the materiality of domicil in any case; but most emphatically was the dissenting judge bound, by his every duty, not to declare the law of the domicil to be the law of the case, in face of the distinct proposition of the court; "that personal property has no *situs,* forms rather a metaphysical position, than a practical and legal truth," and thus substitute metaphysics for law, as the rule of his judicial action.

At the time of rendering their final decree, the circuit court for the Pennsylvania district could not have forseen, that without overruling the decision of this court, made in 1831, by the same high authority which pronounced it; when no question was presented to this court by counsel touching the matter, or argued by them, after the suggestion had fallen from the bench; it should now appear to the same judges, to be a principle of law

so manifest, so clearly and decisively settled, as to make the *most solemn decree of inferior courts against executors mere nullities, because the pleadings on which they were founded did not contain an express averment of the domicil of the testator; although the bill and answer contained express averments of the citizenship of the testator, the place where he made his will, the place of his death, of administration, and the *situs* of the property. As these averments were in strict conformity with the decision and reasoning of this court in *Robinson* v. *The Bank*, it could not have been thought, that there remained in the vitals of the record, a disease fatal to the action of the circuit court upon the matters in issue.

Had it been objected, that the *situs* of the property, or the place of the testator's death or of administration, had not been averred, the necessary amendment would have been made; though the pleadings had averred the domicil, that must have been deemed immaterial, according to the then doctrine of this court, which was, that personal property had a *situs*, without any reference to the domicil of an intestate. It follows, that if an averment of the *situs* was indispensable, that of the domicil could not be, as the rules of distribution would be different by the local laws. And as the law of the *situs* was the rule, when these pleadings and issue were made up, and the final decree rendered, it would most certainly have stood the test of this objection, though it must have been reversed, had the *situs* not been averred, notwithstanding the domicil had been, however explicitly. Yet now it seems, that a record containing an averment of the *situs* in all its bearings on the case, is mere blank paper, because the domicil is averred only by way of inference or conclusion from facts stated.

In 1831, the materiality of the *situs* was "a legal and practical truth," that of the domicil was "a metaphysical position," an absurdity in terms in the opinion of all the judges of this court but one. In 1835, the materiality of the *situs*, is the metaphysical position; and that of the domicil, the legal and practical truth. This radical difference between the promulgated law of this court, on the same question arising at these periods, presents a *conflictu legum* which the circuit court of Pennsylvania were not bound to anticipate; the consequences of which it is hard to visit upon suitors in that court, by drawing a sponge over all the proceedings in this cause, to
*522] their great delay and *injury; though they were had and conducted according to the solemn opinion of this court as to the law of the case, when the suit began and ended. At that time, the judges of the circuit court had for their guide no better rules for their decision, than those laid down in 1831, and the practice of this court at the same term; which, to one of the judges, at least, is some apology for not exercising his legal acumen, in discovering a fatal defect of jurisdiction over a cause, in which, it now appears, he has assumed an unwarranted power to render a decree on the merits. It is his consolation to find, not only in the solemn judgment in *Robinson* v. *The Bank*, the reasons for overlooking the indispensable necessity of an averment of domicil, but the fact, that in two other cases in the same term, this court had practically decided it to be unnecessary.

The case of *Backhause* v. *Patton, Adm. cum test. ann., de bonis non, of James Hunter*, was a bill in equity to compel an account of the personal estate of the testator, and for its due distribution; the bill averred the testator to be a citizen of Virginia, but contained no averment of his domi-

cil. 5 Pet. 160, &c. The case of *Page* v. *Lloyd, Executor of Hanbury, and Patton, Adm. cum test. ann. of Mann Page,* was on a similar bill, containing an account of the *situs* of Mr. Mann Page's personal property in two counties in Virginia; but no averment of either his citizenship or domicil. 5 Pet. 304. This court took cognisance of both cases, on certificates of division from the circuit court of Virginia, and finally decided on all the matters so certified, without a doubt at the bar, or on the bench, of the regularity of the record; and as the rules of its decision are the same, whether a cause comes up on certificate, or on appeal, these must have been deemed records on which it could act judicially. It is not doubted, that a further examination among the records of this court, on appeals from other circuit courts, in cases of equity against executors, will furnish additional proof, that if the practice of that of Pennsylvania has been in violation of all rules, it has the fullest sanction in the course of this court through all time; and this is the first time it has annulled a decree for such cause.

It is equally unknown to the fundamental principles on which it is organized as an appellate court, which in this case has not exercised its powers as directed in its constitution, by *re-examining and reversing [*523 the decree, and rendering such a one as ought to have been given. Its power has been exerted on a summary motion, not on an assignment of errors; the decree and all preceding acts of the circuit court have been declared null and void, collaterally, not for errors in the record or decree; for this court would not re-examine either, nor have they, in remanding the cause, directed what final decision shall be made. The only exception in the 24th section of the judiciary act, which authorizes any departure from the injunction to render such decree as ought to have been made, is, "where the reversal is in favor of the petitioner in the original suit, and the matter to be decreed is uncertain; in which case, they shall remand the cause for a final decision." But this case does not come within the exception, for though the reversal is in favor of the petitioners in the original suit, the matter decreed was certain; it was, therefore, no case to be remanded; though, if it was, the court has not remanded "the cause for a final decision." Its mandate is a peremptory order to the circuit court, to amend the pleadings from the beginnnig, to admit proofs of new matter and new parties; in one word, to make a new case throughout; and concludes with ordering, "such other proceedings are to be had in the said cause, by the said court, as to law, justice and equity shall appertain.

It had, heretofore, been thought to be the province of a court of original jurisdiction in equity, to decide on amendments in their legal discretion, or according to the act of congress, with which this court never interfered; that after publication, and before a decree, the admission of new proofs, new matter, or new parties, was discretionary with the chancellor, on a petition presented; that after a decree made, but before enrolment, neither could be introduced into a cause, unless by a supplemental bill, in the nature of a bill of review; nor after enrolment, unless by a bill of review, on newly-discovered evidence, filed by parties or privies to the original suit. It was also believed, that there was no distinction better established by the law of equity, than the different effect of defective pleadings, when demurred or excepted to in the court below, and when they are unnoticed till the cause

is removed for review in an appellate court. And it has hitherto remained
*524] *equally well settled, that no decree will be reversed, even on a bill of review, for any new-discovered evidence, unless in a case where a new trial would be awarded by a court at law.

But if the decision now made, is to be hereafter considered as a precedent for the future action of this court on appeals in equity cases, it portends a fearful change in the rules which have heretofore drawn a line between the original and appellate jurisdiction of the courts of the United States, the consequences of which cannot be foreseen. The practical effect of this judgment and mandate is, an assumption of the province of the former, not only as to the rules of practice, pleadings, amendments, parties, proofs and issues, which depend mainly on the exercise of discretion; but is giving to an appeal from a final decree, the effect of a special demurrer to a bill, an exception to an answer, as well as of an original, supplemental or bill of review, in all their respective operations on the case. This appellate court does not decide upon the case or decree appealed from, it orders an entirely new one to be made, by an utter prostration of everything in the record, from the original bill throughout. It does not remand this cause for a final decision by the circuit court; it first divests it of all the attributes and requisites of a case for a final decree, and then commands that a case shall be made up for their original jurisdiction, as a suit in equity, under positive directions, which leave no discretion in the exercise of their jurisdiction over the matters referred to in the mandate.

The reasons assigned by the court for these proceedings are worthy of the most serious consideration. They decide, that an averment of domicil is indispensable, because it might indicate the intention to give the property to such person as would be the heir-at-law by the law of one country, who would not be the heir, by the law of the other, but adds, "we do not say what is the case." That the country by whose laws the will is to be interpreted, should be first ascertained, and then the inquiry is naturally presented, what the provisions of those laws are." They also direct an averment of the domicil, "at the time of the will being made," "at the testator's death," and "in the intermediate time" (a period of thirty-three years); yet declare that they do not mean to express any opinion as to the effect on the will, of
*525] the domicil being at a different place at these different times. *Whence then arises the necessity of the averments? The natural order of inquiry would seem to be, whether there was any difference between the law of England and Pennsylvania, in the interpretation of the will; and next, whether the will should be construed by the law of the domicil at the death of the testator, or at any other time; for the materiality of the averments depends entirely on the solution of these two questions. If the law of both countries was the same, at all times, the averments are useless. It is surely a strange ground for uprooting a cause from its foundation, by an appellate court, merely because the original bill does not contain an averment of a fact which, by possibility, may be material as the evidence of intention, or the existence of that fact, at a time when it could have no possible bearing on the will.

When the new case now directed to be made up, shall have been decided by the circuit court, and come here again on appeal, it is to be presumed, that this court will then deign to inquire by what law this will must be

interpreted, and what the provisions of that law are. It is also to be hoped, that by that time, they will feel prepared to instruct the circuit court of Pennsylvania, whether their next final decree shall be in conformity to the law of the testator's domicil, when he made his will, when he died, or at what period of the thirty-three years which intervened, not omitting an explicit opinion upon the preliminary question, whether the domicil has any bearing on the will. As the mandate now is, that court is ordered to proceed "as to law, equity and justice shall appertain," but are uninstructed by what law or rule the justice or equity of the case is to be ascertained, other than the law which the testator has prescribed in his will. The predicament in which that court is now placed, is a most unpleasant one; their past errors have been so gross and palpable, as to make their whole proceedings nullities; yet they remain in the dark as to the means of correcting them; the averment of domicil will lead to no new evidence or issue, not in the present record, and no new question of law or fact can arise in that respect. When a new case shall have been presented, it will differ from the present only in this one averment, which, by the admission of this court, cannot have the most remote effect on the decree, unless on the contingency *of a *conflictu legum*, which is now as little ascertained as before this reversal. [*526

If the action of this court had stopped here, the embarrassment of the circuit court would be sufficiently great, in being precluded from the exercise of all discretion in the proceedings, preparatory to a final decree, by the peremptory orders now given on all matters for their ultimate judgment; and as to that, left without any directions how to avoid the recurrence of the same errors which have caused great and expensive delay. There is, however, another ground assumed by this court, which is infinitely interesting to all persons whose rights may be affected by its appellate powers in equity cases, as well as to all inferior courts, on general principles; but most emphatically to the judges of that court whose proceedings have been thus roughly handled in the opinion delivered. After the direction to make the averments, the court remark, "it appears from the motions which have been made to this court, as well as from certain proceedings in the court below, which have been laid before us in support thereof, that there are certain claimants of this bequest, asserting themselves to be heirs-at-law, whose claims have not been adjudicated upon in the court below, on account of their having been presented at a late period." "As the cause must go back for further proceedings, and must be again opened for new allegations and proofs, these claimants will have an opportunity of presenting and proving their claims in the cause, and we are of opinion they ought to be let into the cause for this purpose."

The "motion" alluded to, was to revise the whole proceedings in the case, made by the counsel of persons who were not parties or privies in the original suit, or to the appeal; the "certain proceedings in the court below" were had, on a petition asking for leave to file a bill of review by those persons, for newly-discovered evidence, and to make themselves parties. Leave was refused, for the reasons given at length in the opinion delivered by the circuit court, some garbled extracts from which, the counsel who urged the objection taken to the want of the averment of domicil, not the counsel who made the "motion" referred to by the court, thought proper to read in the

course of his argument. Had the whole opinion been read by the counsel or
*527] court, had they seen the reasons of the refusal to permit *the bill of review to be filed; it would have been most apparent, not only that it was not because the petition "was presented at too late a period," but the circuit court expressly declared, that the petition was presented within due time after the final decree, had there been no other objections. The grounds of the objection to the petition were, that those claimants never asked to be admitted into the cause, till after the final decree, and the pendency of the suit in this court on the present appeal; that the circuit court could not reverse their final decree, in any other way, than by a bill of review for error apparent or new matter. That such bill lies only in favor of parties or privies to the final decree, in neither of which characters could those persons stand; that their case was not supported by the requisite affidavits; that the matter relied on was not new, or newly discovered, but had been relied on in bills in the courts of chancery and exchequer, in England, years before the petition for review, and by the same parties; that even if new, it was not competent to procure a decree in their favor; that with full knowledge of the state of the fund, and the pendency of this suit, they had been guilty of such gross and unaccountable negligence, that no court of equity could afford them any relief on a bill of review, and if they had any remedy, it must be sought in some other mode.

The circuit court could not adjudicate on their claim, before it was presented for adjudication, and when so presented, they had no longer any power of adjudication over it, but on a bill to reverse the original decree by review for error apparent, or on an original bill which the petitioners had a right to file. The bill of review for new matter, is a matter of favor and discretion, which, in the case presented, they could not permit, without the utter disregard of the oldest and best-established rules of the law of equity; whereupon, the parties filed their original bill, on which there has not been time for any proceedings to be had. It is, therefore, a gratuitous assumption, that "those claims were not adjudicated on in the court below," "on account of their having been presented at a late period;" unless this court intended to refer to the gross delay of the parties before the final decree, and the settled principles of law which forbade that court from letting the claimants into the case, on a bill of review for the cause assigned. The judge
*528] who gave *the opinion of the circuit court, feels bound to repel the imputation which would otherwise rest upon the "certain proceedings in the court below" as wholly erroneous, and unfounded on any other construction which may be given to that part of the opinion of this court containing the allusion to those proceedings. It is also his right and duty to inquire, by what rule of law, a court of mere appellate power over final decrees of a circuit court, assume appellate jurisdiction over a subject-matter not contained or referred to in the record of the cause before them on appeal? By what power this court can review the proceedings of that court, on a petition for leave to file a bill of review to reverse their own decree, after an appeal, on new-discovered matter, which rests exclusively in their discretion as to granting or refusing it, and especially, after the parties had acquiesced in the decision and had adopted another remedy? And above all, by what warrant this court can act on an appeal by the parties now before them, in favor of persons who are utter strangers to the record and

suit, who, being neither parties or privies, can be heard only by an original bill, filed in a court of original equity jurisdiction?

The knowledge that these persons had desired and had been refused admission into the cause, not having been derived from the record, was wholly extra-judicial, and is so admitted by this court; yet it is made the basis of judicial action, and its peremptory mandate to the court below to admit them as parties, and hear their proofs. Thus, indirectly and collaterally, but most effectually, reversing the refusal to permit them to file a bill of review, and giving them not only all the benefits which they could have desired from a bill of review actually filed, but of an actual reversal; nay, much more substantial benefits. On the hearing of a bill of review, the plaintiffs are confined to the new matter set forth in their bill; and this would have been the utmost extent of the relief which could have been given them, had they appealed to this court, obtained a reversal of the proceedings in the circuit court on their petition, and the case had been remanded, with directions to permit the bill of review to be filed, and its merits to be adjudicated. Whereas, they now come into the cause, as original parties, with the same liberty as to proof, as those who have been contending for years. They are likewise fully *absolved from every requisition and [*529
duty enjoined by the law of equity, as the indispensable conditions of their admission as parties to a suit, after a final decree, as well as from all the consequences of gross and long-continued negligence. All this has been done in their favor, without any appeal by them, but on information laid before this court, in support of a motion which they would not listen to, and on which they could not act directly, in virtue of their appellate power, consistently with the acknowledged doctrines of courts of equity, or the directions of the judiciary act, that is, an appeal by the party aggrieved by a final decree. In the present course, then, of this court, in relation to those persons who are no parties to this appeal, as also to those who are proper parties, it must be asked, what brings any decree or other proceedings of a circuit court in equity, within any power of this, if not an appeal? what the act of reversal necessarily implies, if not jurisdiction of the case and its exercise? or what is the nature of that jurisdiction, if it is not appellate? and what respect is paid to the judiciary act, if this appellate jurisdiction is not exercised by re-examining the record and proceeding, according to the directions of the law which confers the power, and is the only authority by which any proceeding of a circuit court can be reviewed, or its final decrees be reversed?

As the court has reversed and annulled every proceeding which has been had, directly or collaterally, in this suit; whether it related to the rights of parties, privies or strangers to the record, to the subject-matters of appeal, or those which have come to their knowledge, without judicial information; inasmuch as their whole action has been on a summary motion to reverse, solely for the want of an averment in the bill, which the court most cautiously avoid deciding to be material to the merits of the cause, otherwise than in the event of an unascertained and possible conflict of laws, not asserted to exist, and wholly refuse to decide any one matter put in issue by the parties, as to either law or fact, the mandate of reversal must be referred to some other than their appellate power, as granted by the constitution, defined, limited and regulated by congress; for it cannot be pretended to be

within the legitimate scope of any construction which can be given to the
*530] words "appellate jurisdiction," which necessarily requires *re-examination of what had been before adjudicated in the court below. If the jurisdiction now exercised is original, it is only necessary to refer to the decision of this court in *Marbury* v. *Madison*, to pronounce it unconstitutional. Be it, however, appellate or original, it is incompatible with the organic laws of this court, with the principles and usages of law in those appellate tribunals from which we have adopted our rules, and can have no sanction from precedent, unless by some silent unadjudicated practice, which may have crept into our proceedings, without a due consideration, and which has been often decided, is not binding as authority, and is never too late to correct, when its errors are discovered. 8 Wheat. 321–2.

There is no power so dangerous as that which can be traced to no definite or authoritative source, or which is exercised without a reference to some fixed principles; it is in the nature of that which is assumed by any department of government, to be capable of no other limitation than such as it may choose to prescribe to itself; while that which is conferred by the constitution or statutes, is defined, limited and regulated in its exercise to the cases specified, and in the mode prescribed. Such are the appellate powers of the circuit and supreme courts of the United States; they are of limited jurisdiction—necessarily incompetent to act by any prerogative or inherent power; as the creatures of the judiciary act, they are not at liberty to exercise any power over the proceedings of inferior courts, by any general supervisory power, such as has been assumed by the king's bench and house of lords. Their supervision is only by writ of error or appeal, and such writs as congress have authorized them to use; so that in whatever case they act as an appellate court, it is by special authority, and can exercise no other than what is appropriately appellate, as contradistinguished from original jurisdiction. In the present case, there seems to be a mixture and excess of both, whether the mandate and opinion are tested by the rules of other courts of appeal, or the acts of congress.

The house of lords act as an appellate court, by their own authority, without an act of parliament, but have never assumed any original jurisdiction on appeals in equity causes, nor reversed the decree of a chancellor, because an issue before him will not enable the lords to make a satisfactory decree; they remand the cause for amendment (1 Bligh P. C. [N. S.]
*531] *471, 477); or give the party leave to withdraw his appeal (2 Bligh P. C. 392; S. P. 12 Wheat. 12). Such a course would have been peculiarly proper in this case; the only irregularity complained of on this motion, was by the appellants' own fault, in not making an averment in their own petition, which is admitted were amendable, and is so decided by the court; and it cannot be denied, that it was competent to them to remand the cause for this purpose (12 Wheat. 12), or permit the appellants to withdraw their appeal, to enable them to amend their own petitions, if the court deemed it indispensable to make a final decree on its merits. But it is most confidently asserted, to be against all rules, and without precedent, to reverse a decree and declare all previous proceedings void for such a cause; no court of original jurisdiction in equity, can annul its own decrees, without a bill of review, even for error apparent; this has been the law from the time of Lord BACON. This court has no power to revise

its own decrees after the term expires, unless for clerical errors; it can exercise no original jurisdiction in this case; and that which has been exercised is not appellate, by any rules which define what appellate power is, and its lawful course. So far from adjudicating any one matter appealed from, or point of law or fact presented by counsel, they have left every right and claim of the parties wholly unnoticed; and though they have annulled every proceeding of the circuit court, have not adjudged any one order, or their final decree, to be erroneous in law or fact; but have done it for the ostensible purpose of inserting in the bill and petitions, an averment of a fact, which would have been directed, of course, in the circuit court, on suggestions of either party; and solely to meet a contingent question of local law, which that court, in their solemn opinion, declared could not arise in the cause, and which the counsel on both sides agreed did not exist, and would not be raised.

There is only one rule by which such a proceeding can be held to be the legitimate exercise of appellate power, "*sic volo, sic jubeo, stat pro ratione voluntas;*" the opinion of the court precludes any other conclusion; for if they had appellate jurisdiction, they were bound to give the record appellate inspection and consideration; not having done so, their opinion *and mandate is their judgment, that there was no case before them for [*532 their appellate action. This presents another view of this case, which is alarming as a precedent. This court has no more power to declare and consider the proceedings of a circuit court null and void, than a district, circuit, or state court has, unless they are before them by an appeal, according to the act of congress; excepting such a case, the powers of all these courts are equal. All are bound to respect a judgment until appealed from, however erroneous; while any one may disregard it, even as *primâ facie* evidence of any fact professed to be adjudicated, if the judgment is void. If the course of this court is consistent with the rules of law, then the final decree of the circuit court would be as much a nullity, after the expiration of the five years limited for an appeal, as it is now; and if a nullity in this court, it must be so in every other. If the want of an averment of testator's domicil, in a bill of equity, nullifies all subsequent proceedings against an executor for an account, there are many void decrees on the records of this court, which state courts may declare so, by the same power with which this court has acted in this case.

This rule of action must be taken to be, that the bill must contain direct averments to meet every possible contingency which may arise in the proofs, as to questions of fact or law; that it is not sufficient to aver a fact, from which the necessary conclusions may be drawn, though the parties have taken issue upon it in both courts, and thus admitted, that there was a proper case for the exercise of their respective jurisdiction. The mandate admits of no other conclusion, than that the action of the circuit court, on a bill or petitions like the present, is wholly without legitimate power or jurisdiction, and their whole proceedings "*coram non judice;*" if so, it follows, that their decree is not a judicial act, entitled to the least respect in any court. If this court can declare it void, without appellate re-examination, it is, because it is an extra-judicial act; and surely no one can contend, that the extra-judicial proceedings of this court are entitled to any more respect. As if they should award a *mandamus* to a secretary of state, reverse the judg-

ment of a state court in a case not within the 25th section of the judiciary act, or take cognisance of an *original bill in equity between individuals. Let it once become a settled rule, that the want of an averment like the present, is fatal to jurisdiction, the proceedings of no court can stand the test of a scrutiny so severe as has been applied to these.

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With the precedent now established, the judges of state courts will look with microscopic eyes at our records, as well as those from other states, and be sure to find, at least to their own satisfaction, some defect which might have been fatal on special demurrer or abatement, and in their turn declare our decrees and judgments void, by the same summary power. Nor will the consequences stop here; the federal courts will exercise the same power over the judgments of state courts, without appeal or writ of error; their proceedings, in cases not within their judicial cognisance, are as much nullities as those of a circuit court, and may be declared void by this court, on the same rule as is now adopted. Let the directions of the judiciary act be nullified, by following up this precedent, the appellate power of this court becomes absolute, arbitrary and illimitable; and all other courts may be justified in following the high example.

There is yet another view which must be taken of the judgment now rendered. The court has ordered the averment of domicil to be made at the death of the testator in 1824, at the making the will in 1791, "and in the intermediate period (if there was any change), so that the elements of a full decision may be finally brought before the court." Each averment being then considered as equally indispensable, it must be deemed, that the omission of either is equally fatal to the proceedings of the circuit court; each must, therefore, be considered as having a vital bearing on the construction of the will, or there would not have been a positive order to insert them. Such an order may, indeed, afford "the elements of decision," but must protract it till many of the parties to the suit shall have passed away. When the fact of residence, at different times during thirty-three years, shall have been ascertained in the circuit court, they must then decide in what place the law adjudges the domicil to have been at the time of each change of residence; then arises the question, by what law the will is to be interpreted. As the case of *Robinson's Administrator* v. *The Bank* is now overruled, the law of the *situs* of the *property of administration or making the will, which is Philadelphia, is not to be regarded, the law of the domicil must govern; but the court are left in utter darkness as to the rule by which to apply that law, should the domicil appear to have been in different places at different times. As the circuit court has hitherto been so unfortunate as to have been ignorant of the effect of the domicil, in relation to a will of personal property, and as one of the judges has the misfortune to dissent again on the subject, it is much to be feared that, as there may have been, possibly, three or more places of domicil in so long a period, at least one, if not more, final decrees may be reversed, because the proper one may not have been designated in their opinion.

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Hitherto, the law of the domicil at the death of the testator, has been deemed the rule; but this point must now be considered as unsettled, or the court would not have directed its averment at any other time, as indispensable to a full decision of the cause; as it remains for this court, at some future period, to declare the law on points so doubtful, great delay

must necessarily take place, before it can be known by what law the will must be construed ; next, what the provisions of that law are ; and lastly, what ought to have been the first inquiry—whether the domicil of the testator is, or, in any possible event, can be, in any way, a material question in the cause.

Before the decision of this case, it was considered to be a settled principle, that a final decree in chancery was of equal effect as a judgment at law, until reversed. 6 Wheat. 113. That the sufficiency of an averment in a declaration, bill or petition, was a question of merits, examinable on demurrer, at the hearing, on a motion in arrest of judgment, or by writ of error or appeal ; but in no case was a question of jurisdiction, unless for the want of parties, or a proper cause of action. That if there was a substantial cause of action alleged, all defects in the pleadings were cured by a verdict of decree, if not pleaded or demurred to for cause ; and that no appellate court could reverse a final judgment or decree, for any error in either, on the ground of an insufficient averment, if the plaintiff's case was one that would entitle him to a judgment on a general demurrer. So the law was taken by the counsel for the appellants themselves, and so it would have remained, had not the court *prevented them from arguing the points in their printed brief, and, yielding to the suggestion of one of [*535 the judges, decided, that they would examine no question in the record, nor hear any argument on any point except one, which was not stated at the bar in either court, and may have no bearing on the rights of any party. This is another innovation upon the settled, uniform course of all appellate courts, which makes this precedent an alarming one.

It is an established rule, founded on the soundest principle of justice, that a party shall not be permitted to reverse a judgment or decree, on an objection not made in the court below. Upon an objection being made in the house of lords, that an account had not been taken in the court of chancery, and it appearing that none had been called for previously, by the party making the objection, Lord ELDON observed, "If this cause had been heard in the court of chancery or exchequer in England, no client could have induced a counsel to make that a point, at the bar of this house, under such circumstances ; because such counsel, having been previously conversant with the cause, would have known that as it was not made below, it could not be made by way of appeal. Had this cause been heard before me, and had I presided during the argument of the appeal against it, under the circumstances that have occurred, I would not have allowed counsel to make the point at your lordship's bar." 2 Sch. & Lef. 712, 710, 718. When the opportunity of objection is passed by in the court below, it is taken to have been waived (Ibid. 713 ; 12 Wheat. 18 ; S. P. 11 Ibid. 209–11 ; 7 Pet. 98 ; 2 Binn. 168 ; 12 Serg. & Rawle 103); unless the defect in the record is one which could not have been cured, or amended in the court below, if the objection had been made before it was removed. 4 Johns. 602 ; 14 Ibid. 560 ; 16 Ibid. 353 ; 18 Ibid. 558–9 ; 2 Dow P. C. 72. The names and judicial reputation of the American jurists, who have ever acted on this rule, and of Lords ELDON and REDESDALE, may, with propriety, be referred to, and invoked in support of a dissenting judge ; and the rules and decisions of this court, till this time, may also be called to his aid.

Had the present appellants demurred to the bill, objected in the plead-

ings, or at the hearing, on the ground now taken, *the defect, if any, would have been cured in the court below, by an amendment, without affecting the proceedings; but here, it would seem, that there can be no amendment ordered, without annulling everything heretofore done in the cause. If it was so intended by the appellants, they have delayed this objection most profitably, for the purposes of vexation; it has been received under circumstances which would have prevented it being listened to in any other appellate court, but which have entitled it to favor here. It is not made by the respondent, whom alone it concerned to reverse erroneous proceedings by the appellants, who were complainants against him; if he chooses to waive defects in their petition, they could not be injured thereby; they did not ask for an amendment in theirs, or the petition of the party who obtained a decree in his favor. The appellants asked a reversal and a decree in their favor; they have obtained a reversal indeed, but it is of every step they have taken to submit their rights to the final adjudication of this court; the cause is open to indefinite litigation, by each of the three hundred claimants to the fund in the hands of the executor, as well as those now ordered to be added to the suit, who may be not the least troublesome, at least, to the appellants. A principle, too, has been established, by which each claimant is permitted, during the five years allowed for appeal, after a final decree, to reserve his objection to the pleadings, till a convenient time, and then obtain reversals on a summary motion, for defects that are amendable on application in the discretion of the circuit court, by the general rules of courts of equity and law, and by right, under the provisions of the judiciary act.

There can be no course so utterly subversive of equity, nay of common justice, as to hear parties in an appellate court, on points made under circumstances like the present; it is one to which I can never consent, and against which I shall deem it a duty to suitors to protest, on all similar occasions. I will never, while sitting in this court, reverse a decree upon objections which a court of chancery or exchequer, on a cause regularly before them, would not, in the exercise of their original jurisdiction; or the house of lords, or court of errors and appeals in New York, would not permit counsel to argue on appeal. Nor will I, in any way, admit, that any appel-
*537] late *court can, in the legitimate exercise of their jurisdiction, render a judgment of reversal, on any ground, on which they would not be bound to hear an argument of counsel. It is a great hardship on parties, to have their judgments set aside, on technical objections raised at the bar; but the grievance will become intolerable, if the court should be such as to do it, when they are first suggested from the bench.

Let an objection like the present, however, come whence it may, I consider it as purely technical, which I cannot, sustain consistently with the respect due to the solemn and unanimous decisions of this court, in *Harding* v. *Handy*, and *Renner* v. *Bank of Columbia*, with many others founded on the most immutable maxims of the law. They settle the rule, that the conclusion of fact drawn from a circumstantial averment, is sufficient to support a decree in equity, and forbid me from disregarding the evidence which has been admitted without objection, and now forms part of the record before me for judicial inspection, merely because the subject-matter of that evidence was not averred in the bill or petitions of the claimants.

And when, to this high and unquestioned authority, is added the 32d rule of this court, I find safe rules for my guide, which would be violated by any sanction given to any proceeding in opposition thereto. That rule is, "in all cases in equity, &c., no objection shall hereafter be allowed to the admissibility of any deposition, deed, grant or other exhibit, found in the record as evidence, unless objection was taken in the court below, and entered of record, but the same shall otherwise be deemed to have been admitted by consent." I feel bound to examine all the evidence in this record, as it is found, without an objection; and as counsel and parties are precluded from now making any, it is my duty to give it its full effect on the question of domicil, as well as any other which may be relevant to the cause; any other course would, in my opinion, annul this rule, which counsel must respect, and which I had thought the court would adhere to, by hearing an argument on a point arising on the evidence, made by the counsel of the appellants in the brief presented for our judicial action.

The order for the admission of new parties deserves some notice, on account of the manner in which it was made, which *is believed to to be unprecedented. Their names were not in the record, they were [*538 in no way before the court, but had employed counsel, who were desirous of being heard as *amici curiæ*, in order to point out some irregularities which, as they conceived, would authorize the reversal of the decree, so as to permit them to make an application to become parties; stating, at the same time, that the circuit court had very properly refused such application by a bill of review. This court promptly and unanimously refused to hear them in support of their motion, yet have granted what they would not permit to be moved for by the counsel of the new parties, and of course, without motion; for the counsel of the appellants who signed the brief as representing three individuals and others, on being called on by the counsel for the appellees, in open court, to state for whom they appeared, declined an answer. In the circuit court, it may not be within the line of duty to inquire, by what authority, and on whose application, these parties have been ordered to be admitted as litigants in the cause; so far as respects one of the judges, he will obey the mandate. But in this court, he may, and does, make the inquiry, respectfully, but as a matter of right, and fearlessly insists, that it has been done in violation of the best-established principles of the law of appellate courts. As the court would not hear the motion of the counsel of these parties, they could not be judicially informed, that they desired admission into the cause; *à fortiori*, they could not judicially decide, whether their case was one which gave them a right to admission. Their judgment and mandate have, therefore, been given on extra-judicial knowledge, such as no appellate court can receive or act upon, as it was wholly *dehors* the record, and related to no party to the appeal, nor anything appealed from.

In issuing their order, founded on such knowledge as they chose to receive, the court must have taken a very partial view of the papers presented to them for their collateral inspection; had they been judicially examined, or their contents known, it would have been apparent, that the case deserved some deliberation at least. By their own admission, these parties had full knowledge, that the fund they claimed, was in the hands of the executor in Pennsylvania, yet their first application to be admitted as par-

ties to this suit, was ten years after the death of *the testator, and nearly six months after the final decree. That after the failure of their petition for a bill of review, they had filed their original bill in the circuit court, having previously applied to the orphans' court of Philadelphia county (which is a court of equity and of record, before whom the administration account was in a course of settlement), for an order of distribution in their favor.

This court also knew judicially, for it appeared in the answer of the executor in this case, that he had interpleaded and prayed the protection of the court; for which purpose they had made an order (also in the record) that all claimants of the fund who did not appear by a given day and present their claims, should be barred thereafter; which order was sanctioned by the practice and rules of all courts of equity. These parties suffered the time to elapse, long before they thought proper to make any claim, without in any way denying notice of the pendency of the suit, or accounting for their delay in applying to become parties before the final decree. If any court could be justified in admitting them, afterwards, in a case circumstanced like this, it most assuredly could be only by the exercise of original jurisdiction, by bill of review, and not by any appellate power over this record; these parties were not and could not be appellants from a final decree to which they were not party or privy; nor could this court lawfully reverse the decree on new matter, or for any cause appropriate to a bill of review. As to these persons, there was no case in this court; it could have no appellate jurisdiction to hear and determine on anything; and the proceeding was wholly *coram non judice*, unless it could exercise original jurisdiction over the parties and the subject-matter, as a case originating in this court.

Thus considered, I feel it a duty to declare, that the mandate to the circuit court, ordering these persons to be made parties, is without any authority of principle or precedent, and although I shall obey it in that court, as the command of a court of the last resort, yet, in my best judgment, feel constrained to pronounce it inconsistent with the best established rules and usages of law, and a violation of the constitution of an appellate court.

*540] *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 Pennsylvania, and was argued by counsel: On consideration whereof, it is ordered, adjudged and decreed, that the decree of the said circuit court in the premises be and hereby is reversed and annulled, and that the cause be remanded to the said circuit court for further proceedings; with directions to the said court to allow the bill and the petitions of the claimants to be amended, and the answers and pleadings also to be amended to conform thereto, and proofs to the new matter also to be taken; and with further directions to allow any other person or persons, not now parties to the proceedings, who shall claim title to the funds in controversy as heir or heirs-at-law or representatives of the testator, to present their claims respectively before the said court, and to make due proofs thereof, and to become parties to the proceedings, for the due establishment and adjudication thereof. But the proofs already taken in the cause are to be deemed admissible evidence in regard to all such persons, not now parties, who shall claim title as

aforesaid, and become parties in the cause under this order; and such other proceedings are to be had in the said cause by the said court, as to law, equity and justice shall appertain.[1]

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*The CHESAPEAKE AND OHIO CANAL COMPANY, Plaintiffs in error, [*541
v. ABRAHAM KNAPP and others.

Assumpsit.—Bill of particulars.

An action of *indebitatus assumpsit* was instituted to recover a large sum of money, alleged to be due for the construction of certain locks, &c., on the Chesapeake and Ohio canal; the defendants pleaded the general issue, and called on the plaintiffs for a bill of particulars; the item of claim upon which the jury gave a verdict for the plaintiffs, was stated in the bill of particulars to be, "detention and damage sustained for want of cement on locks No. 5 and 6."

There is no doubt, that a bill of particulars should be so specific as to inform the defendant, substantially, on what the plaintiff's action is founded; this is the object of the bill, and if it fall short of this, its tendency must be to mislead the defendant rather than to enlighten him.

As the bill of particulars is filed before the trial, it is always in the power of the defendant to object to its want of precision, and the court will require it to be amended, before the commencement of the trial; and if this be not the only mode of taking advantage of any defect in the bill, it is certainly the most convenient for the parties.[2]

Although this bill of particulars does not specify, technically and fully, the grounds on which the plaintiffs claim damages, it sufficiently expresses to the defendants that the claim arises for want of cement on locks No. 5 and 6.

The ancient doctrine, that a corporation can act, in matters of contract, only under its seal, has been departed from by modern decisions; and it is now considered, that the agents of a corporation may, in many cases, bind it and subject it to an action of *assumpsit*.

There can be no doubt, that when a special contract remains open, the plaintiff's remedy is on the contract; and he must set it forth specially in his declaration; but if the contract has been put an end to, the action for money had and received lies to recover any payment that has been made under it.

It is a well-settled principle, that where a special contract has been performed, a plaintiff may recover on the general counts.

The court ought not to instruct, and, indeed, cannot instruct, on the sufficiency of evidence; but no instruction to the jury should be given, except upon evidence in the case. Where there is evidence on a point, the court may be called upon to instruct the jury on the law, but it is for them to determine on the effect of evidence.

ERROR to the Circuit Court of the District of Columbia, and county of Washington. This was an action of *assumpsit*, instituted originally in the county court of Montgomery county, in the state of Maryland; and by

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[1] For the further proceedings in this case, which was finally decided by a divided court, on the question of domicil, see Packer *v.* Nixon, 10 Pet. 408; Aspden *v.* Nixon, 4 How. 467; White *v.* Brown, 1 Wall. Jr. C. C. 217; Brown *v.* Aspden, 10 How. 25; and Aspden's Estate, 2 Wall. Jr. C. C. 368, 451–2.

[2] Bills of particulars may be ordered in all cases; an application therefor is the appropriate proceeding, where a party seeks to be apprised of the particulars, or circumstances of time and place, set forth in his opponent's pleading. People *v.* Nolan, 10 Abb. N. C. 471. It may be ordered, in a criminal case, where the indictment fails to give notice to the defendant of the specific matters intended to be proved against him. Williams *v.* Commonwealth, 91 Penn. St. 493. It must be sufficiently full to disclose the gist of the plaintiffs demand. Gilpin *v.* Howell, 5 Id. 41. It is not, however, the office of a bill of particulars to state the grounds upon which the plaintiff claims to recover, but merely to identify the items embraced in his claim. Seaman *v.* Low, 4 Bosw. 337. Its office is merely to limit the generality of the complaint, and prevent a surprise on the trial, not to furnish evidence. Drake *v.* Thayer, 5 Rob. 694; Fullerton *v.* Gaylord, 7 Id. 551.

agreement of the parties, transferred, with all the pleadings, depositions and other proceedings therein, to the circuit *court of the United States for the county of Washington, in the district of Columbia.

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The declaration contained nine counts: the first, second and third, for goods sold and delivered; the fourth, fifth, eighth and ninth, for work, labor and services, and for materials furnished, &c.; the sixth, for money paid, laid out and expended, and for money had and received for the use of the plaintiffs; and the seventh, an *insimul computassent.* The defendants pleaded *non assumpsit,* and issue was joined thereon. A rule having been entered on the plaintiffs to file a bill of particulars, the same was duly filed, setting forth all the items of claim against the defendants.

The plaintiffs in the circuit court had, on the 4th day of May 1829, entered into articles of agreement with the Chesapeake and Ohio Canal Company, to execute certain sections of the canal, then being made by the company, according to certain specifications before agreed upon by the parties. Under this agreement, the plaintiffs constructed eight locks on the canal, and this action was brought for the value of the work done, and materials expended on the same, and for other matters which had arisen under the agreement. The only item in the bill of particulars which was deemed material, and which came under examination and discussion by the counsel and the court, in the argument and decision of the cause, was the following: "To detention for want of cement, at proper times, at locks No. 8, 15, 16, 17, 18 and 20; damages sustained in consequence of such detention, $600."

The defendants in error read in evidence the specification for lock No. 6, and their offer to contract for the construction of the said lock, on the terms therein stated; and also a paper containing their proposal to execute the said lock, according to the plan and the specification; and they proved, that the proposals were accepted. They also read the agreement between them and the canal company, dated the 4th of May 1828, for the construction of the work pursuant thereto: and also like specifications and proposals, and their acceptance by the parties, for the execution of the other eight locks, and the contract for the same; the execution of the work to be done by them under the said contract, being also proved. The specifications particularly described the work to be done, the *materials to be used, and the manner and time of its execution. In the specifications, there was inserted the following: "It is believed, that hydraulic cement, suitable for the construction of lock masonry, may be obtained on the Potomac, as far east as Shepherdstown. Its average cost, it is presumed, will not exceed forty cents the bushel, delivered at the shore opposite the locks; should it be found not suitable for the purpose, and it become necessary to import the New York hydraulic cement, or Parker's Roman cement, the president and directors will furnish to the contractor cement so imported, in good season, say, by the 1st of May 1829, at the price of forty cents the bushel, which shall be deducted from the sum to be paid for the lock, if the contractor furnished the cement himself. The extent of its use, if it be so applied, may be limited by the engineer to a certain distance from the face of the wall." The proposals stated the price at which the work was to be done; and the agreement set forth stipulations for the performance of the work, and

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the sums to be paid for the same; with other matters to secure and define the obligations of the parties thereto.

The plaintiffs also offered, and read in evidence, the following resolution of the president and directors of the canal company, passed the 2d day of September 1829: "Ordered, that the board will furnish water lime to such contractors for masonry as shall provide houses to receive it, to be delivered at the river shore, opposite to their works, at forty cents per bushel." And also the following resolution of the said president and directors, passed the 20th of January 1830. "Resolved, that although this board has stipulated to supply the contractors with water lime, yet the board will not be held responsible for any damage arising from the want of that article."

And also the answer of Theophilus Williams, to an interrogatory on the part of the plaintiffs. "To the thirty-second annexed interrogatory, this deponent replies, that the plaintiffs were very greatly hindered in their operations, by the want of cement. This deponent has no written memoranda of the time which the plaintiffs were so hindered, but believes that the time lost by the failure of the *defendants to furnish cement, was not less than one-third of the whole time from the 1st of April to the 1st of August 1830; and this deponent can further state, that the opinion of the late resident engineer, Daniel Van Slyke, Esq., agreed with that of this deponent above stated, as to the proportion of the time lost by the plaintiffs for want of cement. Orders were given to the plaintiffs not to discharge their men, when idle for want of cement, but to retain them all, under pay, until a supply could be procured. This order had not reference to any one particular time when the plaintiffs were hindered for want of cement. The deponent was directed by the resident engineer to communicate the order to the plaintiffs, and did accordingly communicate it to them. This was the usual course of transmitting orders to the contractors for the different works on the Chesapeake and Ohio canal. This deponent received the same order, at several different times, from the president of the company. It was reiterated to the plaintiffs, at various times, and was, as this deponent believes, strictly complied with by them. This order, as well as that referred to in the answer to the twentieth, was, according to this deponent's recollection, verbally given. This deponent cannot state with accuracy, to what extent the plaintiffs were delayed for want of cement, previous to the 1st of April, but thinks there was some considerable, for want of cement, before that time. From what this deponent recollects of the number of men and teams employed by the plaintiffs, and the high wages paid to laborers generally, and more particularly to mechanics, and the expense of subsisting men and teams, this deponent is fully convinced that, including the wages of laborers and mechanics, the subsistence of men and teams, and the wear and tear of tools, the expense of the plaintiffs must have averaged, while hindered for want of cement, from one hundred and fifty to one hundred and seventy-five dollars a day. The deponent cannot say with exactness, what number of days the plaintiffs were compelled to suspend their operations for want of cement, but thinks the whole detention may have been equal to from thirty to forty entire days." [*544

And also the answer of Milo Winchel, to an interrogatory on the part of the plaintiffs. "To the ninth interrogatory, this deponent, answering, says, that the defendants delivered the cement very irregularly, in small

quantities, which caused very great hindrance and loss *of time, and expense to these plaintiffs, by keeping a very large force of mechanics, common laborers, and teams, lying idle, and upon expense of wages and board, whilst waiting for cement; the precise loss and damage incurred deponent cannot state, but, from his best recollection, would say, that the loss of time thus incurred, from the 1st of March 1830, until the completion of the said locks in August, therefrom, could not be less than forty days, at an expense to these plaintiffs of from one hundred and sixty dollars to one hundred and seventy dollars per day; besides, the damage was very serious by delaying the work until the sickly months of July and August, which was the cause of a great advance in all kinds of labor, to induce laborers to remain upon the line of the canal at this season of the year; all this expense and risk might have been saved to these plaintiffs, had the cement been furnished as agreed on the part of the defendants, which would have enabled the plaintiffs to have completed the whole of their work early in June 1830."

And also the answer of Henry Smith, to an interrogatory on the part of the plaintiffs. "To the eleventh interrogatory this deponent will answer, that much delay was occasioned to the plaintiffs by the non-delivery of cement, in quantities to meet their demands; the consequence was, they were compelled to keep their hands, under pay, without labor, and deferring the completion of their work until the more sickly season, when labor, if procured at all, was obtained at an advance from twenty to thirty-three per cent. It is believed by this deponent, that if sufficient quantities had been delivered in season, that the locks would have been completed by the 4th of July. That, at the time locks Nos. 18 and 20 were in progress, the plaintiffs often complained of a scarcity of cement, and one particular time they were lying idle for a number of days, with a large force of hands, and, as deponent understood at the time, they were all under pay from the plaintiffs. The number of days alluded to above is believed to be two weeks or more; and many other times deponent knows of there being a want of cement, but the aggregate cannot be positively stated."

And also the answer of Moses Randal, to an interrogatory on the part of the plaintiffs. "To the eighth interrogatory hereunto annexed, this *546] *deponent, answering, says, that these plaintiffs were greatly hindered and delayed, nearly the whole time they were employed in building these locks, by the irregular manner in which the cement was delivered, and that the amount of such hindrance upon locks Nos. 15, 16, 17, 18 and 20, from the 1st of March 1830, till their completion in August following, was not less than forty entire days, at an expense to these plaintiffs of one hundred and seventy dollars per day. There were eighteen days at one time, in which the plaintiffs received but two small loads of cement for the use of two hundred men, being insufficient to supply them one day; besides, the damage was very serious by protracting the work until the sickly months of July and August, which was the cause of a great advance in all kinds of labor, to induce the laborers to remain upon the line of the canal at this season of the year. All this risk might have been saved to these plaintiffs, had the cement been furnished as promised on the part of the defendants, which would have enabled the plaintiffs to have completed their whole work early in June 1830; and deponent further says, that the plaintiffs suffered

great hindrance and loss by the interference of the work under Messrs. Bargy & Guy, on section 18, by the breaking of the face-stone, by coming in contact with their carts and wagons, and by the men being driven from their work many times in a day to escape the dangers from the heavy rock blasting upon said section; the damage done to the plaintiffs during this interference, deponent cannot precisely state, but knows it was great. This deponent recollects that, in one instance, on lock 18, a large rock was thrown against the wing wall of the lock, and so deranged several courses of their work as to require relaying; in several other instances, the work of the plaintiffs on locks 17 and 18, was deranged by the falling stones breaking and displacing the cut stones in the wall. The plaintiffs remonstrated against these injuries, and threatened to abandon the work, in consequence of which, Daniel Van Slyke, the agent of the defendants, agreed to indemnify them against all damages arising from this source."

And also the answers of Benjamin Wright, to interrogatories put to him by the plaintiffs. "To the ninth interrogatory, he saith, that he knows, that in many cases, the cement was very bad; in others, the same was damaged, by having been allowed to get wet, before *delivery to the plaintiffs. That it was furnished by the defendants in small quantities, and in a [*547 very irregular manner; and in many cases, not furnished at the times agreed upon between the plaintiffs and defendants; it being expressly understood between the plaintiffs and defendants, that the cement should, at all times, be furnished as it was required for the prosecution of the work. To the tenth interrogatory, he saith, that he knows the plaintiffs were put to serious loss and damage, in consequence of the failure of the defendants in supplying cement, as stated in the last interrogatory, the said plaintiffs being obliged to keep their laborers and mechanics in pay, when they were actually unemployed, said plaintiffs being in the daily expectation of receiving the said cement; which state of things continued, in some instances, for a week together, and at others for two, four and six days; and deponent further knows, that, in consequence of such failure on the part of the defendants to furnish the cement, at the periods agreed upon, the work of the plaintiffs was necessarily protracted to the sickly part of the season, which necessarily caused a great increase in the wages of the mechanics and laborers, to induce them to remain during the said period. Deponent further saith, that he knows that the president of the company, on many occasions, directed the plaintiffs not to dismiss their men, stating, from time to time, that he would have cement furnished, which, in many cases, was not furnished in compliance with his assurances; but deponent cannot say, what was the actual loss incurred by the plaintiffs, although, as above stated, he believes it to have been very serious."

Upon which testimony, the plaintiffs prayed the court to instruct the jury, and they did, on the said prayer, instruct the jury, that if the jury believed, from the said evidence, that the defendants had, on the 2d day of September 1829, and from that time until the 20th day of January 1830, contracted with the plaintiffs to furnish them with cement, &c., in due time, &c., and that the plaintiffs, expecting that sufficient supplies of cement to go on with the work would be furnished by the defendants, as defendants had so engaged to do, hired a large number of hands, and brought them to the locks, and when the defendants had so failed to furnish the cement, kept

the same hands idle, waiting for cement, on the defendants' *desire that they should do so, in order to be ready to go on with the work, and paid them their wages while so waiting; then the plaintiffs were entitled, under the count for money laid out and expended, contained in this declaration, to recover the money so paid to said hands, during such periods. But that the plaintiffs were not entitled to recover for wages paid to their workmen on account of a deficiency of cement, after the said 20th day of January 1830, unless the jury should be satisfied by the said evidence, that the said resolution of the board of directors, of the 20th of January 1830, was rescinded by the said board, and a new contract entered into thereafter by the defendants, to furnish cement to the plaintiffs, and the subsequent failure on their part so to furnish it, and an agreement also to pay for the wages of the plaintiffs' workmen, while so waiting, and so forth. The defendants excepted to this instruction.

The jury found a verdict for the plaintiffs of $20,707.56; on which judgment was entered by the court; and the defendants prosecuted this writ of error.

The case was argued by *Coxe* and *Southard*, for the plaintiffs in error; and by *Key* and *Webster*, for the defendants.

The counsel for the plaintiffs in error contended, that the court erred in giving the instruction: 1. Because there was no notice or intimation given by the plaintiffs to the defendants, in their bill of particulars, of charge against the defendants for money laid out or expended, in the payment of wages to workmen, while kept idle waiting for cement. 2. Because the court, in the said instruction, has adjudged on a matter of fact, and told the jury, that the defendants had engaged or contracted to deliver cement at certain times and prices, and had failed to furnish the said cement; which said facts ought to have been left to the jury upon the evidence. 3. Because, admitting the existence of such a contract, and the failure to comply therewith on the part of the defendants; the payment of wages by the plaintiffs to their workmen while idle, waiting for cement, and the loss thereby could only be *recovered in a distinct action by the plaintiffs against the defendants, for the breach of such contract. 4. Because the court, in the said instruction, has submitted the fact of an agreement on the part of the defendants, to pay for the wages of the plaintiffs' workmen, while so waiting and idle; without any evidence of such an agreement being proved or offered to be proved.

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Coxe, for the plaintiffs in error, stated, that the amount of the sum originally claimed by the plaintiffs in the circuit court, was $141,000 and upwards; and most of the items in their claim were rejected; so that the demand was reduced to comparatively an inconsiderable sum It was upon the instructions of the court, which are for examination here, that the recovery was had by the verdict of the jury. There was a contract in writing between the parties, and the evidence proved a full performance of every part of it, in every particular, by the plaintiffs in error. There were some defects in the work, and in the manner of its performance, which operated very extensively on the claims of the defendants in error. Some modifications were made in the agreement of the parties; some extra work

was done, for which claims, opposed by the canal company, were made; and these were rejected.

The instruction, now under consideration, which was excepted to by the plaintiffs in error, was erroneous, because the claim which it sanctions is not in the bill of particulars. The bill of particulars states the claim to be for "detention and damages," in consequence of such detention for want of cement; and the instruction authorizes the defendants in error, to recover before the jury for money laid out and expended, on the count in the declaration; the money having been paid to their hands while waiting for the cement. The company had not agreed to furnish cement. There was no express contract to do so. The supply they were to furnish depended on their obtaining the article; either on the canal, or in New York, or elsewhere. It was a proposition, which, having been accepted, was not binding, unless the means of executing it were procured. This was the state of the arrangements between the parties, before the time limited in the contract expired; and it was *not afterwards renewed. Thus, on the evidence, there was no foundation for the instruction; the proof to [*550 establish it failed. The evidence showed, that there was not a deficiency until after the 30th of December 1829. The deficiency which took place in the spring and summer of 1830, could not be made the subject of a claim. The whole instruction rests on the assumption, that the money was paid at the instance of the company. There was no evidence of such a request, and the court so decided in their previous ruling on the trial. Cited, Angel on Corporations 60, and the cases collected.

By a reference to the charter of the company, under the Virginia law, the power given to the company to act, and the manner in which contracts binding on the company are to be made, will be seen. The agreements which are held to bind the company, in this case, do not conform to those provisions. No contract is to be inferred from the confessions, or the casual conversations of the directors, or any of them. 7 Cow. 462.

The circuit court left it to the jury to infer, that the contract had been rescinded, without a particle of evidence; and they left it also to the jury to infer a new contract, when there was no testimony to sustain it. The claim to recover on the count for money laid out and expended, is against the authorities. Cited, 1 Tidd's Pract. 537; 13 Petersd. 80; 3 Stark. 1055–6; 2 Bos. & Pul. 243. The instruction is upon the effect of evidence, or rather it is positive that certain matters had been proved. This was contrary to the principles of law regulating the trial by jury.

The action of *indebitatus assumpsit* cannot be sustained for such a cause. Selw. N. P. 61. This action will only lie, where debt will lie, and a recovery of this kind cannot be had on such a general count. There should have been a special count, setting out all the circumstances, and alleging the liability of the canal company to furnish the cement by the contract. 6 East 569–70.

Key, for the defendants in error.—The bill of exceptions is sufficiently descriptive of the demand of the plaintiffs in the circuit court. It gave the defendants notice of the nature of the claim. If it was not, they *could have called for a further specification; and this court will not allow an objection to be made here, which was not presented for the [*551

consideration of the court below. As to the effect of the bill of particulars: cited, 1 Holt's Nisi Prius 552; 9 Wheat. 581. Had the objection been made below, the plaintiffs would, under the law of Maryland, of 1785, ch. 8, § 4, have had the privilege of amending, even after the jury were sworn.

As to the objection that the court has undertaken to instruct the jury on matter of fact, it is said, that the court adjudged that the canal company had undertaken to furnish the cement. This is not so; the whole is put hypothetically. This court will not be disposed to construe the action of the circuit court unfavorably. The instruction assumes no facts; the court left the case and the evidence which was given, to the jury.

As to the objection that the action could not be sustained by the evidence offered under the bill of particulars: cited, 1 Selw. N. P. 60; *Moses* v. *Macferlan*, 2 Burr. 1008; *Perkins* v. *Hart*, 11 Wheat. 237. The evidence supported the claim stated in the bill of particulars. If there had been no evidence, it is admitted, the instruction was erroneous; but the depositions of a number of witnesses prove the deficiency of cement, and the wages paid by the contractors while waiting for it. The court is particularly referred to this testimony.

It is contended, that the acts of the president and directors, and the agents of the company, as proved in the depositions, were not binding upon the canal company. These acts were in the course of their duty; and the principles settled by this court in the cases of the *Bank of Columbia* v. *Patterson*, 7 Cranch, 299; *Bank of the United States* v. *Dandridge*, 12 Wheat. 64, support this evidence. The evidence is that of the agents of the company; that they received and communicated the orders of the board of directors to the contractors to keep their hands, and they would pay them. It is said, there should have been a record of the acts of the board upon this matter, and that only such a record would be evidence. This, it is considered, was an objection to the evidence, which cannot be taken here. But the *law does not require this evidence. The testimony was offered to show the contract, and was so received. The counsel in the court below allowed the evidence to be given, and took the chance of its influence; and they now come into this court and make objections to it.

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Webster, also for the defendants in error.—The proceedings in this court are on a writ of error to revise a judgment of the circuit court, in a case in which the plaintiffs below were creditors of the canal company, and sought the recovery of their claim; of which, on the demand of the defendants, they furnished a bill of particulars. It seems, they met in the case all the obstacles usually presented in actions against corporations. There were more than the usual exceptions taken in this cause, even in cases in this district. The record shows this. Many parts of the evidence were excluded by exceptions taken by the defendants; and upon what was left, out of a claim for upwards of five times the amount, a verdict for upwards of $20,000 was obtained.

On the writ of error in this court, nothing can be brought under an examination, but the accuracy of the motion ruled in the court below. The precise inquiry in the case is, does the bill of exceptions present a question for a decision of the court, which could be required of the court, on the counts in the declaration? The law of bills of particulars is settled. If the bill of

particulars refers to the particulars of the matter excepted to, without being sufficiently definite, exception should be taken to it, and a further demand made. In this case, no such demand was made ; and under this general bill of particulars, the party went to trial, and no question was made before the trial, as to its sufficiency. It is said, that when the evidence was given, it was not known how it would be applied ; but this might have been brought to light by asking instructions of the court. The party introducing it cannot say, "I will show you hereafter how the evidence will apply." If the party against whom the evidence is offered admits it, he may ask the court to instruct the jury it does not apply. The bill of particulars shows that the claims of the plaintiffs *below were for wages paid, while waiting for cement ; and that there was a deficiency of cement. This was [*553 enough, unless the defendants had asked for more ; which they could have done. The evidence was within the bill of particulars, and was fully authorized by it.

The ruling complained of is a ruling in matters of law, and not of evidence. It is not a ruling as to the character of the evidence. It was the effect of the ruling of the law, upon a supposed state of evidence. Although it is admitted, that there must be some evidence, yet it was not necessary it should be strong. The question for the jury was the effect of the evidence. The questions presented are : 1st, Was there any evidence on this point ? 2d, Was the ruling right ? The rule against stating speculative cases cannot apply. There must be evidence to raise the question out of which the points are to be presented to the court. If there was any evidence, it was enough to sustain the ruling of the court, that the question should be given to the jury upon it.

Was there such evidence, good or insufficient, to submit the case ? The evidence was various ; and that of one of the witnesses, Mr. Wright, was particularly applicable. The directors, at a meeting in the counting-house of the treasurer of the company, agreed, that the company would pay the contractors for their losses by the want of cement. If this evidence was against an individual, it would be sufficient and competent. If it was objectionable as irregular, as it was against a corporation, it should have been excepted to. It was admitted, without an exception. The admission of it, on the trial, is equivalent to an agreement in writing to allow it to be given. Evidence given on trial, without objection, cannot afterwards be made the subject of an exception. By this evidence, it appears, that the engineers and officers of the company, assured the contractors they should be paid ; and this with the authority of the directors.

The resolution of the board of directors, that they would not pay damages for the failure of the company to deliver cement, was the act of the plaintiffs in error. The contractors did not assent to this determination ; nor were damages claimed by the defendants in error. The claim is for the actual pecuniary expenses paid by them, while waiting for the cement. *But if this resolution could operate, the evidence shows, that it was [*554 afterwards rescinded or disregarded by the officers of the canal company.

The instruction given to the jury was well given, under another view of the case. The instruction involves the question of law, whether the plaintiffs in the circuit court could recover for the wages paid their men

while waiting for cement, under the count in the declaration for money paid, laid out, &c. Whether the evidence authorized such a recovery under this count, has been disregarded in the argument for the plaintiff in error. The defendants had prayed the court to instruct the jury, that no recovery could be had, unless a new contract was proved. This was denied by the plaintiffs. The instruction is thus put hypothetically; and it should be so read by this court, interposing before each statement, "if the jury believe;" and thus it will be manifest, that the court left all the matters to the jury. The bill of particulars in this aspect of the case, had nothing to do with the questions thus left to the jury. The evidence given was before the jury, and they found upon it for the plaintiffs; without any other than the legitimate action of the court upon the facts.

Southard, for the plaintiffs in error.—The plaintiffs in error complain of an instruction given to the jury in the court below. To understand the instruction and test its validity, it is necessary to consider: 1. The nature of the action. 2. The claim made by the plaintiffs below. 3. The specific evidence to which the charge related. 4. The legality of the evidence in this action. 5. The legality of it, in the precise circumstances in which it was offered. These points embrace not only the views presented by the plaintiff in error, but those by which they have been resisted.

1. The action. It is *indebitatus assumpsit*. What may be recovered in this action? Technically and practically, there are two kinds of *assumpsit*, as distinct as other forms of action. 1. A special *assumpsit*, when the plaintiff sets forth the breach of which he complains. In this he has to *555] set out a specific agreement, and the breach *of it; both of which he must prove. This was clearly not done in this case. 2. *Indebitatus assumpsit*. It is in its nature an action of debt; and is substituted for it; because the defendant is not permitted in it, as he may in an action of debt, to wage his law. 4 Co. 91; 3 Wooddes. 168. Its precise character is important; especially, as one of the counsel for the defendants has thrown himself on this point, and suggested, that it had been disregarded in the opening argument. It is, however, without difficulty. The rule laid down is universal; although questioned by Lord Mansfield, in 2 Burr. 1088, the case cited by the defendants in error. It is established, that the form of *indebitatus assumpsit* will lie, in no case in which debt will not lie; although debt will lie, when it will not be sustained. 1 Salk. 23. In this action, the cause of the debt must be stated, but it must be concisely; yet if not stated, it is error, or is reason for arrest of judgment, Cro. Jac. 206–7, because the court must see that there is matter on which the *assumpsit* may be founded. In stating the matter, general forms, called common counts, have been long settled; and it is an inquiry what may be proved under them. It will be lawful to prove any fixed, settled and determinate sum, arising on a precise contract, where the sum is, or may be, reduced to certainty; such as, fees due by custom for tolls; or on a foreign judgment. But you cannot recover in it anything which is not of a definite character. 1 Salk. 23; 1 Ld. Raym. 69. It is common to avoid this difficulty by setting out in a special count, the contract by which the money is claimed; and then, if a failure to prove the contract takes place, the general counts may be resorted to. But the special contract must be set out, if there is to

be a recovery upon it. Among the common counts, "money paid, laid out, &c.," is the most frequent. The law, in such cases, implies a promise of repayment; and there must be such a promise, express or implied. 8 T. R. 310, 610; 1 Ibid. 20. If the promise is express, it must be so stated; as when one pays, to one in his own employ, wages, for the benefit of another, there must be an express contract stated and proved, or there is no consideration. *These are the very elementary principles in this action; and they would not have been repeated, but they have been brought into question by the adversary argument. The proper conclusions from them are: 1. That you cannot recover under a general count, what is founded on a special agreement, without setting out that agreement; and if it be permitted, there is error somewhere in the progress of the cause: 2. That you cannot claim unascertained damages, resulting from the violation of an agreement; if you do thus recover, there is equal error. The suggestion that everything recovered in the action must be damages, was made without precision of thought, or of expression. Damages are nominally, technically, recovered in this action; but this is the description given to the amount of debt which is recovered; and the sum which may be assessed by court or jury, for an injury sustained; an account stated; an agreement to deliver grain at a given price, an ingredient of which is, the benefit to be derived from the possession and sale of it. When, therefore, it is complained, that damages have been recovered in this form of action, it means the latter, not the former kind. If they can, it should be shown how they can be recovered. This is now to be considered. [*556

2. What is the case before the court? What is the claim? The case stated is on all the common counts, but only one comes in question here: that of "money paid by plaintiffs for defendant's use." This is important to the precise understanding of the legal questions raised. What is this count? For money paid. How pretended to have been paid? Not on any legal ability, as surety or otherwise, but upon an express contract. What is the contract pretended? That the defendants had promised to furnish water lime, had failed so to do, and when the plaintiffs were suffering from the same, they promised, if they would not leave the work, would retain their hands, and pay them, they would refund the amount paid. A more special contract cannot be set out—a more specific claim for damages cannot be made. Take it in parts. 1. A promise to furnish water lime, and a failure. Could damages be recovered for these? This need not be argued. 2. If you will keep and pay your hands, we *will save you harmless. The payment of the hands is but a part of the agreement, and the damages follow. Is this varied by the promise to pay? If it is, it must be applicable alike to all other damages; for this was only a part, and the promises related to all. It appears clear, then, that there has been in the case a recovery which is against law; and the inquiry is, can this court now arrest it; or has the cause been so managed below, that the eye of the judge cannot reach it, his ear is closed, and violations of law are to be sanctioned. The answers are to be found in the instruction which is now resisted. [*557

The history of the instruction is essential to the correct understanding of it. The plaintiffs claimed $140,000, on various accounts. They presented a bill of particulars, containing the items which formed this amount. At the trial, they offered proof of them; but they were all overruled; explicitly,

and without a single exception, overruled. This is a strong leading fact in the cause. There was a stage in the trial when the court had laid down the law, excluding every item in the bill of particulars. This fully appears on the record. The decisions of the court upon the claims of the plaintiffs, embrace: 1. The construction of all the locks, and the labor upon them, and the damages for not complying with the agreement, &c. The evidence given on the trial must have applied to one or other of those heads. First, as to the work, and the price of it. The contract prices had been paid. This is expressly shown in the record. Thus, the contract was established, and the prices were fixed; and the accounts had been presented according to it and paid. All, therefore, in the bill of particulars, which relates to all the work contracted for at first, had been settled. The effort of the plaintiffs was, to obtain, not the contract prices which had been stipulated, but a higher price; a *quantum valebat*, or *meruit*; and the court expressly decided, that this could not be. All the extra price, therefore, was out of the case; and this one decision left less than the amount recovered, as will be seen on an examination of the bill of particulars. This clearly shows, that in the further progress of the *case, there was some error which admitted matters to wrong the defendants below. 2. There were changes and modifications in the work, and some of the items were founded on them. For these the plaintiffs sought to recover their value; but the court ruled that they also must be governed by the contract; and that as the engineers were to estimate for them, and to settle controversies respecting them, their decision was to be conclusive, and no erroneous estimate, at a previous time, or by other persons, could alter it. The contract, and the instruction given upon it, will fully establish these positions, and show that all these items were overruled. 3. The plaintiff claimed damages on the subject of injuries sustained on a contract to furnish lime. Whether this contract was found in the original agreement, or in some subsequent one, it was all met by the court. The principle they sustained in the previous instruction was, that in this action, damages for the breach of a special contract could not be claimed and recovered. 4. The plaintiffs were hurried to finish the work by the 4th of July 1830, and they claimed damages in the form of higher wages, thirty-three per cent. advance on these wages. But the answers to this are—1st. The defendants had, by the contract, a right to urge them at any time. 2d. The evidence of this was the sayings of the president, which are clearly inadmissible to bind the company to pay damages. 3d. This was long after the time in which the contract was to be completed; and there was no evidence that the time was extended. This matter was then overruled.

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In these decisions of the court, on the several claims stated, all the claims of the plaintiffs, it is repeated, were overruled by the court in their previous instructions. Not an item in the bill of the plaintiffs can be found, to which one or other of the instructions of the court had not applied. If any exception from this position could be found, it was wages of the men during the detention, as alleged, from the want of cement. But these are manifestly independent of any contract to pay them, and they were damages from breach of contract; as purely so, as any other evil resulting from the neglect of the defendants on this point. *Whether they can be removed from this condition, by what occurred in the subsequent

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part of the case, will be hereafter considered. Whether the court did right or not, in thus excluding the plaintiffs from evidenee, or the effect of evidence in these particulars, is not now the question. The plaintiffs below have recovered, and come here to sustain the judgment; and this they cannot do, by showing the court erred in deciding against them on other points. This is clear and is admitted. Nor is it necessary to discuss the conduct of the circuit court, in admitting these various instructions. The practice is peculiar to that court, and the courts of Maryland. No one can conduct a case in safety under it. Not fact and justice, but skill, must triumph; or the prejudices of the court and jurors prevail. But it is more important to remark, that these instructions are a substitute for the practice which prevails elsewhere, of taking exceptions to the admission of evidence, or claiming the rejection of evidence. And this is an answer to the suggestion, that the defendants should have objected to, and have asked the court to overrule the evidence.

After this long examination, we have reached a position clear of difficulty, and can observe the action of the court in the instruction, which is the subject of examination on this writ of error. We have a claim, by the plaintiffs below, for a debt; the particulars of that debt; a written contract with the defendants by which it was limited; and the overruling of every item in that bill, except such as were proved to have been paid. The result of this state of things to the plaintiffs, was inevitable. To escape from it, the plaintiffs sought an instruction on one specific point. It was in relation to the payment of wages on locks No. 5 and 6. It applied to no other locks. It was wages there, and on these locks only. This is a full answer to all the reference to the evidence in the case. There is no evidence relating to these locks; all the testimony relates to other locks. The language of the instruction must be confined to this point; and the importance of so confining it is apparent. 1. Because damages with regard to all the other locks had been excluded; and all damages for the want of cement. *2. The claim was under a contract to pay the wages on these, and not on [*560 others. 3. If it extended to others, it will produce the result of making the court directly contradict itself; having in eleven previous exceptions laid down other rules. 4. Because it was asked respecting two locks only, and if such a construction be given to it, as applies to others, an immense amount of damages is let in, ten times greater than is asked under this instruction. 5. Wages, as such, had been overruled, as damages; these are to be brought in, because there was a special contract.

If the instruction be liable to such an interpretation, it was error. The jury were not guided by it, but they were misled. On a particular examination of the instruction, it will be found to have two parts, as to time; from the 2d of September 1829, to the 30th of January 1830: and after the 30th of January, the jury are told, that if they believe, 1st. That between the 2d of September 1829, and the 20th of January 1830, the defendants had contracted to deliver water lime; 2d. That the plaintiffs expected it; 3d. That hands were kept idle, and were paid by the plaintiffs; 4th. That the defendants requested this, and promised to pay for the same: the plaintiffs might recover the sums so paid, under the count in the declaration for money laid out and expended. This is not for damages, for that had been overruled; but upon a special contract, and that contract was not stated.

The cases referred to in a previous part of the argument, have, therefore, full application to this ruling of the court. The second part of the instruction proves that this was the view of the court. They regard the contract as evidenced by the order of the 2d of September 1829, and rescinded by that of the 30th of January 1830.

The instruction then was, that there was a contract, and wages paid on account of it, between the 2d of September 1829, and the 30th of January following. Let us examine, if this was correct, in point of law. There was no notice of such a claim. What notice was given? The bill of particulars. It states detention and damages, for want of cement on locks 5 and 6, $600. The case cited shows, and it is admitted, that the bill of particulars, in such actions, must refer to the matters claimed, clearly and *distinctly. Here, a contract for the payment of wages is embraced under the words "detention" and "damages." Do they embrace it? There is no reference to the contract, in the notice, no information of the ground of claim. Could the defendants suppose, that under it a specific contract was to be proved? They knew that detention and damages could not be proved. There is a most marked distinction between them. Cited, 2 Bos. & Pul. 243; Tidd's Pract. 537; Stark. Evid. 1056; 4 Taunt. 189. The claim presented to the jury in the instruction is not detention and damages, but a debt upon a specific contract; and the contract is not referred to nor stated in the bill of particulars.

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But it is objected, that although this be true, the plaintiffs in error are now too late. We are bound to notice, before trial, a defect in the bill of particulars, in stating matters not legally claimed, under such an action as this was. But it is denied that this is the law. When the parties came to the trial, they objected to the evidence. This was done expressly, when the claim assumed the form of damages, as it did when the eleventh instruction was given. A party may either object to the omission of the notice, or move to overrule the evidence, and to exclude it. The latter was done. It was, therefore, objected to, so far as it was in the power of the party to do it.

Another objection to the instruction is, that it adjudges matters of fact. Upon this the counsel of the defendants in error differ with those who maintain this position. The court will decide the question. But there is another objection to the instruction. It submits what was not at all in evidence in the case. In support of this position, the counsel for the plaintiffs in error went into a particular examination of the evidence in the record.

These reasonings on the instruction are submitted as fatal to it; and the evil which the plaintiffs in error sustained from it has been serious. While the damages claimed by the defendants, in the court below, were overruled, yet by this instruction, the whole question as to damages was left open to the jury, and a verdict was given in their favor, for upwards of $20,000. In the circuit court, if the claims of the defendants in error are just, they will have no difficulties *in another trial: and, if the law requires it, they may amend the declaration and the notice.

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It is not denied, that a contract may be inferred from the acts of a corporation. It is the better opinion, in modern times, that it can be done; but in this case there was no evidence of any acts of the corporation, but

solely of some of the officers employed by it. There was no entry on the books of the corporation; no meeting of the directors, or vote by the board. It was the act of the president only, on which the plaintiffs below rested their claims; and of the engineers, on the authority of the president. This was not sufficient. The court must adjudge whether there was sufficient evidence to make the corporation liable. 1 Pet. 363; 12 Wheat. 74, were cited by the counsel of the defendants in error; and they sustain the rule now contended for.

McLean, Justice, delivered the opinion of the court.—This case is brought before this court, by writ of error to the circuit court for the district of Columbia. The defendants here, who were plaintiffs in the circuit court, commenced an action of *assumpsit*, to recover a large sum alleged to be due, for the construction of certain locks, &c., for the Chesapeake and Ohio Canal Company; and filed their declaration, containing nine general counts of *indebitatus assumpsit*, for work done and materials found, money laid out and expended, on account stated, &c.; and the defendants pleaded the general issue. On the trial, several exceptions were taken to the ruling of the court, by the plaintiffs; and one exception was taken by the defendants, which presents the points for the decision on the present writ of error.

The following is the instruction referred to: "In the further trial of this cause, and after the evidence and instructions stated in the preceding bills of exceptions had been given, and after evidence offered by the plaintiffs, of the payment of money to the laborers for the time during the detention, occasioned by the want of cement on locks 5 and 6, the plaintiffs, by their counsel, prayed the court to instruct the jury, that if the jury believe, from the said evidence, that the defendants had, on the 2d of September 1829, and from that time till the 20th day of January 1830, contracted with the plaintiffs to furnish *them with cement necessary, &c., in due time, &c.,,and that the plaintiffs, expecting that sufficient supplies [*563 of cement to go on with the work would be furnished by the defendants, as defendants had so engaged to do, hired a large number of hands, and brought them to the locks; and when the defendants had so failed to furnish the cement, kept the same hands idle, waiting for cement, on the defendants' desire that they should do so, in order to be ready to go on with the work; and paid them their wages, while so waiting; then the plaintiffs are entitled, under the count for money laid out and expended, contained in the declaration, to recover the money so paid to said hands, during such periods. But that the plaintiffs are not entitled to recover for wages paid to their workmen, on account of a deficiency of cement, after the said 20th day of January 1830, unless the jury shall be satisfied by the said evidence, that the said resolution of the board of directors of the 20th of January 1830, was rescinded by the said board, and a new contract entered into thereafter, by the defendants, to furnish cement to the plaintiffs, and the subsequent failure on their part so to furnish it, and an agreement also to pay for the wages of the plaintiffs' workmen, while so waiting," &c.

The resolution referred to in the bill of exceptions, is in the words following: "Resolution of the Board of Directors of the canal company, in meeting, January 20th, 1830. Resolved, that although this board has stipulated to supply the contractors with water lime, yet the board will not

be held responsible for any damages arising from the want of that article." A bill of particulars was filed by the plaintiffs under the order of the court; and in which bill, the following item is charged: "Detention and damage sustained, for want of cement, in locks No. 5 and 6, $600."

This case has been ably argued on both sides, and the questions involved in it are of much practical importance. The counsel for the plaintiffs in error object to the bill of particulars, and insist that the above item for damage for want of cement, &c., is not sufficiently specific, as it does not apprise the defendants of all the facts on which the charge for damage is made. It does not state how the damage was sustained by the plaintiffs, and on what ground an indemnity *was claimed of the defendants. *564] A bill of particulars, it is contended, when demanded, becomes a part of the declaration; and with the exception of certain averments, it should contain equal certainty. There can be no doubt, that a bill of particulars should be so specific, as to inform the defendant, substantially, on what the plaintiff's action is founded. This is the object of the bill, and if it fall short of this, its tendency must be to mislead the defendant, rather than to enlighten him. As the bill of particulars is filed before the trial, it is always in the power of the defendant, to object to its want of precision, and the court will require it to be amended, before the commencement of the trial. And if this be not the only mode of taking advantage of any defect in the bill, in practice, it is certainly the most convenient for the parties.

In 4 Taunt. 188, the court of common pleas say, substantially, "if a bill of particulars specifies the transaction upon which the plaintiff's claim arises, it need not specify the technical description of the right which results to the plaintiff out of that transaction." In that case, the plaintiff declared for goods sold and delivered, and for money paid; and delivered to the defendant a bill of particulars, viz: "To seventeen firkins of butter, fifty-five pounds six shillings"—not saying for goods sold. The court decided, that the action should be sustained on the count for money paid. And they remark, as to the objection taken respecting the bill of particulars, bills of "particulars are not to be construed with all the strictness of declarations; this bill of particulars has no reference to any counts, and it sufficiently expresses to the defendant, that the plaintiff's claim arises on account of the butter." And we think, in the present case, that although the bill of particulars does not specify technically and fully the grounds on which the plaintiffs claim damages; yet, in the language of the above case, it sufficiently expresses to the defendants, that the claim arises for want of cement in locks No. 5 and 6.

But the ground on which some reliance seems to be placed for the reversal of this judgment, and which, in the view of the court, is one of the principal points presented by the record, is, that the jury were instructed to find for the plaintiffs below, on *proof of a special contract, and *565] under a declaration containing only general counts. By the instruction of the court, if the jury found, from the evidence, that the contract had been made by the defendants, as stated, and that the money had been paid to the hands detained for want of cement, the plaintiffs were entitled to a verdict on the count for money laid out and expended. In the argument, it was contended, that there was no legal proof of the special contract. That a corporation can only contract within the terms of its charter, and

that there does not appear to have been any action of the board, sanctioning the contract as insisted on by the plaintiffs.

The ancient doctrine, that a corporation can act in matters of contract only under its seal, has been departed from by modern decisions; and it is now considered, that the agents of a corporation may, in many cases, bind it, and subject it to an action of *assumpsit*. But it is unnecessary to examine either the ancient or modern doctrine on this subject; for as no exception was taken to the evidence which conduced to prove a special contract in the court below, the objection cannot be raised in this court.

There can be no doubt, that where the special contract remains open, the plaintiff's remedy is on the contract; and he must set it forth specially in his declaration. But if the contract has been put an end to, the action for money had and received lies, to recover any payment that has been made under it. The case of *Towers* v. *Barrett*, 1 T. R. 133, illustrates very clearly and fully this doctrine. In that case, the plaintiff recovered, on a count for money had and received, ten guineas paid to the defendant for a one-horse chaise and harness, which were to be returned, on condition the plaintiff's wife should not approve of the purchase, paying three shillings and six-pence *per diem* for the hire, should they be returned; and as the plaintiff's wife did not approve of the purchase, they were returned and the hire was tendered at the same time. "But if the contract remain open, the plaintiff's demand for damages arises out of it, and then he must state the special contract, and the breach of it." It is a well-settled principle, where a special contract has been performed, that a plaintiff may recover on the general *counts. This principle is laid down by this court, in the case of the *Bank of Columbia* v. *Patterson's Administrators*, [*566 7 Cranch 299. In that case, the court say, "we take it to be incontrovertibly settled, that *indebitatus assumpsit* will lie to recover the stipulated price due on a special contract, not under seal, where the contract has been executed; and that it is not, in such case, necessary to declare upon the special agreement."

It would be difficult to find a case more analogous in principle to the one under consideration, than the above. The same questions, as to the right of the plaintiff to recover on the general counts, where the special agreement was performed; and, also, as to the powers of a corporation to bind itself, through the instrumentality of agents; were raised and decided in that case, as are made in this one. And it would seem, where this court had decided the point in controversy, and which decision had never afterwards been controverted, that the question is not open for argument. But whether this doctrine be considered as established by the adjudications of this court, or the sanction of other courts, it is equally clear, that no principle involved in the action of *assumpsit*, can be maintained by a greater force of authority.

In 1 Bac. Abr. 380, it is laid down, that "wherever the consideration on the part of the plaintiff is executed, and the thing to be done on the defendant's part, is mere payment of a sum of money, due immediately; or where money is paid on a contract which is rescinded, so that the defendant has no right to retain it; this constitutes a debt for which the plaintiff may declare in the general count, on an *indebitatus assumpsit*. Anciently, the count in such cases was special, stating the consideration as executory, the promise, the plaintiff's performance, and the defendant's breach; but the *indebitatus*

has grown, by degrees, into use." "So also, if goods are sold and actually delivered to the defendant, the price, if due in money, may be recovered on this count; and this though the price is settled by third parties." 1 Bos. & Pul. 397; 12 East 1. "Where the plaintiff let to the defendant land, rent free, on condition that the plaintiff should have a moiety of the crops; and while the crop of the second year was on the ground, it was appraised for both *parties, and taken by defendant; it was held, that the plaintiff *567] might recover his moiety of the value in *indebitatus assumpsit*, for crops, &c., sold; for by the appraisement, the special agreement was executed, and a price fixed at which the defendant bought the plaintiff's moiety." The same principle is found in *Helps and another* v. *Winterbottom*, 2 B. & Ad. 431; *Brooke* v. *White*, 4 Bos. & Pul. 330; *Robson* v. *Godfrey*, Holt 236; *Heron* v. *Granger*, 5 Esp. 269; *Ingram* v. *Shirley*, 1 Stark. 185; *Forsyth* v. *Jervis*, Ibid. 437; *Harrison* v. *Allen*, 9 Moore 28; *Bayley* v. *Gouldsmith*, Peake 56; *Gendall* v. *Pontigny*, 1 Stark. 198; *Farrar* v. *Nightingale*, 2 Esp. 639; *Riggs* v. *Lindsay*, 7 Cranch 500; *James* v. *Cotton*, 7 Bing. 266; *Foster's Administrator* v. *Foster*, 2 Binn. 4; *Sykes* v. *Summerel*, 2 Browne (Pa.) 227. As, by the instruction of the court, the jury must have found the contract executed by the plaintiffs below, before they rendered a verdict in their favor, we think, the question has been settled by the adjudged cases above cited; and that on this point there is no error in the instruction of the court.

But it is insisted, that, in their instruction, the court lay down certain facts, as proved, which should have been left to the jury. If this objection shall be sustained, by giving a fair construction to the language of the court, the judgment must be reversed; for the facts should be left with the jury, whose peculiar province it is to weigh the evidence, and say what effect it shall have. The instruction states, "that if the jury believe from the said evidence, that the defendants had, on, &c., contracted with the plaintiffs, expecting that sufficient supplies of cement to go on with the work, would be furnished by the defendants, *as defendants had so engaged to do*, hired a large number of hands and brought them to the locks, and, *when the defendants had so failed to furnish the cement*, kept the said hands," &c. The words italicised are those objected to, as assuming the facts stated to be proved, and consequently superseding an inquiry into those facts by the jury. It must be observed, that in the first part of the instruction, the jury were told, "that if they believe from the said evidence, that the defendants had contracted with the plaintiffs to furnish *them with cement neces- *568] sary, &c., in due time, &c., and the plaintiffs expecting that the cement would be furnished, *as defendants had so engaged to do*, &c., making the words italicised to depend upon proof of the contract, viz., the furnishing of the cement in due time, as stated in the bill of exceptions; it would, therefore, seem to be clear, that these words could not have withdrawn from the jury any fact, as they were made to depend on the establishment of the contract by the finding of the jury. And the same remark applies to the other words objected to; that is, when "the defendants had so failed to furnish the cement;" for these words could have had no influence with the jury, unless the evidence, by their finding, not only established the contract to deliver the cement, but also showed a failure by the defendants to deliver it. It therefore appears, that the words objected to in the instruction, when

viewed in connection with its scope and the language used, did not assume facts by which the jury could have been misled ; but stated them as resulting from the finding of the jury, that the contract had been made and broken by the defendants, as hypothetically stated in the instruction.

It is objected, that there was no evidence in the case, conducing to prove the facts on which the above instruction was founded. The court ought not to instruct, and indeed, cannot instruct on the sufficiency of evidence ; but no instruction should be given, except upon evidence in the case. Where there is evidence on the point, the court may be called on to instruct the jury as to the law, but it is for them to determine on the effect of the evidence. In the present case, there was evidence, which was not objected to, conducing to prove the contract, hypothetically stated in the instruction ; and in such case, whatever ground there might have been for a new trial, there is none for the reversal of the judgment.

The instruction was limited to the damages sustained by the plaintiffs, for a failure to deliver cement by the defendants, for the construction of locks numbered five and six ; and as the bill of particulars charges the damages thus sustained at $600 only, and the damages assessed by the jury amount to the sum of $20,707.56, it is contended by the *counsel for the plaintiffs in error, that on these facts, the judgment should be reversed. In the course of the trial, twelve bills of exception were taken by the plaintiffs to the rulings of the court on the various points raised ; but these exceptions are not now before the court for decision. It is insisted, however, that although the questions of law raised by these exceptions are not before the court ; yet the facts, in regard to the evidence which is shown by the exceptions, are before them, and should be considered in reference to the point now under examination. In the eleventh bill of exceptions, after certain prayers by the plaintiffs' counsel, which were refused by the court, the defendants, by their counsel, "prayed the court to instruct the jury, that the plaintiffs are not entitled to recover damages under either of the counts in the declaration in this cause, by reason of any failure on the part of the defendants to deliver cement to the plaintiffs for the prosecution of their work on the locks contracted to be built by them ; which the court gave as prayed." And in the twelfth exception, they gave a similar instruction, on the prayer of the defendants. From these exceptions, and others taken by the plaintiffs below, and the bill of particulars, it is contended, that it sufficiently appears, there was no evidence before the jury, under the instructions of the court, except that which conduced to show the amount of damages sustained by the plaintiffs, for the want of cement in the construction of locks five and six. If it were proper to look into the exceptions of the plaintiffs below to ascertain this fact, there would still be no difficulty in overruling the objection ; for the instruction given on the prayer of the plaintiffs below, and excepted to by the defendants, and which is the error complained of, may be reconciled with the other exceptions, on the ground that additional evidence was heard by the jury, before the instruction was given. [*569

But if this were not the case, it would afford no ground for the reversal of the judgment of the circuit court. Whether the court erred or not in refusing to give the various instructions prayed for by the plaintiffs below, is not now a subject of inquiry. It may be admitted, that they did err, so

that if the verdict had not been satisfactory to the *plaintiffs, they might have reversed the judgment on a writ of error; yet the evidence on which those instructions were refused, remained in the cause, for the action of the jury. And as additional evidence was given, as appears by the exception of the defendants below; the cause was submitted to the jury upon the whole evidence.

Whether the jury assessed the damages on account of the injury sustained by the plaintiffs, for the want of cement in the construction of locks, other than those numbered five and six, or on account of other items stated in the bill of particulars; it is impossible for this court to determine. If the jury failed to observe the instructions of the court, or found excessive damages, the only remedy for the defendants was by a motion for a new trial. As the case now stands, we are limited to the legal questions which arise from the instruction given on the prayer of the plaintiffs, which was excepted to by the defendants, and on which this writ of error has been brought. And as it appears from the views already presented, that the circuit court, in giving this instruction, did not err, the judgment below must be affirmed, with costs.

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 Columbia, holden in and for the county of Washington, 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 affirmed, with costs and damages, at the rate of six per centum per annum.

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*571] *The Life and Fire Insurance Company of New York *v.* Christopher Adams

Mandamus.

Although no rule to show cause why a *mandamus* should not issue to the district judge of Louisiana had been granted by the court, the district judge had agreed to appear, as if a rule had been granted by this court, and had been served upon him; and copies of the papers on which the motion for a *mandamus* was founded, had been served by the district judge and on the parties in the suit in which the *mandamus* was to operate, during the vacation; the district judge filed an answer, as if the rule had been served on him, and appeared by counsel, waived the formal rule on notice, and stated his readiness to show cause. Under such circumstances, there is no necessity for directing a rule to be entered and notice to be given; all the purposes of the rule are accomplished.

This was a motion for a *Mandamus*, to be directed to the District Judge of the district of Louisiana. There had not been any rule taken out and served on the district judge, to show cause why a *mandamus* should not issue. Copies of the papers on which the motion was founded, with notice that the same would be made at this term, had been served on the district judge and the parties in the suit pending before him, during the late vacation. The district judge appeared by counsel, and waived any notice of a rule to show cause, and offered to show cause *instanter*. An objection having been suggested, whether, even by consent on both sides, the rule and service thereof ought to be dispensed with, some discussion took place on the subject between the bench and the bar.

BALDWIN, Justice, was of opinion, that in a cause of this sort, the court ought not to dispense with the regular course of proceedings, by the granting and service of a rule to show cause.

MARSHALL, Ch. J., said, that the grant of a rule to show cause and the service thereof, is a matter in the discretion of the court. The court may, in its discretion, grant an alternative *mandamus*, if it deems it more conducive to public *justice, and to prevent delays. Here, all the parties express themselves ready to proceed in the cause. The district judge waives any formal rule and notice, and wishes no delay; and states his readiness now to show cause. Under such circumstances, all the purposes of a rule to show cause and notice are accomplished, and there is no necessity for directing such a rule and notice. The court, therefore, in my opinion, may properly proceed at once to the hearing of the cause, for the purpose of ascertaining whether a *mandamus* ought or ought not to be awarded. [*572

The other judges concurred in the opinion of the chief justice; and the court directed the motion to come up on the next motion day.

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*THE LIFE AND FIRE INSURANCE COMPANY of NEW YORK *v.* CHRISTOPHER ADAMS.[1] [*573

Mandamus.

In the district court of the United States for the district of Louisiana, the district judge refused to extend a judgment previously entered in the district court, so as to cover other instalments due to the plaintiffs, which became due after it was entered; and to enter a judgment in favor of the plaintiffs, mortgagees, upon a transaction which had been entered into with the mortgagor, in relation to the debt due to the mortgagees, in which it was stipulated, that judgment should be entered for certain instalments to be paid to the plaintiffs, on the non-payment of the same; the district judge not considering the plaintiffs entitled to have the judgment entered, according to the terms of the transaction, without notice to the debtor and his syndics, into whose hands his property had passed under the insolvent law of Louisiana, after the execution of the transaction, and after a judgment for part of the debt had been entered; which was the judgment asked to be extended. The district judge was also required to receive a confession of judgment against the mortgagor and the insolvent, by an agent of the plaintiffs, and whose powers to confess the judgment, the district judge did not consider adequate and legal for the purpose; an execution had been issued for a part of the debt, upon the previous judgment in the district court, and the execution was put into the hands of the marshal of the United States; who, finding the property of the insolvent defendant, the property mortgaged to the plaintiffs in the hands of the syndics of the creditors of the mortgagor, according to the insolvent law of Louisiana, refused to proceed and sell the same, and returned the execution unexecuted. An application was made to the supreme court for a *mandamus*, to command the district judge to enter the judgment required of him, and to receive the confession of the judgment by the agent of the plaintiffs, and award execution thereon; and also to compel him to oblige the marshal to execute the execution in his hands, on the property of the defendant wherever found. The court refused to award a *mandamus*, on any of the grounds, or for any of the purposes stated in the application.

To extend a judgment to subjects not comprehended in it, is to make a new judgment. This court is requested to issue a *mandamus* to the court for the eastern district of Louisiana, to enter a judgment in a cause supposed to be depending in that court; not according to the opinion which it may have formed on the matter in controversy, but according to the opinions which

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[1] For a prior proceeding in this cause, see 8 Pet. 291.

may be formed in this court, on the suggestions of one of the parties; this court is asked to decide that the merits of the cause are with the plaintiff; and to command the district judge to render judgment in his favor. It is an attempt to introduce the supervisory power of this court into a cause, while depending in an inferior court, and prematurely to decide it; in addition to the obvious unfitness of such a procedure, its direct repugnance to the spirit and letter of our whole judicial system cannot escape notice.

*574] *The supreme court in the exercise of its ordinary appellate jurisdiction, can take cognisance of no case, until a final judgment or decree shall have been made in the inferior court; though the merits of the cause may have been substantially decided; while anything though merely formal, remains to be done, this court cannot pass upon the subject. If, from any intermediate stage in the proceedings, an appeal might be taken to the supreme court, the appeal might be repeated, to the great oppression of parties; so, if this court might interpose by way of *mandamus*, in the progress of a cause, and order a judgment or decree, a writ of error might be brought to the judgment, or an appeal prayed from the decree, and a judgment or decree, entered in pursuance of the *mandamus*, might be afterwards reversed; such a proceeding would subvert our whole system of jurisprudence.

The *mandamus* ordered by this court, 8 Pet. 306, directed the performance of a mere ministerial act.

It is the duty of a marshal of a court of the United States, to execute all process which may be placed in his hands; but he performs this duty at his peril, and under the guidance of law; he must, of course, exercise some judgment in the performance; but should he fail to obey the *exigit* of the writ, without a legal excuse, or should he, in its letter, violate the rights of others, he is liable to the action of the injured party.

In the particular case in which the creditor asks for a *mandamus* to the district judge, to compel the marshal to seize and sell the property mentioned in the writ, that property is no longer in the possession of the debtor against whom the process is directed; but has been transferred, by law, to other persons, who are directed by the same law, in what manner they are to dispose of it. To construe the law, or to declare the extent of its obligation, the questions must be brought before this court in proper form, and in a case in which it can take jurisdiction; the case so far as it is before any judicial tribunal, is depending in the district court of the United States, and perhaps, in a state court in Louisiana. The supreme court of the United States has no original jurisdiction over it; and cannot exercise appellate jurisdiction, previous to a final judgment or decree, further than to order acts, purely ministerial, which the duty of the district court requires it to perform; this court cannot, in such a condition of a case, construe judicially the laws which govern it, nor decide in whom the property is vested; in so doing, it would intrude itself into the management of a case, requiring all the discretion of the district judge, and usurp his powers.

Though the supreme court will not order an inferior tribunal to render judgment for or against either party, it will, in a proper case, order such court to proceed to judgment. Should it be possible, that in a case ripe for judgment, the court before whom it was depending could perseveringly refuse to terminate the cause; this court, without indicating the character of the judgment, would be required by its duty to order the rendition of some judgment; but to justify this mandate, a plain case of refusing to proceed in the inferior court, ought to be made out.

MOTION for a *Mandamus* to the District Court for the Eastern District of Louisiana. The case is fully stated in the opinion of the court.

*575] *The case was argued by *Butler*, Attorney-General, and *Jones*, for the petitioners; and by *Clay* and *Porter*, against the *mandamus*.

Butler stated, that the case was before the court upon the following order: That the Honorable Samuel H. Harper, judge of the district court of the United States for the eastern district of Louisiana (who now here appears by his counsel, Henry Clay and Alexander H. Porter, Esquires, and consents to this rule), show cause, on Saturday next, why this court shall not award a writ of *mandamus*, requiring and commanding him: 1. To issue, or permit to be issued, such an execution as was, in fact, issued at the

instance of the plaintiffs, on or about the 12th of March 1834, on the judgment of the Petitioners *v.* Christopher Adams, in the petition mentioned; being an execution for the amount now due on all the notes secured in the mortgage and transaction executed by said Adams: or, 2. If the said judge shall show sufficient cause, in the opinion of this court, against the issuing of such execution, in the present condition of the said judgment, then, commanding him to amend such judgment, or to permit the same to be amended, by extending the terms thereof, so as to make the same an absolute judgment upon all the notes and sums of money enumerated in the original transaction, and thereupon to issue, or permit to be issued, such execution as above mentioned: or, 3. If, in the opinion of this court, sufficient cause shall be shown by said judge, against the consummation of said judgment, in the mode and form last above stated, commanding him then to consummate the interlocutory part of the same, by entering and signing final judgment or judgments, upon and for all the notes and sums of money mentioned in the transaction aforesaid, as not being then due; and thereupon, to issue, or permit to be issued, such execution, for the whole amount of all the notes as above mentioned; and, 4. In respect to such execution, if any, for the whole amount of the said notes, as may be so ordered to be issued by this court, commanding the said judge to compel, by due process of law, the marshal of the eastern district of Louisiana, duly to execute the same, notwithstanding the cession of the *estate of said Adams, and the appointment of a provisional syndic thereof. But if, in the opinion [*576
of this court, sufficient cause shall be shown by the said judge, against any writ of *mandamus*, requiring him to do, or permit to be done, the matters and things herein-above suggested, in regard to an execution for the whole amount of all the said notes; it is then ordered, that the said judge show cause why a writ of *mandamus* should not issue, as aforesaid, requiring him to compel, by due process of law, the marshal of the eastern district of Louisiana, duly to execute the writ of execution heretofore issued on the said judgment, for the amount of the notes of said Adams, due on the 16th of May 1826 (the date of said transaction), which said execution was dated the 30th of April 1834, and returnable the third Monday of May thereafter, notwithstanding the cession and other matters mentioned in the return of the said marshal to said execution.

Butler said, the general objects of the application for the *mandamus* were: 1. To obtain execution or executions for the whole amount of all the notes given by Christopher Adams to the Life and Fire Insurance Company; or, at all events, for the notes not due when the first judgment was entered. 2. To procure the execution of the process issued by the district court of the United States, upon the property mortgaged; notwithstanding the cession of the property of Adams, under the insolvent laws of Louisiana, and the possession of that property by the syndics, acting by the authority of those laws. These objects can only be obtained by a *mandamus* from this court. As to so much of the application as asks for a *mandamus* to compel the judge to perfect the judgment and award execution, there can be no doubt of the jurisdiction of this court to award it. It is within the principles established by the court, at the last term, in the *Life Insurance Company* v.

Heirs of Nicholas Wilson, 8 Pet. 291. Upon this part of the case, no doubt is therefore entertained of the success of the application.

*577] The rule which has been obtained in this case embraces *several points, and this cause is sustained by the case *Ex parte Bradstreet*, 6 Pet. 774. The first point is founded on the supposition, that in the present state of the record, in the court below, the petitioners are entitled to an execution for the whole amount of the debt due by Adams. The original mortgage imported a confession of judgment, because it was made according to the laws of Louisiana, before a notary. Civil Code of 1825, art. 2231–3. It, therefore, authorized the creditors to sue out an execution "*in via executiva*, without resorting to an action on the mortgage, *in via ordinaria*." Code of Practice, 733, 734 ; Digest of the Civil Code of 1808, 460, art. 40 ; Digest of 1825, 3361 ; 7 Mart. 238 ; 12 Ibid. 671. On these authorities, the petitioners were, without notice to the mortgagor, entitled to execution on the mortgage ; by simply making oath that the debt is due, in whosoever hands the property mortgaged may be. Code of Practice, 61–4. If, therefore, an application had been made by the insurance company to the district judge, for an execution, or writ of seizure and sale, it must have been given ; and if he had not granted it, this court would have compelled him by a *mandamus*. In 1826, such an application was made to Judge Robertson, and was granted by him.

But the petitioners have other securities which render their right to this judgment, and the proceedings upon it, still more certain. The "transaction" of 1826 was a confession of judgment for the whole amount of the debt. The effect of this "transaction" on it, and the seizure, was to allow and authorize the party, as the instalments became due, to take out execution for the amount thereof. All such agreements have the force of law, have the force of things adjudged ; and cannot be revoked or altered by the party who enters into them with his creditors. Civil Code, art. 3038, 3045, 2270. The decree of the district judge, entered on the 7th of March 1834, under the *mandamus* issued at the last term of this court, is in conformity to the rights of the petitioners, thus understood, and covers the whole of their claim. It became the duty of the clerk, after that decree, to enter the judgments for the instalments not due in 1826 ; and this was a mere matter of form. It was a judicial mortgage, and stood like a judgment on a bond,

*578] in a court *of common law, for a debt payable by instalments ; or like a decree in equity on a mortgage payable in like manner. This "transaction" did not extinguish the mortgage. Civil Code of 1825, art. 3374.

The second alternative presented by the petitioners, asks this court, if cause should have been shown against issuing the executions for the whole amount of the debt ; that this court command the amendment of the judgment, or permit its amendment, so as to include in it all the notes ; and issue, or permit execution to issue, for the whole amount of the judgment so amended. The objection to the entry of the judgment, under the power given by Adams, is, that having become insolvent, he has no capacity to confess a judgment. "No standing in judgment," according to the law of Louisiana. To this it is answered, that the rule as to standing in judgment in cases of insolvency, applies only to the plaintiffs. But in this case, the act of confessing judgment is not under a power given since the insolvency

of Adams. It was proposed to be entered, under a power granted in 1826, and is the legitimate exercise of the power; which Adams could not revoke, and on which the laws of Louisiana could not operate retrospectively. If such could be the operation of these laws, they would rescind and annul a solemn contract; and this they are forbidden to do by the constitution of the United States. This would be a retroactive effect upon the vested rights of the creditors of Adams; and impair a security, perfected and, according to the laws of Louisiana, existing and in force when the contract was made. The cession of the property of an insolvent is his own act; in this case, it is a voluntary act of Adams, and this is claimed as vacating his prior contract. When a transaction, such as that in this case, prohibits an appeal from the judgment upon it, or any action in a court to diminish its effects; shall it be in the power of a party who has entered into it, by an application for the benefit of the insolvent law, to defeat it?

It is also urged, that the civil code of Louisiana contains no prohibition of an insolvent defendant to confess a judgment. The allegation that such a defendant has no standing in judgment, is derived from the decision of the courts of Louisiana. *It is a deduction of a state court from the law, and has no binding effect on a court of the United States. The [*579 power of Mr. Eckford to confess the judgment was regularly transferred to Mr. Barker; and as the attorney of Adams, under the substitution held by him, no notice was required to be given to Adams. This was the objection of the district judge to the exercise of the power, and to the confession; but by the law of Louisiana, notice is not necessary. If Adams had deemed notice necessary, he should have stipulated for it in the transaction. The authority of Mr. Barker to confess the judgment, was derived under the assignment of the Life and Fire Insurance Company to the Mercantile Insurance Company. The former company had sold all this debt, and had transferred all the powers they possessed to collect it; and Mr. Barker acted under the assignment by the Life and Fire Insurance Company to him. Mr. Eckford is dead, but it was not a personal trust in him; it was held for the benefit of the insurance company of which he was the presiding officer. The power to confess the judgment was a part of the security, and passed with the transfer. A note to the president of a company for a debt due to the company, may be put in suit by the company, without the aid of the president.

It is admitted, that, on general principles, a *mandamus* ought not to issue to a judge, to act in a particular manner, in a case within his discretion. But this court, at the last term, decided, that the signing of a judgment was a ministerial act; and such only is the proceeding now required. Judge Robertson, in the former case, had applied his judicial mind upon the notes due in 1826, no more than Judge Harper has done in this. He had done nothing but a mere formal act. He was bound by the law of Louisiana to enter the judgment; and he did enter it. So, in this case, there is an obligation on Judge Harper to act ministerially, and enter the judgment. Ought not the marshal of the United States for the eastern district of Louisiana, to be compelled, by a *mandamus* directed to the judge of the district court, to execute the process of execution, which was issued upon the judgment entered in that court?

It is the desire of all the parties in this case, to have the *question [*580

upon the duties of the marshal decided in this court. All know, that if the question is not now regularly before the court, it must ultimately come up for decision; and it would be highly beneficial and satisfactory, to have it now disposed of. It is admitted, that consent does not give jurisdiction; but this is given by the judiciary act of 1789, § 13. Congress intended, by "usages of law," the terms in the statute, such as had prevailed in England, and in the states of the Union, which had made these usages the rules of the local tribunals. Such has been the understanding of this court; and the general jurisdiction exercised by the court of king's bench is referred to, for the purpose of ascertaining "what the usages of law" are. So, where the highest tribunals of the states have exercised them, the existence and nature of the usages as proved. The general rules on this subject, are to be found in *Ex parte Bradstreet*, 7 Pet. 635. The court decided in that case, that wherever the legal rights of a party had been violated, and in a case where the discretion of the judge was not involved; this would be corrected by a *mandamus*, if it was not the subject of a writ of error. 7 Pet. 635; 3 Dall. 42; 6 Pet. 216, 223. This is also the rule in the state courts. Although there may be another remedy, the court will proceed, if there will not lie a writ of error. The courts of New York possess and exercise the same jurisdiction as the court of king's bench in England. 5 Wend. 114.

It was the duty of the marshal to execute the process. Judiciary act, § 27. (1 U. S. Stat. 87.) The action against the marshal, by suit, may be an inadequate remedy; and under any circumstances, it is one of great delay and expense. The provisions of the statute of the United States referred to, give the courts full power to enforce the execution of process. If the marshal shows no sufficient cause for disobedience, he is in contempt; and the injured party has a legal right to compulsory process; as where he does not return a writ or bring in the body. In the present case, the marshal received process, commanding him to levy on certain property, described in a petition annexed. He was desired to seize on a particular and specified tract or piece of land, and to sell it. It was not a general
*581] *execution against all the property of the defendant, but an execution *in rem*. It was his duty to proceed under the mandate of the court. If he violates this duty, if he refuses to obey the command of the writ, he may be liable to an action; but this does not exempt him from the power of the court. The marshal of the district court returned a reason for not executing the process, which the court below pronounced sufficient; but if this court shall consider it insufficient, the injured party has a right to a *mandamus*.

As to the sufficiency of the return, it is to be observed, that it contains no evidence of the insolvency of the defendant, but the word of a person who was no more than a provisional syndic. The cession of the property was made on the 9th of March, and the execution issued in April. The cession did not expressly divest the estate of the insolvent; and if this was the effect of the proceeding, it was such by implication only. But what did the cession pass? Nothing more than the interest of Adams, and this could not affect the prior liens. These liens were not to be affected or impaired by the cession. To delay the fruits of the execution, by preventing its operation, would impair it. And the lien of the petitioners was a

special mortgage, which cannot, by the laws of Louisiana, be disregarded. Civil Code, art. 3253–5, 3249, 3273–4, 3277–8, 3297, 3360.

The law of Louisiana, of 1817, did not attempt to operate on securities of this kind. The law of 1826 was passed two years subsequently to the mortgage, and could not affect it. In fact, a suit on the mortgage by the petitioners was then depending; the premises were then in the actual custody of the marshal, and his proceeding against them had been enjoined, but the injunction did not operate as a discharge.

By the application of the mortgagees, in March 1826, the circuit court obtained jurisdiction *in rem*, which has never been lost, and cannot be ousted. 2 Mart. (N. S.) 262; 2 Wheat. 290; 1 Gallis. 168; 4 Johns. Ch. 209. The judgment rendered by Judge ROBERTSON will be considered as signed, if it ought to have been signed. When a plaintiff in an execution, has a clear right to proceed against a specific thing, he may insist on the sale of it, under an execution, without giving an indemnity. It is not *the demand of indemnity which gives a right to it, but there must be a substantial cause for apprehension in the marshal, to authorize [*582 his insisting on it. It is no cause for indemnity, when an officer is asked to sell a tract of land specifically subjected to the process; all that can be sold is the right of the party defendant, in the process; and if this right is not valid, the sale injures no one.

If there is a law of Louisiana which disqualifies a party who has become insolvent from appearing in court, it can have no operation in a court of the United States. Nor can the provisions of the insolvent law of Louisiana, which transfer all proceedings against insolvents in other courts into the parish court, or the district court of the state, operate on proceedings in the courts of the United States. If this could be done, the provisions of the constitution of the United States would be subverted.

Clay, contrà.—The attempt of the petitioners, in this case, is to exonerate themselves and their agent from the general laws of the land; and to obtain for themselves peculiar privileges and advantages, to the injury of others. While the laws of Louisiana are applauded for their justice, their administration is assailed.

It should also be observed, that the counsel for the petitioners has mistaken the tribunal before which the proceedings in cases of insolvents' estates are entertained to any effective action. They commence before the parish judge, who is a notary; before him, the preliminary proceedings are instituted; but they are transferred to the district court of the place, a tribunal of high rank, and the judge of which has the highest talents and character. An inspection of the proceedings in the case of Wilson's Heirs and of Adams, will result in a conviction that they are all regular. Nothing is to be seen in them of any other character, but the attempt of the agent of the petitioners to become the syndic of the insolvent; and after being disappointed in this, he returns to the court of the United States, and endeavors to counteract and overleap all those proceedings.

A great and important general principle is to be examined in this case. What are the powers of the courts of the United *States in cases between citizens of different states. Certainly, in these cases, the [*583 law is the same for all parties. The law which is applied in the state courts, in cases between their own citizens, will be applied by the courts of the

Union, in suits brought into those courts. The local and state laws will be enforced in both; the same rules of justice will be maintained; for the establishment of courts of the United States was not to authorize the administration of different laws, but was, because it was considered, that in the national tribunals, greater confidence in their impartiality would prevail among suitors proceeding against citizens of a state to which they did not belong. If the purpose of establishing national courts had been other than these, it would not have been endured by any state in the Union. To apply a different, or a higher rate of justice, in the case of a non-resident, would not be permitted. If the law regulating the proceedings of syndics in insolvent cases, has established rights binding on the citizens of Louisiana, that law must be applied to citizens of other states, unless it shall interfere with some provision in the constitution of the United States.

The insolvent law of Louisiana is in effect a bankrupt law. Although, under the acts of 1817 and 1823, the person of the debtor is not exempt from the power of the creditor, yet, by applying to the civil court, and having the signatures of two-thirds of his creditors in favor of the purpose, he may, by an order of the court, be exempt in his person from his past debts. It is then a bankrupt system, binding on the citizens of Louisiana, and on those of the other states. Various privileges are secured in favor of creditors by the laws of Louisiana, and preferences are given which cannot be disturbed. The highest security on real estate, is for the unpaid purchase-money; that of a vendor, on an estate sold by him. 10 Mart. 448.

There are two modes of proceeding under the insolvent laws of Louisiana; one voluntary, the other compulsory. But when the cession under a voluntary subjection to the law is accepted by the judge, the cases, and proceedings in them, are afterwards the same. Adams made a voluntary application, but the judge accepted the cession, and all the provisions of the laws
*584] *were brought into full operation. It could not afterwards be withdrawn. This case, referred to (10 Mart. 448, shows), that a mortgage creditor must come in and receive payment from the syndics, notwithstanding his mortgage. All the estate of the insolvent is divested; impliedly, by the act of 1817; expressly, by act of 1823. That case shows, that a creditor having a lien cannot take the property and sell it, but must leave it to the administration of the syndics, and take payment of this lien through them.

Marshall, Ch. J., asked, if there is any law which secures the rights of mortgage-creditors.

Clay.—The syndics act to prevent a scramble among the creditors for the effects of the debtor, and to take the property of the insolvent out of their hands. They take the property, make a tableau of distribution, regarding the lien-creditors according to their respective situations, giving each his particular rights in the distribution; and an equal distribution is made of the residue only, among creditors of equal condition. No matter what the lien or preference may be, it is upheld and respected in this distribution. Cited, the 35th section of the Act of 1817. By the law, if the mortgage-creditors insist on a sale, it must be made. There is then no difference as to the rights of those creditors, under the general and insolvent laws. There is, however, a difference in the result; as, if the property

is sold by the syndics, there will often remain a balance in favor of the general creditors; if disposed of by the syndics, it is not permitted to be sold for less than its appraised value; but if sold by the marshal, no such restriction prevails. 1 Mart. (N. S.) 495. The only change, then, made in the relation of debtor and creditor, is in the remedy, or rather in the mode of using it. The security of the lien-creditor is not impaired. It is not denied, that state legislatures have powers to vary the remedy, but not to affect rights.

In the case before the court, the act of 1817 was in force, before this mortgage was given. The law in force, at the *time of a contract, is incorporated in it, and the mortgage was taken with the knowledge that, in the event of the insolvency of Adams, the property pledged would be administered according to the insolvent law of Louisiana; and notwithstanding the lien, the rights of his other creditors would be regarded. What was the decision of this court at the last term? The decision was no more than that the judgment should be signed; merely that a ministerial act should be performed. The court had no right to look at the consequences of that act, nor did it. The question is then presented, what is this judgment which was signed by Judge HARPER? Was it, or was it not, a judgment for the subsequent instalments? A slight reference to the terms of the judgment, as it stood before Judge ROBERTSON, and as, under the mandate of this court, it was perfected, before the present district judge, will satisfy this court, that it was absolute for the notes due in 1826, and prospective, as to the notes to become due, and as they became due, a judgment for the amount was to be entered, not was entered. It was not in the power of the judge to go beyond what was due. [*585

It is contended for the petitioners, that the transaction is the law between the parties; admit this, but yet it was not a judgment, it only gave a right to a judgment. It is the highest evidence of their rights; but parties cannot erect courts. The provision is, that judgment shall be given as the notes become due. If the transaction is the law of the parties, look at it. It declares, that Adams shall go into court, from time to time, and confess judgment, and in his default, his successors or attorneys shall do it. This shows that judgment was not to be given without the action of the party. From a part of the contract, it appears, that judgment was to be entered as the instalments became due. The party cannot be allowed to postpone indefinitely the entry of the judgments. Judge ROBERTSON directs, that whenever the sums become due, the judgment on each sum shall be entered; but the party has not done this; he waited five years, and then he came into court and asked for a judgment for the whole sum. This case is not like a bond with a penalty, the debt payable by instalments. In such a case, the judgment is given for the whole penalty, according to the terms of the bond. *Before the statute of William III., the party to a bond was bound for the penalty, and could only obtain relief, in equity, on the payment of the sum actually due. [*586

Could an action of debt be maintained to recover the sum, prospectively to become due, by the judgment of Judge ROBERTSON? It could not; for it was only a promise that judgment should be given, and no suit could be instituted for more than the actual amount of the judgment in 1826. The law of Louisiana is, that the party asking a judgment on a warrant of

attorney, must make an affidavit of the debt, and that it is unpaid. This regulation was not complied with, in the case before the court; the affidavit does not state that the debt is due and unpaid. Law of Louisiana respecting affidavits, Old Civil code, 460, art. 1; 10 Mart. 222, decides this.

It has been suggested, that the district judge should have amended the judgment, so as to include the additional sums. There was nothing to amend by. The party might entitle himself to the judgment for those sums, by complying with the forms required by the law, and the practice of the court. No case was made out before the district judge; and the time which had elapsed since the first application for judgment, from 1826 to 1834, was properly to be inquired into and explained. The application was to give the judgment a retroactive effect; and this was not warranted by the transaction, or by the law. If the rights of the parties are to be maintained only by the transaction, the modes of proceeding which it prescribes excludes others.

Supposing the judgment could not be amended or extended, did the representative of the petitioners, Mr. Barker, present himself before the district court, with powers authorizing him to act. The power to confess judgment could not be conferred by any warrant, on the corporation. A corporation exists by its law of creation, and there is no authority in such a body to appoint an attorney in fact. In this case, Adams gave a power to Mr. Eckford, not to the corporation; but the power under which Mr. Barker claimed to act was not derived under Mr. Eckford. It is a general power to collect debts, not given by the successors of Mr. Eckford, but derived from
*587] the Mercantile *Insurance Company, who were the transferees of the debts due by Adams to the Life and Fire Insurance Company.

It is also to be considered, that all the parties, the syndics as well as Adams, should have had notice. Adams had no existence as to this proceeding; his insolvency prevented his interference; the effect of the judgment on the rights of his creditors, represented by the syndics, was to be considered; and notice of the motion for judgment should have been given to them. This the district judge thought necessary, and he thought correctly. It has been decided in Louisiana (12 Mart. 695), that entering a judgment on a power to confess one, is a judicial action. The whole matter upon which the judgment was to be entered, was to be examined. The power of attorney, the existence of the debt, the terms of the affidavit; all these were to be looked to. The judge would be unworthy of his situation, if, without citing the parties interested, or giving them an opportunity to appear, he had proceeded, as he was asked to do by the agent of the assignees of the petitioners.

It is not necessary to decide, whether this case can be taken out of the federal court, and placed in the district court of Louisiana, for the action of that court on the claims of the petitioners. The constitutional provision is sufficiently satisfied, when suit may be brought against the syndics. By the insolvent law, the syndics might be sued; and this right to sue them was well known. Suits against syndics have been brought in the circuit court of the United States. The case of *Field and others* v. *United States*, before this court at last term, was a suit against syndics (*ante*, p. 182). It is admitted, that there is a difficulty, when a suit has been commenced in a federal court, in transferring it, in consequence of the insolvency of the defendant,

into a state court. This may be productive of differences between the state courts and those of the Union ; but it is one of those difficulties which result from our peculiar system of state and federal governments ; and it will be arrested and prevented doing evil, as many others have been, by the presiding spirit which has so often rescued the government of the United States from embarrassment.

It has been stated to be strange, that after his insolvency, *Adams could not confess a judgment. This is the law, and it is the same in [*588 England, in bankruptcy. The law of Louisiana takes away this faculty, and all the rights of the insolvent are transferred to the syndics. The petitioners were not entitled to a new judgment, nor to an extension of that already entered, for they had not brought themselves within the rules of the court or the law on the subject. Will this court substitute themselves for the inferior court, and say this is a case for a *mandamus?* A *mandamus*, properly issued, operates mechanically on a judge. It operates physically, not on the mind of the officer. In the case of *United States* v. *Lawrence*, this court refused to usurp the power of the judge to decide. Will the court transfer themselves to Louisiana, and say that they will compel the entry of the judgment? If this cannot be done, there remains the question, whether this court will undertake, in this state of things, on a petition for a *mandamus*, to set aside the laws of Louisiana, and say that a party who has placed himself under the insolvent laws of that state, shall be subjected to the process of the court of the United States? If the district judge is to compel the marshal to execute the process, by selling the estate, this will be the case.

The powers of a judge are judicial and ministerial. So are those of a marshal. These are judicial, when he summons a jury to decide whether property is liable to be seized under an execution. What is the action required from the judge, when he is asked to attach the marshal? He is asked to decide one of the most difficult questions of conflicting laws, that can be presented ; whether the law of Louisiana shall give place to the law of the United States? This is a judicial question of the highest order ; and this court is called upon to take it from the judge, and oblige him to compel the execution of the process by the marshal.

Porter, against the motion.—The power given by Adams to confess the judgment was to be exercised, in his default, but it does not appear that he was called upon to enter it. The execution of the power, without a previous demand on Adams, or notice to him, was unauthorized and void. *The second objection to the execution of the power is, that it was [*589 given to Eckford, who is dead, and the agent of the plaintiffs derives no power from him ; Adams the principal has lost his standing in judgment, by his insolvency, and no one could act as his agent. An agent, Mr. Barker, who claims to be the agent of Adams, can exercise no powers which his principal could not exercise. By the decisions of the courts of Louisiana, a party cannot send a confession of a judgment into court and have it entered. It must be submitted to the judge for his consideration, and he, after an examination, must sign it. Without his signature, it is not a judgment. He acts by his judicial functions, and is not a mere ministerial agent.

The questions involved in this case are of great importance; and their decision by this court is looked for with great anxiety.

When the execution against the property of Adams was put into the hands of the marshal, the property was in the hands of the syndics, by the cession made under the insolvent law. After discussion and examination in the district court, it was held, that the plaintiffs were to go into the state court for payment of their debt, under the proceedings of that court. This was not a transfer of the case from the court of the United States to the state court: but it was only deciding, that as the property was in the state court, there the plaintiffs should obtain payment of their lien, which was not impaired by any proceedings in the state court. If this court shall say, that the marshal shall take the property which has passed from an insolvent into the hands of syndics for distribution, it will subject the marshal to great difficulties. Cited, 2 Mart. 337.

The statute of Louisiana of 1817 regulates the cession of goods and property of an insolvent debtor, and the act of 1826 (Laws of Louisiana 136) enacted, that the cession should be made immediately on the application of the insolvent for the benefit of the laws. Shall not Louisiana be permitted to say that property within her own limits, shall by her laws pass to creditors by cession; and that the judgments of the courts of the United States shall not interfere? If, by the laws referred to, the property
*590] of insolvents cannot be *placed in the hands of the syndics, for administration, and this without affecting the prior liens of a creditor; no laws for the transfer of the property of creditors can be effectual. The proceedings in the district court of New Orleans show, that Mr Barker, representing the petitioners, endeavored to obtain the appointment of syndics; and disappointed in this purpose, he turned round, and seeks to set the law under which he was desirous of acting, aside. He thus became a party to those proceedings, and was bound by them. This point has been settled by this court in the case of *Clay* v. *Smith*, 3 Pet. 411.

Jones, in reply, contended, that the constitution and laws of the United States, had guarantied to citizens of the United States the right to resort to the courts of the United States for the recovery of debts due to them; and by no state laws, or state proceedings, could these rights be interfered with. The remedy for a wrong in the courts of the United States, is a part of the privilege secured by the constitution; and the motives which induced the introduction of the provision into the constitution, establishes the exclusive power of the federal tribunals in such cases. It was considered as securing an impartial administration of justice; and the confidence which such a provision would necessarily produce, was one of the means by which the permanency of the government would be established.

In the case before the court, the petitioners had a mortgage on the property of their debtor; and it was one which, as it was executed before a notary, entitled the creditor to proceed, without notice to the debtor, by the *via executiva*, under the laws of Louisiana, and seize and sell the property, without notice to the debtor. Upon the issuing of this process, the creditors were interfered with by an injunction; and after this, the "transaction" was entered into which has been so frequently referred to, and is fully before the court.

The entering into this transaction was not an abandonment of the rights of the petitioners ; it was no more than a suspension of their exercise, and the lien of the judgment and execution was not removed, but proceedings under it were postponed for the period stated in the transaction. When a creditor *takes a judgment in addition to his prior security, the security is not avoided. The transaction, and the judgment entered [*591 in 1826, were a judicial lien on the property of the debtor. They authorized a sale of the property, as soon as the period arrived which was fixed by the agreements of the parties, and were a grant of execution by a decree ; and this judgment, and the rights of the parties under it, cannot be disturbed. No inquiry can be made into the validity or legality of the judgment, in any other mode than by writ of error. All the process to enforce it, is given by the judgment. The transaction is equivalent to a decree of foreclosure. If the judgment upon it was interlocutory, was not the district judge bound to make it final?

Mr. Jones also contended, that there was no law of the state which deprived insolvents of their right to appear in a court of justice ; certainly, no law which prevented this in a court of the United States. The effect of such a rule would be, to take from the courts of the United States their jurisdiction over persons within reach of their process. Such a law would be against the constitution of the United States.

He also contended, that the provisional syndic (and no other syndic existed when the execution was in the hands of the marshal) is but a depositary of the property of the insolvent. The syndic has no rights in the property, he has only an equity of redemption, and may divest the rights of prior lien-creditors, only by paying off the incumbrances. In this view of the case, the action required of the district judge, when he was called upon to sign the judgment for the residue of the notes, was only to be ministerial ; the parties had previously adjusted all other questions, and the form of an entry of judgment, according to the rules of the court, was only required.

The powers held by Mr. Barker, were full and sufficient for him to confess the judgment. He acted under the authority given by Adams to Mr. Eckford, which extended to his successor, the president of the Life and Fire Insurance Company, who took his place after him. But if this was not sufficient, his authority under those who had a transfer of the debt due *by Adams, under the Mercantile Insurance Company, was com- [*592 plete, and was ample.

Marshall, Ch. J., delivered the opinion of the court.—The petition for a *mandamus* states, among other things, that Christopher Adams, of Iberville, in Louisiana, on the 16th day of January 1824, at New Orleans, executed and acknowledged before a notary-public, a mortgage of a plantation, called the Belle Plantation, in Iberville, with seventy slaves, for securing to the petitioners divers sums of money, amounting to $32,522.50; at different periods, the last payment to fall due on the 18th day of January 1829, all bearing interest at the rate of seven per cent. per annum. At the time of executing the said mortgage, sundry notes were also given for the payment of the same sums of money.

In consequence of the failure of the said Adams to pay any part of the

said debt, application was made to the honorable Thomas B. Robertson, then judge of the district court of the United States for the eastern district of Louisiana, for an order of seizure and sale, who granted the same, in the following words: "Let the mortgaged premises, set forth and stated in the plaintiff's petition, be seized and sold, as therein prayed for, and in the manner directed by law, subject to the payment of the debts of the plaintiff. Thomas B. Robertson, Judge U. S. Eastern District of Louisiana." John Nicholson, the marshal, who seized the mortgaged property, and advertised the same for sale, was stopped by a writ of injunction, on which the following return was made: "Received this writ of injunction, this 18th of March 1886, and served a copy thereof, and of plaintiff's petition, on Ripley & Conrad; on same day, released the property, at suit of Life and Fire Insurance Company of New York against Christopher Adams; and returned into court, the 20th of March, instant."

On the 2d day of May 1826, the petitioners entered into a transaction with the said Christopher Adams, before a notary-public, in which it was stipulated, that the injunction be dissolved; and in which the defendant agreed to confess judgment, and did confess judgment, on all the notes then due. *He further stipulated to confess judgment on the residue of the notes, in the deed of mortgage mentioned, as they should respectively become due, "and in default of such confession of judgment, the said Christopher Adams did, by the said transaction, constitute and appoint Henry Eckford, president of the Life and Fire Insurance Company, or his successor in office for the time being, his attorney in fact, and irrevocable, in his name and stead, to appear in said court, and cause judgment to be entered up against him, the said Adams, for each and every of said notes, with interest, as aforesaid, whenever the same shall arrive at maturity, as aforesaid." And the said Adams further gave to the said Henry Eckford, or to his successor in office for the time being, attorney as aforesaid, full power of substitution in the premises. And the said Life and Fire Insurance Company, in consideration of such confession of judgment, and preserving all their liens, mortgages and preferences in and over the mortgaged premises, agreed to stay execution until the 18th day of January 1829, when the last note would arrive at maturity. It was further agreed, that this transaction should be entered upon the records of the court of the United States for the eastern district of Louisiana, as a decree of said court, and shall have all the force and effect as though it were entered up in open court.

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In pursuance of this transaction, a judgment was recorded in the said district court, on the 18th of May 1826; which the judge died without signing. The petitioners then transferred their interest in the said debt to Josiah Barker, in trust for the Mercantile Insurance Company of New York, with power to use their names in the collection thereof. In the instrument of transfer, the said Life and Fire Insurance Company constituted Josiah Barker, his executors, administrators and assigns, their true and lawful attorney and attorneys irrevocable, in their names, but to and for the use of the said Mercantile Insurance Company of New York, to pursue and enforce in all courts and places whatever, the recovery and payment of the said money.

The honorable Samuel H. Harper, the successor of the honorable Thomas B. Robertson, having refused to complete the said judgment of his predecessor, by signing it; a **mandamus* was directed by this court,

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ordering him to do so, in compliance with which the said judgment was signed.

The judgment is in these words: "Life and Fire Insurance Company of New York *v.* Christopher Adams. In this case, the plaintiffs having filed in this court a transaction, &c., it is, therefore, ordered, adjudged and decreed, that in pursuance of said transaction, the injunction in this case shall be dissolved; and it is further ordered, adjudged and decreed, that judgment be entered up in favor of the plaintiff, in pursuance of said transaction, for all the notes therein specified, which have become due and payable, with seven per cent. interest thereon, &c., to wit, the sum of $1500, &c. It is further ordered, adjudged and decreed, in pursuance of the transaction aforesaid, that whenever any of the notes mentioned in the said transaction as not yet arrived at maturity, shall become due and payable, that the judgment shall be entered up for the plaintiffs upon all and every of the said notes, as they arrive at maturity, &c. It is further ordered, adjudged and decreed, that there shall be a stay of execution, &c., until the 18th day of January 1829; and that if the amount of the judgment in this suit is not then paid, &c., that the lands, slaves and movable property described in the mortgage mentioned in the plaintiff's petition, shall be sold according to law, to satisfy the judgment in the premises."

Application was, at the same time, made to the district court, to enter a further judgment for the notes which had become due subsequent to the 16th day of May 1826, which was refused. The petitioners insisted on their right to require a judgment for the whole sum, under the irrevocable power given to confess it; but the judge declared, that, without notice to the defendants, he would permit no further judgment to be entered.

The petition states at large the different views entertained by the judge and the petitioners on the application. At length the following rule was entered: "Life and Fire Insurance Company of New York *v.* Christopher Adams. On motion of George Eustis, counsel for the plaintiffs, on *filing all the notes referred to in the transaction on file, it is ordered, [*595 in pursuance of the *mandamus* of the supreme court of the United States, requiring the honorable judge of this court to sign the judgment rendered in the premises, and to order execution to issue, that execution do issue for the whole amount of the judgment." Under this rule, an execution was issued for the whole sum claimed on all the notes, without any direction that it should be first levied on the mortgaged property. On this account, the marshal, by order of the plaintiff's attorney, returned it unexecuted, and a new execution was demanded.

In consequence of the refusal of Judge Harper to enter judgment for the residue of the notes, Josiah Barker caused a paper to be read in open court, in which, as successor to, and as having entire control over, the said notes, and in virtue of full and irrevocable powers from the Life and Fire Insurance Company of New York, he did, in behalf of the defendant, Christopher Adams, by virtue of the compromise entered into between him and Josiah Barker, agent for the said Life and Fire Insurance Company, on the 2d of May 1826, confirmed by decree of this court, confess judgment on all the said notes; which confession he requested might be entered on the clerk's minutes. The judge refused to allow the entry, without notice to the opposite party; but offered to grant a rule requiring the defendants

to show cause why the judgment should not be entered. This rule being declined, the judge permitted the confession to be filed, subject to all legal exceptions. An execution for the whole sum was thereupon issued, which was accompanied by a letter from Josiah Barker to the marshal, requesting him to give notice to Christopher Adams and to Nathaniel Cox, the provisional syndic of the estate of the said Adams, who had become insolvent, that he, the marshal, considered himself in possession of the property in virtue of a former seizure, and should proceed to sell the same; should the marshal refuse to do this, the marshal was required to seize the property and to sell it, by virtue of the execution then in his hands. Supposing, from the proceedings of the court in a similar case, in which also he was counsel, that the execution issued in this case would be quashed, and the said marshal having refused to proceed without indemnity against the estate of
*596] *Christopher Adams, which had been surrendered under the insolvent law of Louisiana, the said Josiah Barker requested the marshal to return this second execution.

On the 30th of April 1834, a new execution was issued on the judgment of the 18th of May 1826, to be levied on the mortgaged property, in whosoever hands it might be found. The marshal refused to execute this writ, further than by giving notice thereof to Nathaniel Cox, the provisional syndic for the creditors of Christopher Adams; whereupon, a petition was presented to the honorable Samuel H. Harper, praying the interposition of the court, by commanding the marshal to sell the mortgaged premises, without requiring any bond of indemnity; or by granting a rule requiring the marshal to show cause why he should not be attached for contempt of the court, in disobeying or refusing to execute its mandate. The rule was granted before the time for returning the execution had elapsed, and was therefore discharged, whereupon the marshal made the following return:

"May 1st, 1834. Gave notice of the seizure of Nathaniel Cox, Esquire, provisional syndic of C. Adams, the defendant, the property having been previously surrendered by him to his creditors, and accepted by the court of the fourth judicial district of the state of Louisiana, and placed under the charge and control of N. Cox, Esquire, as provisional syndic thereof. The further execution of this writ could not be effected. Returned, 19th of May 1834. John Nicholson, U. S. Marshal."

On the succeeding day, a new rule was awarded against the marshal, who appeared on the return-day thereof, and showed for cause against it, his return on the writ, as recited above. After solemn argument, the judge determined the return of the marshal, that he found the property in the hands of others, was *primâ facie* evidence that it belonged to others; and that he should not require the marshal to take the responsibility of enforcing the execution, without indemnity.

*597] On the 27th of May, application was made to the judge, to *sign the confession of judgment, filed by Josiah Barker in the name of Christopher Adams, on the 10th of March, subject to all legal exceptions, due notice of the filing thereof having been served on Christopher Adams and Nathaniel Cox; but the judge refused to sign the same, saying that it was not a judgment of the court.

The petitioners, conceiving that they are entitled to have the execution, issued on the 30th of April 1834, enforced against the mortgaged premises

by the marshal of the United States, and to have a further execution for the balance of their aforesaid claim, either by the authority of the aforesaid *mandamus*, or by having the aforesaid confession of the 10th of March last signed; or by virtue of the original order of seizure and sale, or otherwise; pray a further writ of *mandamus*, directed to Samuel H. Harper, judge of the district court of the United States for the eastern district of Louisiana; and if necessary, also to John Nicholson, marshal of the said court; or otherwise direct such a course of proceeding as will secure the due execution of the *mandamus* heretofore granted by this court, and afford them such other relief as they may be entitled to in the premises.

Judge Harper appeared by his counsel, and showed for cause against issuing the *mandamus* for which application was made: That in obedience to a *mandamus* issued by the supreme court of the United States, he did, on the 7th day of March 1834, sign a judgment entered in this cause by his predecessor in office, on the 18th day of May 1826, and directed that execution should issue thereon. This was a specific judgment for the amount of all the notes which had then become due, and which were enumerated in a transaction between the parties then committed to record. It was stipulated in this act of compromise, on which the judgment was entered, that the defendant, Christopher Adams, should confess judgment on each of the remaining notes as it should fall due; and in default of such confession, he consented that Henry Eckford, president of the Life and Fire Insurance Company, or his successor in office for the time being, should appear in court and cause judgment to be entered against the defendant. No confession of judgment has been entered, nor has any judgment been rendered on any one of the said notes. When the *judgment of the 18th of May 1826, [*598
was signed, Josiah Barker, agent for the plaintiffs, offered to confess judgment in the name and on behalf of Christopher Adams, for the residue of the notes. The court refused to receive this confession, for the following reasons: The plaintiffs, instead of causing judgment to be confessed, in conformity with the stipulation contained in the transaction, appear to have abandoned their original suit. No step was taken until the 13th of April 1829, after all the notes had become due, when a new suit was instituted by the Mercantile Insurance Company of New York, to whom the claim had been assigned, to recover the whole amount due, including the judgment of the 18th of May 1826. The defendant filed an answer, charging the plaintiffs, among other things, with usury; upon which they, on the 12th of January 1831, suffered a nonsuit; when, after this proceeding, the agent for the plaintiffs offered to confess judgment in the name of the defendant, no notice of this intended confession had been given to the defendant, and a rule upon him to show cause against the judgment, was declined by the plaintiffs. Had the person offering to confess judgment even been the regularly-constituted attorney of the defendant, there would have been, under all the circumstances of the case, some objection to receiving his confession, without notice. But he was not the regular attorney. In the transaction of the 2d of May 1826, Christopher Adams stipulated to confess judgment on all the notes as they should become due," and in default of such confession, he constituted and appointed Henry Eckford, president of the Life and Fire Insurance Company, or his successor in office for the time being, his attorney in fact, and irrevocable, in his name and stead, to appear in court and cause

judgment to be entered up," &c. ; and the said Adams further gave to the said Henry Eckford, president as aforesaid, or to his successor in office for the time being, attorney as aforesaid, full power of substitution in the premises, &c. Josiah Barker is not the substitute of Henry Eckford, nor his successor in office for the time being. The permission to file this paper, subject to all legal exceptions, did not convert it into a confession of judgment by the defendant, or his attorney, nor could the mere notice that such a paper was filed, add to its efficacy, there being no day fixed for contesting it. The transfer of the claim to Josiah Barker, *in trust for the Mer- *599]
cantile Company of New York, does not substitute him for Henry Eckford, or his successor in office for the time being. If either the mortgage acknowledged before the notary, or the transaction of the 22d May 1826, had itself the force of a judgment, no *mandamus* would be required, to order the rendition of a new judgment ; but these documents require judicial action to make them operative. It is a circumstance which ought to suggest, and which has suggested, circumspection in the proceedings to be taken in this cause, that though the judgment was recorded in May 1826, and Judge Robertson died late in 1828, and held several courts in the mean time, yet he never signed this judgment ; nor was any application made to him for judgment on the notes which afterwards fell due, during his life, though they amounted to six or seven.

In showing cause against a *mandamus* to compel the marshal to levy an execution on the mortgaged property, wherever it may be found, Judge Harper observes, that after the emanation of the execution, Josiah Barker addressed a petition to the court, stating many facts connected with the execution, and complaining that the marshal refused to enforce it, without being indemnified, and praying for a rule requiring him to show cause why he should not be attached for contempt in disobeying the mandate of the court. The rule was granted. The marshal returned, "that he had given notice of seizure to Nathaniel Cox, provisional syndic of Christopher Adams, the defendant ; the property having been previously surrendered by him to his creditors, and accepted by the court of the fourth judicial district of the state of Louisiana, and placed under the charge and control of Nathaniel Cox, as provisional syndic thereof ; the further execution of the writ could not be effected." Accompanying this return was the following letter :

"John Nicholson, Esq., marshal. Dear sir:—As counsel for N. Cox, syndic of the creditors of Christopher Adams, I am authorized to notify you, that any attempt to seize the property in his hands, at the suit of the *Life and Fire Insurance Company, will be resisted, and that you will *600]
proceed therein at your peril. Respectfully, G. Strawbridge."

The court was restrained from entering into any inquiry in whom the property was vested, by the considerations, that the creditors who claimed it were not before the court, and could not be brought before it, on a rule upon the marshal. The trustee for the Mercantile Company of New York contended, that the property still remained in possession of the marshal, under the order of seizure granted by Judge Robertson ; but the court was of opinion, that such presumption would be extravagant, inasmuch as the injunction continued in force for more than eight years ; for, though dissolved in terms by the judgment of 1826, that judgment, by the laws of Louisiana, had no force, until it was signed in pursuance of the *mandamus*

of the supreme court. In addition to this, it appears, from the return of the marshal, that the property was released on receiving the injunction.

The judge also conceived, that by a fair construction of the transaction of the 2d of May 1826, the plaintiffs must be understood to have agreed to discontinue their suit, in consideration of the dissolution of the injunction; as a prosecution of the suit, after the dissolution of the injunction, was not within the intention of the parties. He was also of opinion, that the property being found in possession of a third party, is *primâ facie* evidence that it belonged to that third party; but that this was a question which could not be investigated on a rule against the marshal, in the absence of the party interested. He was also of opinion, that the marshal, not being indemnified, and proceeding at his peril, ought to be governed by his own judgment; and would make himself personally liable to the creditors of Adams, if they should thereafter establish their right to the property ceded to them. This liability has been established by the supreme court of Louisiana against this very marshal, in which the court said, "that if acting in his capacity as marshal, he wrongs a citizen of a state, he is individually answerable, and in her courts." In another case, judgment was given against the same marshal, for the amount *of money made by him on an execution, issued out of the district court of the United States, [*601 under which he had seized and sold property in the hands of the syndic of the debtor. The judge added, that he had never thought it his duty to compel the officers of the court to perform acts for the benefit of others, which might work their own ruin.

Counsel have given more precision to the general application of the petitioners, by presenting five separate and alternative prayers for a *mandamus* commanding a particular thing; each application founded on the rejection of that which precedes it. The first is, for such an execution as that which was issued on the 12th of March 1834, at the instance of the plaintiffs, being an execution for the amount of all the notes secured by the mortgage and transaction in the petition mentioned; to be levied on the mortgaged property; but if not sufficient, then on the property generally of the said Christopher Adams, whereof he was owner on the 18th day of May 1826, into whose hands soever the same may have come. The applicant does not inform us, whether the execution is to be issued on the judgment entered by Judge Robertson and signed by Judge Harper; or on the confession made by Josiah Barker, in the name of Christopher Adams, on the 10th day of March 1834.

Judge Harper has shown for cause against an execution for the whole debt, on the judgment entered by Judge Robertson on the 18th day of May 1826, that the whole debt was not then due; and that the judgment, in its terms, comprehends that portion of the debt only which was actually due. He shows for cause against any execution founded on the paper delivered by Josiah Barker, on the 10th day of March 1834, that Josiah Barker exhibited no power of attorney from Christopher Adams, and showed no right to personate him. That the court did not receive his confession as the confession of Christopher Adams, nor enter any judgment upon it. Of consequence, that act cannot warrant an execution of any description. The record, we think, verifies these statements.

If the cause shown against a *mandamus* to issue such a writ of execu-

tion as is asked, or the judgment in its present state be deemed sufficient, then the petitioners ask for a *mandamus* *commanding the judge *602] to amend such judgment; by extending the terms thereof, so as to make the same absolute upon all the notes and sums of money enumerated in the original transaction, &c. To extend the judgment to subjects not comprehended within it, is to make a new judgment. This court is requested to issue a *mandamus* to the court for the eastern district of Louisiana, to enter a judgment in a cause supposed to be depending in that court; not according to the opinion which it may have formed on the matter in controversy, but according to the opinion which may be formed in this court, on the suggestions of one of the parties. This court is asked to decide, that the merits of the cause are with the plaintiff; and to command the district court to render judgment in his favor. It is an attempt to introduce the supervising power of this court into a cause, while depending in an inferior court, and prematurely to decide it. In addition to the obvious unfitness of such a procedure, its direct repugnance to the spirit and letter of our whole judicial system, cannot escape notice. The supreme court, in the exercise of its ordinary appellate jurisdiction, can take cognisance of no case, until a final judgment or decree shall have been made in the inferior court. Though the merits of the cause may have been substantially decided, while anything, though merely formal, remains to be done, this court cannot pass upon the subject. If, from any intermediate stage in the proceedings, an appeal might be taken to the supreme court, the appeal might be repeated, to the great oppression of the parties. So, if this court might interpose by way of *mandamus*, in the progress of a cause, and order a judgment or decree, a writ of error might be brought to the judgment, or an appeal prayed from the decree; and a judgment or decree entered in pursuance of a *mandamus* might be afterwards reversed. Such a procedure would subvert our whole system of jurisprudence. The *mandamus* ordered at the last term (8 Pet. 291), directed the performance of a mere ministerial act. In delivering its opinion, the court said, "on a *mandamus*, a superior court will never direct in what manner the discretion of an inferior tribunal shall be exercised; but they will, in a proper case, require the inferior court to decide." To order the district court to give *judgment for the *603] plaintiffs, is "to direct in what manner its discretion shall be exercised." Sufficient cause is shown against granting this prayer.

In the event of this prayer being rejected, the court is asked to award a *mandamus* to the district judge, commanding him to consummate the interlocutory part of the said judgment, by entering and signing final judgment upon and for all the notes and sums of money mentioned in the transaction aforesaid as not being then due; and thereupon to issue such execution, &c. This prayer does not vary substantially from its predecessor. It requires the same interference of the supreme court in the proceedings of the inferior court while in progress; and the same direction how its discretion shall be exercised. It requires a direction to the district court to give judgment for one of the parties, and prescribes the party for which it shall be given. The cause shown against granting the preceding prayer applies equally to this.

Should this last prayer also be rejected, the court is next asked to award a *mandamus*, commanding the district judge to compel the marshal duly to

execute such process as may be issued ; notwithstanding the cession of the estate of the said Adams, and the appointment of a provisional syndic thereof. It is the duty of the marshal, to execute all process which may be placed in his hands ; but he performs this duty at his peril, and under the guidance of law. He must, of course, exercise some judgment in its performance. Should he fail to obey the *exigit* of the writ, without a legal excuse ; or should he, in obeying its letter, violate the rights of others, he is liable to the action of the injured party. In the particular case in which the creditor asks for a *mandamus* to the district judge, to compel the officer to seize and sell the property mentioned in the writ, that property is no longer in possession of the debtor against whom the process is directed ; but has been transferred, by law, to other persons, who are directed, by the same law, in what manner they are to dispose of it. To construe this law, or to declare the extent of its obligation, the questions must be brought before the court in proper form, and in a case in which it can take jurisdiction. This case, so far as it is before any judicial tribunal, is depending in a district court of the United States, and *perhaps, in a state court of Louisiana. The supreme court of the United States has no original [*604 jurisdiction over it, and cannot exercise appellate jurisdiction, previous to a final judgment or decree, further than to order acts, purely ministerial, which the duty of the district court requires it to perform. This court cannot, in the present condition of the case, construe judicially the laws which govern it, nor decide in whom the property is vested. In so doing, it would intrude itself into the management of a case requiring all the discretion of the district judge, and usurp his powers. The *mandamus* cannot be granted as prayed.

The fifth prayer asks a *mandamus* requiring the judge to compel the marshal to execute the writ of execution heretofore issued, on the 30th of April 1834, on the said judgment, for the amount of the notes of the said Adams, due on the 16th of May 1826, notwithstanding the cession and other matters mentioned by the marshal in the return thereof. This prayer differs from that which preceded it only in the amount for which the execution is to issue. So far as respects the interference of the supreme court in construing laws not regularly before it, and controlling the discretion of the district court, they stand on precisely the same principle. The objections, therefore, which were stated to granting the fourth prayer, apply equally to the fifth.

The court cannot grant a *mandamus* ordering the district court to perform any one of the specific acts which have been stated in the petition ; or in the more particular application contained in the statement presented by counsel.

Though the supreme court will not order an inferior tribunal to render judgment for or against either party ; it will, in a proper case, order such court to proceed to judgment. Should it be possible, that in a case ripe for judgment, the court before whom it was depending, should, perseveringly, refuse to terminate the cause ; this court, without indicating the character of the judgment, would be required by its duty to order the rendition of some judgment : but, to justify this mandate, a plain case of refusing to proceed in the inferior court, ought to be made out. In *Ex parte Bradstreet*, 8 Pet. 590, this court said : "We have only to say, that a judge must

exercise his discretion in those intermediate proceedings which take place *between the institution and trial of a suit; and if, in the performance of this duty, he acts oppressively, it is not to this court that application is to be made. A *mandamus*, or rule to show cause, is asked in the case in which a verdict has been given, for the purpose of ordering the judge to enter up judgment upon the verdict. The affidavit itself shows that judgment is suspended, for the purpose of considering a motion which has been made for a new trial. The verdict was given at the last term; and we understand, it is not unusual, in the state of New York, for a judge to hold a motion for a new trial under advisement till the succeeding term. There is then nothing extraordinary in the fact, that Judge Conkling should take time till the next term, to decide on the motion for a new trial."

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In the case now under consideration, no application is made for a *mandamus* directing the court generally to proceed to judgment. The petitioners require a *mandamus* ordering the judge to render a specific judgment in their favor. It is not even shown, that the case is in a condition for a final judgment; nor is it shown, that the judge is unwilling to render one. The contrary may rather be inferred, from his readiness to grant a rule on the defendant, requiring him to show cause why judgment should not be rendered. In a case of such long standing, where it is more than possible, the defendant might not be in court; where judgment is asked on a confession made by the agent of the plaintiffs, professing to be the attorney of the defendant; the judge may be excused for requiring that notice should be given to the defendant. The rule is discharged.

McLean, Justice.—I concur with the opinion which has been delivered. At first, I was inclined to think, that, under the general prayer for relief, the court might award a *mandamus*, directing the district judge to enter a judgment in the case. Not that this court, on a *mandamus*, should direct the district court to enter a judgment in behalf of either party; but that, in the due exercise of its discretion, it should proceed to render a judgment in the case, in order that such judgment might be brought before this court, for revision by writ of error. *But as there is no specific prayer for a *mandamus*, on the ground, that the court has refused to give a judgment, I am content, as it involves a mere question of practice, to agree with my brother judges, that a prayer for this writ must point out specifically the ground of the application.

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Whatever effect the insolvent law of Louisiana may have, to divest the jurisdiction of a state court, where the property of a defendant is transferred to the syndic; such cannot be the effect on the jurisdiction of a court of the United States. No state law, or proceedings under a state law, can divest a court of the United States of jurisdiction. And in this case, I can entertain no doubt, that the district court, having jurisdiction, may proceed to a final judgment. Whether an execution, issued upon such judgment, may be levied upon the property in the hands of the syndic, presents a question which depends upon very different principles.

On consideration of the motion made in this case for a *mandamus* to be addressed to the honorable Samuel H. Harper, district judge of the United States for the eastern district of Louisiana, and of the arguments of counsel

thereupon had, as well in opposition to, as in support of, the motion: it is now here ordered and adjudged by this court, that the *mandamus* prayed for be and the same is hereby refused, and that the said motion be and the same is hereby overruled.

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*Charlotte Dye Owings and Frances T. D. Owings, Plaintiffs in error, *v.* James F. Hull. [*607

Evidence.—Judicial notice.—Presumption.—Agency.—Ratification.

Mrs. C. D. Van Pradelles, being in New Orleans, and about to sail for Baltimore, made her last will and testament, and appointed her sisters, residing in Baltimore, executrices of her will; at the time of her decease, she had real and personal estate, including some slaves, in New Orleans, and she left a number of children; she sailed from New Orleans, and was never heard of, after she left that place. The executrices, after some time, supposing her dead, proved the will in Baltimore; and in 1816, gave a power of attorney to John K. West, of New Orleans, to receive all the moneys due the estate of their testatrix, and particularly, to cause such proceedings to be instituted, as might be necessary to effect a sale of the estate, and to give a deed for the same, and generally to perform all acts in the premises, judicially and extra-judicially, for the effectual settlement of the estate, &c.; West obtained letters testamentary from the court of probate, in New Orleans, authorizing him to collect the estate, and to do all lawful acts as attorney in fact of the executrices; he sold the slaves belonging to the estate, to Mr. Hull, in February 1817, for $1800, by a bill of sale executed before a notary; and all the purchase-money, except $450 paid to one of the children of the testatrix, was paid to him; and he, soon after, failed, without having paid over any part of the proceeds of the sale to the executrices; this sale was communicated to Mr. Winchester, the attorney of the executrices, and by him to them. In 1826, a suit was brought in the parish court of New Orleans, by the children and heirs of Mrs. Van Pradelles, against Hull, according to the laws of Louisiana, for the delivery and possession of the slaves so sold; in which suit, carried afterwards to the supreme court of the state, the slave swere decreed to the plaintiffs, upon the ground, that the sale was absolutely void, under the laws of Louisiana; as executrices can only sell, after an order of court, and by auction; and in this case, the requisites of the law were not complied with. Hull brought this suit in the circuit court, against the executrices, to recover from them the purchase-money paid for the slaves, and his expenses attending the same; the whole proceedings in the Louisiana suit, and the evidence in the same, were read to the jury by agreement, subject to all legal exceptions.

The defendants excepted to the reading in evidence of the record in the case of the Heirs of C. D. Van Pradelles *v.* Hull, as not evidence in the present suit, except as to the judgment; that is, the pleadings and proceedings on which the judgment was founded, and to which, as matter of record, it necessarily refers. This objection was well taken; the suit was *res inter alios acta;* and the proceedings and judgment thereon, were no further evidence, than to show a recovery against Hull by a paramount title.

A copy of the bill of sale of the slaves, from West to Hull, on record in the notary's office in New Orleans, was offered in evidence; no evidence to account for the non-production of the original, was offered by the plaintiff; but, by the laws of Louisiana, copies of such notarial acts are evidence, the *original always remaining, by the law of Louisiana, in the office of the notary: *Held*, that the circuit court was bound to take judicial notice of the laws of Louisiana; and that the copy being evidence by those laws, was evidence in this case. [*608

The circuit courts of the United States are created by congress, not for the purpose of administering the local law of a single state alone, but to administer the laws or all the states in the Union, in cases to which they respectively apply; the judicial power conferred on the general government, by the constitution, extends to many cases, arising under the different states; and this court is called upon, in the exercise of its appellate jurisdiction, constantly to take notice of and administer the jurisprudence of all the states. That jurisprudence is, then, in no just sense, a foreign jurisprudence, to be proved in the courts of the United States, by the ordinary modes of proof by which the laws of a foreign country are to be established; but it is to be judi-

cially taken notice of in the same, as the laws of the United States are taken notice of in those courts.[1]

A copy of the letters-testamentary, granted by the parish court of New Orleans, was proved by the oath of the clerk and register of the court of probates, to be a true copy of the original, and that he could not send the original, which was on file in the court of probates. This is the best evidence which the nature of the case admits of.

The letters and accounts of J. K. West, the attorney in fact of the executrices, transmitted, by him to Mr. Winchester, their attorney in fact, were legal evidence in the circuit court.

In order to recover against the executrices, on this point, the plaintiff should have proved, that the sale of the slaves made to him by West, was in conformity with the laws of the state of Louisiana, and, subsequently to such a sale, a recovery of the slaves from him. Every authority given to an agent or attorney to transact business for his principal, must, in the absence of any counter-proof, be construed to be, to transact it according to the laws of the place where it is to be done; a sale of slaves, authorized to be made, in Louisiana, by an executrix, must be presumed to be intended to be done in the manner required by the laws of that state to give it validity; and the purchaser, equally with the seller, is bound, under these circumstances, to know what the laws are, and to be governed thereby; the law will never presume that parties intend to violate its precepts.

This is not the case of a general agency created by persons acting *en autre droit*. The purchaser was, therefore, bound to see whether the agent acted within the scope of his powers; and at all events, he was bound to know that the agent could not, in virtue of any general power, do any act which was not in confirmity with the laws of Louisiana; the principals could never be presumed to authorize him to violate those laws, and the purchaser, purchasing a title, invalid by those laws, must have purchased it with full knowledge.

A ratification of the unauthorized acts of an attorney in fact, without a full knowledge of all the facts connected with those acts, is not binding on the principals; no doctrine is better settled, on principle and authority, than this—that the ratification of the act of an agent, previously unauthorized, must, in order to bind the principal, be with a full knowledge of all the material facts; if the material facts be either suppressed or unknown, the ratification is invalid, because founded on mistake or fraud.

*609] *Error to the Circuit Court of Maryland. The facts of the case, as stated in the opinion of the court, were:

"The original suit is an action of *assumpsit*, brought by the defendant in error against the plaintiffs in error (the original defendants); the declaration containing the money counts, an *insimul computassent*, and a special count, as for a deceit in the title upon a sale of certain slaves. Upon the trial, under the general issue, the facts appeared as follows: Mrs. Van Pradelles, a sister of the plaintiffs in error, being at New Orleans, in July 1813, made her will, describing herself to be of Baltimore county, in the state of Maryland, and thereby bequeathed all her estate, equally, among her children named in the will, and appointed the plaintiffs in error, executrices of her will. She immediately after sailed from New Orleans, bound, as is supposed, for Baltimore; and has never since been heard of. In May 1815, the plaintiffs proved the will in the orphans' court of Baltimore county, and took administration of the estate. The property of Mrs. Van Pradelles, at New Orleans, consisted of real and personal estate, and, among other things, of some slaves; and in January 1816, the executrices gave a power of attorney to John K. West, of New Orleans, to receive and give receipts,

[1] That the courts of the United States will take judicial notice of the laws of the several states, is abundantly settled by authority. Pennington *v.* Gibson, 16 How. 65; Griffing *v.* Gibb, 2 Black 519; Cheever *v.* Wilson, 9 Wall. 108; Junction Railroad Co. *v.* Bank of Ashland, Id. 226, and numerous decisions in the various circuit courts. So also, the state courts will take judicial notice of the laws of a sister state, wherever the proceedings are reviewable by the supreme court of the United States. Ohio *v.* Hinchman, 27 Penn. St. 479.

&c., for all the goods, &c., belonging to the estate, to receive all sums of money, &c., and particularly, 'to cause such proceedings to be instituted as may be necessary to effect a sale of the whole real and personal estate of which C. D. Van Pradelles, the testatrix, was seised or possessed, at the time of her death, and to execute, &c., a good and sufficient deed, &c., in the name of the executrices, for the purpose of transferring all the right and title of the heirs of the testatrix, therein or thereto, to the purchaser of said estate; and generally, to do, negotiate and perform all other acts, matters and things in the premises, that circumstances may require, as well judicially as extra-judicially, for the effectual settlement of the estate, &c.' West, in January 1817, obtained from the court of probates of the parish of New Orleans, letters-testamentary, authorizing him to collect the goods and effects of the testatrix, and to make a just inventory thereof, and to do all other lawful acts, as attorney in fact of *the executrices. In February 1817, West sold the slaves in question, belonging to the estate, to [*610 the defendant in error, for $1800, by a bill of sale, duly executed before a notary in New Orleans; $1350, part of the consideration-money, was duly paid to West, who afterwards failed, in 1819; but it did not appear in the evidence, that any part of the money had ever come to the hands of the executrices; $450 were, after the failure of West, received by Mrs. Donaldson, one of the children and devisees of Mrs. Van Pradelles. The sale was communicated to Mr. Winchester, the attorney of the executrices, and by him to the latter; and the correspondence between Winchester and West was stated in the record. In 1826, a suit was brought in the parish court of New Orleans, by the heirs of the testatrix, against Hull, according to the laws of Louisiana, for the delivery and possession of the slaves so sold, and their offspring; upon which, such proceedings were had, that a recovery was decreed to the plaintiffs in that suit, by the supreme court of the state, upon the ground, that the sale of the slaves was absolutely void, because, by the laws of Louisiana, executrices can only sell, after an order of court, and by public auction, and not by private sale; and that here there was no order of court, nor sale at auction, but a sale by private contract."

The plaintiff, to support the issue on his part, offered in evidence the record of the proceedings in the parish court of the city of New Orleans, in the case in which the children and heirs of Mrs. Van Pradelles were petitioners, against James F. Hull, for the recovery of the slaves sold to him by John K. West; which proceedings were certified according to the provisions of the act of congress. This record contained a duly-certified notarial copy of the act of sale of the slaves, dated 27th of August 1817, by John K. West, attorney in fact of the executrices of Mrs. Van Pradelles, to James F. Hull. The original, of which this was a copy, was the notarial register of the sale, recorded by the notary, and in his possession, according to the laws of Louisiana.

The record also contained certain depositions, taken and used as evidence in the cause; and documentary proof, such as the letters of J. K. West to J. F. Hull; J. F. Hull to J. K. West; letters from G. Winchester, the counsel of the *executrices of Mrs. Van Pradelles, and afterwards [*611 their attorney in fact, to J. K. West, on the subject of the estate of the testatrix; powers of attorney from the executrices to J. K. West, and Mr. Winchester; a copy of the petition of J. K. West, to the court of pro-

bates of New Orleans, for letters of executorship, and the order of the court thereon, and the letters-testamentary granted on the said petition; the accounts of J. K. West, with the executrices; the correspondence of Mr. Winchester with Morgan, Dorsey & Co., on the affairs of West, after his failure; and the proceedings of the supreme court of Louisiana, on the appeal of J. F. Hull from the parish court.

The plaintiff in the circuit court also gave in evidence, a commission issued to New Orleans and executed there, containing the examination of Martin Blache, register of wills in and for the parish of New Orleans, and *ex officio* clerk of the court of probates; with a copy of the original power of attorney to John K. West from the executrices, deposited in the court of probates; under which power of attorney, John K. West had acted in the premises. The defendants objected to their admissibility, and presented the following objections, which were overruled by the court. 1. That the record in the case of *Donaldson* v. *Hull*, in the parish court of New Orleans, is not evidence in this cause against the defendants, except as to the judgment of the court in Louisiana. 2. The copy of the original bill of sale, on record in the notary's office, is not evidence, unless the plaintiff accounts for the non-production of the original. 3. That to make the act of sale evidence, it must appear, by the laws of Louisiana, properly and legally proven, that the original act of sale, of which it purports to be a copy, is in the custody of a public depository, and cannot be adduced in evidence. 4. The depositions and documentary proof contained in the record, in the cause of *Donaldson* v. *Hull*, are not evidence against the defendants in this cause. 5. That the papers referred to in the testimony of Martin Blache, purporting to be letters-testamentary granted by the court of probates to John K. West, are not legal evidence in this case against the defendants. *6. *612] The evidence of Mr. Winchester, with regard to the letters, and the account of Mr. West, transmitted by him, are not admissible in evidence.

And the defendants by their counsel, offered the following prayers: 1. The defendants, by their counsel, prayed the court to direct the jury, that there is no evidence in the cause to show that John K. West had any authority from the defendants in this cause, to effect a sale of any property belonging to the estate of their testatrix in Louisiana, except in conformity with the laws of said state; and that, unless the plaintiff shows a sale to the plaintiff Hull, by West, in conformity with those laws, and a subsequent recovery from Hull, he is not entitled to recover. 2. The defendants, by their counsel, prayed the court to direct the jury, that unless they believe that John K. West strictly complied with the special instructions given him by the defendants, in the power of attorney of January 30th, 1816, and caused such legal proceedings to be instituted as were necessary to effect a sale of the personal estate of which their testatrix died possessed in Louisiana, and, under such legal proceedings, made sale of certain slaves, being part of the said personal estate, to J. F. Hull, the plaintiff in this cause, and the said slaves were subsequently recovered from the said Hull, that the plaintiff is not entitled to recover.

Thereupon, the plaintiff's counsel, on their part, contended and insisted, that the commission and the return referred to were legal and competent evidence, to prove a recovery of the slaves from the plaintiff, by due course of law, for a defect of title in the defendants, and John K. West, their

agent and attorney, and of the plaintiff, who claimed under the said defendants and their said agent as aforesaid. And also moved the following prayers to the court: 1. The acts of John K. West, relative to the sale of certain slaves to the plaintiff in this case, in Louisiana, which were made known to the defendants, and were assented to, and acquiesced in by them, are binding upon the defendants, as West's principals, whether those acts did or did not conform to a letter of attorney previously given by the defendants to West. 2. The accounts furnished by John K. West to the defendants, *and retained by them, and no item objected to therein, except the charge of five per cent. commissions, are proper and legal [*613 evidence of the nature and particulars of the transactions between West and the defendants, so far as these transactions are therein detailed, except as to the charge for commissions. 3. The letters of George Winchester, written by the direction and with the approbation of the defendants, to West, and to Morgan, Dorsey & Co., and by them respectively received, and the instructions given to Winchester by the defendants, and by him communicated to West, are proper and legal evidence in this case.

And thereupon, the circuit court gave the following opinion: "The action in this case was brought to recover a sum of money, paid by the plaintiff, for certain slaves purchased by him of John K. West, attorney of the defendants, as executors of Mrs. Van Pradelles, a sister. This sale was declared void by the supreme court of the state of Louisiana, where the sale was made, for reasons stated in the opinion of the court; that the sale was made without an order of court, and was not made at public auction. The counsel for the defendants contend, that, as the sale was not made according to the laws of Louisiana, and was adjudged to be void by the court of that state, the proceedings of the attorney were void for that reason; and that West, being a special agent, did not pursue the instructions of his constituents, but acted contrary to them. The counsel for the plaintiff insists, that the instructions of the defendants to their attorney were pursued; and that, whether they were special or general, they were ratified by the defendants, and therefore, binding on them; and that the plaintiff in this suit is entitled to recover the money paid by him for the slaves thus sold. Whether an agent has a general, or only a special authority, is properly matter of evidence, for the consideration of a jury. If an agent exceeds his authority, or if he acts without authority, if the employer subsequently acquiesces in, or approves his conduct, he is bound by it; and a small matter will be evidence of such assent. And if, with a knowledge of all the circumstances, an employer adopts the acts of his agent, *for a moment, he is bound by [*614 them. But the great principle in this cause, is this—that where one of two innocent persons must suffer, by the fraud or act of a third, he who enabled that person, by giving him credit, to commit the fraud, or to do the act, ought to be the sufferer. In this case, it does not appear by the evidence given, that West, the attorney, had or had not taken letters of administration on the estate of Mrs. Van Pradelles. The fact is not noticed in the opinion of the court. The court of Louisiana declare the sale void, because made without an order of the court, and not at public auction. We know, that in Maryland, after letters are granted, the executor or administrator, in many cases, cannot sell slaves, without an order of court. This court will not presume that letters of administration were granted to the

attorney; much less will they presume that they were not granted. The course of proceeding in the courts of Louisiana, is according to the principles of the civil law; in our state, it is different. With these indications of the opinion of the court, the jury are instructed, that if they believe, from the evidence, that the acts of John K. West, the attorney of the defendants, were made known to them, and were assented to and acquiesced in, they are binding upon them, whether the acts did or did not conform strictly to the letter of attorney previously given by them to West. This opinion of the court is deemed a sufficient answer to all the prayers made by counsel for plaintiff and defendants." To this opinion of the court on the said prayers, and the refusal of the court to sustain the objections so made by the defendants' counsel, exceptions were taken.

The defendants, by their counsel, objected to the admissibility in evidence of the record from the parish court, in and for the parish and city of New Orleans, in the state of Louisiana, annexed to the commission, for any purpose, on the ground of its not being authenticated according to law; but the court overruled this objection. The defendants' counsel excepted.

And the defendants further prayed the direction of the court to the jury, that if they should be of opinion, from the evidence, that the defendants did ratify the said sale of said *negroes, yet if they should be of opinion, that West did not, before such ratification, apprise the defendants of the fact that letters of administration were never taken out by him in Louisiana, upon the estate of Mrs. Van Pradelles; and of the fact that, by the laws of Louisiana, the executrices, the defendants, never could have claimed any property in the said negroes so sold; and that the defendants, in ignorance of the existence of these facts, did ratify said sale; then, such ratification being made without a full knowledge of all circumstances material for them to know, before they made such ratification, is not binding upon them. The court said: "This prayer not arising from the facts of the case, the court refuse to grant it. But the court are of opinion, that if the jury should believe from the evidence, that the proceedings of their attorney were ratified by them, it is not material, whether they knew or did not know, that West had not taken out letters of administration on the estate of the testatrix." To which opinion, and to the refusal of the court to grant said prayer, the defendants, by their counsel, excepted.

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The defendants prosecuted this writ of error.

The case was argued by *Johnson*, for the plaintiffs in error; and by *Williams*, for the defendant.

Johnson contended, that the circuit court erred: 1. In overruling the objections made by the defendants below to the written evidence offered by the plaintiff. 2. In refusing the instructions asked by the defendants' counsel. 3. In giving the instructions which were given to the jury.

After a particular reference to the matters contained in the record of the proceedings of the court of Louisiana, Mr. Johnson insisted, that the contents thereof could not be evidence in this case. The defendants below were not parties to it; they had no notice from the plaintiff that the proceeding was instituted, and that they would be affected by the result. If they knew of the suit, it was not by such a knowledge of it, that they became parties to it, or could be bound by it. Nor does it appear, that a notice of the suit,

and of claims upon the attorney of the defendant in the suit, *by Mr. Hull, was given to him, with a view to the ultimate responsibility of his constituents. Although such a notice would not have had any legal effect, yet its absence makes the claim to introduce the record in the circuit court still less entitled to consideration, and entirely denuded. West was the special agent of the plaintiffs in error; his powers were created, and their purposes declared, in the letter of attorney which was sent to him. That power was filed in the office of the clerk of the probate court of New Orleans, and could and ought to have been seen by Mr. Hull. As it gave no authority from the executrices to proceed, but under and in conformity with the laws of Louisiana in reference to the estate of the testatrix; so it gave no power to him to appear for them in actions for a neglect or breach of those laws by him, or to bind them by a mis-execution of the power, or to answer the consequences of such abuse of it. The acts of West were, then, so far as they could affect the plaintiffs, as those of an entire stranger to them; and the record of the proceedings which was admitted in the circuit court, had no other principle of law to sustain its admission, than would support a claim to the introduction, as evidence, of the record of the proceedings in a suit between any other parties, and in any other court or country. As a judgment of the parish court, and of the supreme court, by which Mr. Hull was deprived of the slaves he obtained from West, the record might have been admitted in evidence, but nothing more. Not a portion of the other parts of it were legally in the case. The testimony taken in one trial between parties, is not evidence in a succeeding trial between the same parties, much less is it evidence between other parties. It is *res inter alios acta.*

The authentication of the act of sale, accompanied with the testimony of the clerk of the court of probates, was not sufficient. The original should have been produced; or it should have been proved, that it could not be produced, and must remain with the notary, upon some rule or principle proved to the court. Nor could it be evidence, if the original had been offered. It was an act done by West, out of, and unauthorized by, the power of attorney which he held. It was not an act within the scope of his authority, but was a plain violation of it.

*Nor can the introduction of this evidence be sustained, on the ground, that the acts of West were adopted by the plaintiffs' in error. [*617 Before this could be, it should have been shown, and it was not shown, that they had full knowledge of all those acts, and of every circumstance connected with them. If it had been proved, that the plaintiff in error knew that in the execution of the power under which West acted, he had violated, instead of conforming to, the laws of Louisiana; that the act of sale was not such as was permitted by those laws, and that, in reference to slaves so situated, a sale could only be made by auction; and with this, and a full knowledge of every other fact, they had ratified and adopted all that had been done, the case might have stood differently.

The ruling of the court, that the defendants in the circuit court were bound by the acts of West, was contrary to the established principles of law. They did not know them; they received no part of the money produced by them; they were done without authority. Cited, 5 Johns. 58–9; Cro. Jac.

468; 1 Pet. 246; 3 Ibid. 69, 81; 7 Wheat. 290; Paley on Agency 164, 169; 2 Kent's Com. 278.

Williams, for the defendant.—Had West authority to sell the slaves, part of the estate of Mrs. Van Pradelles? This authority is shown by the letter of attorney; by the correspondence of Mr. Winchester; by his accounts furnished to the executrices, his constituents: all of which testimony is independent of the record of the proceeding in the courts in New Orleans. That he sold the slaves, is also proved by evidence out of that record; by his correspondence; by the act before the notary; by his accounts; and by the correspondence of Mr. Winchester with Morgan, Dorsey & Co.

Has there been a recovery of the slaves from Mr. Hull, by parties having a title superior to the vendors? This is established by the record from New Orleans. The parish court appears to put the right of recovery upon the ground that, as Mrs. Van Pradelles was presumed to be alive, and her children were entitled to be in provisional possession of her property, the slaves could not be rightfully sold. The supreme court, while they seem *618] to imply, that no valid *sale could be made of the property, appear to place the right to recover it, on the ground, "that the sale was made without an order of court, and not by public auction." This, however, is manifest, that neither the defendants, nor their agent, did convey a valid title to the property to Mr. Hull; either, because a good one could not be made by them; or, because the agent did not accompany his sale with the proper formalities. So that the vendors, or their agent, have received the vendee's money, without a valuable consideration in exchange. A vendor is always held, in sales of personal property, impliedly to warrant the title. 2 Kent's Com. 478, and the authorities there cited; *Flotte* v. *Aubert*, 2 Orleans T. Rep. 329; 2 Bl. Com. 451; 3 Ibid. 166. Here, the act of sale before the notary-public contains an express warranty of title.

To the objections urged by the defendants to the evidence offered by the plaintiff, it is answered—1. The record from New Orleans is only relied on to establish a recovery of the slaves from the vendee, for defect of title in him, and consequently, in those from whom he purchased. 2. The original act of sale is shown to be a part of the records of a public officer—a sworn copy is, therefore, the best evidence which can be afforded or required. 7 Pet. 85. 3. This court will take notice, officially, that notaries-public in Louisiana, not a foreign country, are public officers, without further evidence. 2 W. C. C. 449. 4. The depositions and documentary proofs included in the record, are not insisted on, as evidence for the plaintiff; nor are they requisite for him, in order to maintain this action. 5. The letters-testamentary, or authority granted to West, are proved by Blache's testimony. This proof, however, is not essential for the plaintiff's case, as his authority is otherwise sufficiently established. 6. Mr. Winchester's letters are most clearly competent and legal evidence; he proves his appointment as agent and attorney of the defendants, and his authority to write the letters referred to. Of course, his acknowledgment of the receipt of West's accounts affects them with his knowledge and acts.

*619] As to the first exception of the defendant in the circuit court. 1. To the assumption on the part of the defendants, that *there is

no evidence to show that West had any authority to make sales of the property of their testatrix, except in conformity with the laws of Louisiana are opposed the instructions of their counsel, Mr. Winchester, in his letter to West, of the 13th of November 1816, wherein, after giving specific directions to sell the several descriptions of property, and especially, that the negroes were to be sold on a credit of three and six months, he adds: "but it is the wish of the Misses Owings, that you should consider yourself at liberty to exercise your own discretion, as you may think best, under existing circumstances; and whenever you may think it most conducive to the interest of those concerned, to deviate from the above instructions." And in Mr. Winchester's letter to West, of the 14th of July 1817, wherein he acknowledges the receipt of the copies of the correspondence between West and Hull, relative to the sale of the slaves in question, he adds, "the executrices are satisfied with all you have done towards a settlement of the estate; and relying confidently on your friendly exertions in their behalf, have only to add, generally, that whatever, under existing circumstances, may seem best in your judgment to be done with the estate, either real or personal, or with any part of it, they will approve and sanction." In these letters, it will be perceived, there is no reference to the laws of Louisiana, as furnishing guides to regulate the sales by West. 2. It is manifest, by the act of sale, that West supposed himself to be acting within the terms of, and according to his instructions, as contained in the letter of attorney to him, of the 30th of January 1816. And it is no fault on the part of the plaintiff, if West did not conform himself to his instructions. He was the agent of the defendants, and not of the plaintiff. But whether he did, or did not, so conform himself, in the sale of the slaves; everything which he did do in regard to that sale, was known and acquiesced in, and ratified by the defendants. Such knowledge and ratification are proved by Mr. Winchester's letters and testimony.

As to the second exception. Neither in the court below, nor in the points filed by the plaintiffs in error, is the defect in the authentication of the record pointed out. It will be observed, that it does not purport to be a record of the supreme court, but of the parish court *for the parish and city [*620
of New Orleans. And all the legal formalities, required by the act of the 26th of May 1790, appear to be complied with. Moreover, the transcript of the record offered in evidence by the plaintiff, is a part of the testimony taken under the first commission; and it is proved by the witnesses, examined under that commission, to be a true copy of those legal proceedings. 2 Cranch 238.

The third exception of the defendants below. There are no facts in the case whereon to found this exception. 1. It would seem, that the proper authority was taken out by West, to enable him to act as the attorney of the defendants. 2. The want of title in the defendants in the property, which they authorized and directed West to sell, was a matter of law which they were bound to know, and not a question of fact. 3. It does not appear, from the evidence, that the defendants were ignorant of any circumstances material for them to know, in this transaction. 4. If the attorney and agent of the defendants had been guilty of any fraud or neglect towards them, but in which the plaintiff had no participation, they must suffer the consequences, and not an innocent third party. 5. The ignorance of a vendor,

that his title to personal property sold by him is defective, affords no defence against the vendee's action upon an implied, or upon express, warranty of title. 6. The consequences are the same to a vendee, whether the vendor knew, or did not know, of his defect of title. The former has parted with his money, without any equivalent; and the vendor's ignorance in this respect cannot entitle him to retain money, without consideration.

On the points submitted by the plaintiffs in error, Mr. Williams argued: That the record from New Orleans was legal and competent evidence to prove the recovery of the slaves by a paramount title. The record is relied on for this purpose only; and if such judicial recovery is not the only legal evidence to establish such a fact, it is clearly the most proper and conclusive evidence. To the demand for a restoration of the slaves, the purchaser *621] drives the party claiming to a suit, and the defendants have *notice of its pendency; their agent and attorney at New Orleans is a witness in the cause; it is decided against the purchaser; he prosecutes an appeal to the supreme court; and the restoration is only submitted to, under the mandate of tribunals whose commands were irresistible. Authorities can scarcely be required to justify such conduct, and to maintain the right to recover under such circumstances. Cited, *Fenwick* v. *Forrest*, 5 Har. & Johns. 414–15; 6 Ibid. 415–16; *Dimond* v. *Billingslea*, 2 Har. & Gill 264; *Clarke* v. *Carrington*, 7 Cranch 308, 322; 1 Johns. 517; 13 Ibid. 224. Notice to the agent is notice to the principal; 2 Saund. Plead. and Evid. 736.

On the prayers of the plaintiff below, in the defendants' first exception, it was contended: 1. The acts of West, known and assented to by his principals, are binding upon them; whether those acts did or did not conform to the previous letter of attorney. Cited, 1 Esp. 112, and authorities; 4 Ibid. 114; 1 Saund. Plead. and Evid. 53, Admissions; 2 Ibid. 734, 736, and authorities; Paley's Agency 143, 249, 162–3; Long on Sales 224; 2 T. R. 189 n.; 4 Bing. 722; 2 H. Bl. 618; *Cairnes* v. *Bleecker*, 12 Johns. 300; 13 Ibid. 367; 13 Petersd. 723–4, Authorities, 744; 9 Cranch 153, 159; Pet. C. C. 64, 72. Liabilities of agents to principals discharged, by acquiescence in their acts. 1 Johns. 110; 2 Ibid. 424; 1 Caines 526. Principal liable for the misconduct of his agent. 2 Liv. Prin. and Agent 207, 214, 226, 227; 13 Petersd. 724, 727–9. Master liable for contracts entered into by the agent, although unauthorized by him, if the consideration comes to the master's use. 2 Liv. Prin. and Agent 196–8; Long on Sales 221; 3 Esp. 214; 2 Kent's Com. 631; 9 Barn. & Cres. 78.

2. The accounts furnished by West, and received and retained by the defendants, and not objected to, are evidence against them. Cited, *Freeland* v. *Heron*, 7 Cranch 147, 151; 1 Esp. 376, and note; Pet. C. C. 21–2.

3. The letters of Mr. Winchester, written with the knowledge and by the direction of the defendants, containing instructions, &c., are the acts of the defendants, and proper and legal evidence against them. Cited, 2 *622] Stark. Evid. 60, &c.; 12 Wheat. *469; 7 Har. & Johns. 108; Pet. C. C. 21–2; 4 Taunt. 511. His knowledge is their knowledge. 11 Wheat. 87; 13 Petersd. 728, &c.

The circuit court substantially adopt the views of the plaintiff's counsel, and every part of their opinion is believed to be impregnable.

Johnson, in reply.—The ruling of the circuit court was, that the record of the parish court was evidence; and therefore, the counsel for the plaintiff below used the whole contents of the record before the jury. The court refused to discriminate, and to decide on those parts of the proceedings in the court of Louisiana, and the documents produced in that court, which were or were not legal testimony. This was the error then and now complained of. Some of the matters in the record, and part of the correspondence are not proved; nor was it shown, that any attempt had been made to prove them. It was the duty of the plaintiff below, to have proved the want of title, derived under the act of sale, independent of the record. He came into the circuit court to maintain his claim against the executrices of Mrs. Van Pradelles, for money had and received to his use; for money paid under a consideration which had failed. He could only maintain such a claim by legal proof, shown to be such by the rules of evidence, and not made such proof by the judgment of a distant tribunal, in a suit to which they were not parties.

Was the sale made by West binding on his supposed principals? It was not within the prescribed and declared principles on which he was to act under the power of attorney. No money was received by them. There was no proof that any money was received, but by the letter of West, and that letter was inadmissible in evidence, in the form in which it was presented to the court. The whole sum paid by Mr. Hull to West, if any was legally proved to have been paid, was by him retained. The last instalment, if paid to Mrs. Donaldson, was retained by her; if that sum was to be recovered back, it should have been sought in an action against her. She was one of the parties to the proceeding in the parish court to vacate the sale of the slaves, as pretended to have been made by West. She, with the co-heirs of *Mrs. Van Pradelles, recovered the slaves, for which, in part, the money paid by Mr. Hull was received by her; and on every [*623 principle, if any one was liable, she was liable to refund it. And yet, in the circuit court, a judgment was given for this amount, included in the instalments paid to, and retained by West, against the plaintiffs in error!

The defendant in error, as was submitted to the court, in the argument in chief, was bound to know the extent and nature of the powers of West (1 Pet. 264, 290); and whether the act of sale was in conformity to those powers, and to the laws of Louisiana. Those laws are, that executors cannot sell at private sale, and must sell by auction; and the judgment of the parish court was founded solely on the defect of the sale. It was, therefore, a loss sustained by his want of vigilance, by his inattention to his own obligations to protect himself from such a proceeding, from a loss not brought upon him by the acts of the plaintiffs in error, or by acts authorized by their agent; a loss they could not protect him from, but from which he could have protected himself. Suppose, the letter of attorney to West had, in express terms, directed the agent to apply to the court for an order to sell the slaves, and he had sold them, without such an order; it would not have been contended, that the constituents in the power were bound by such sale. The power of attorney in this case, is the same in effect. It contemplates the intended proceedings under it, to be in conformity with the laws of Louisiana. The acts of an agent beyond this authority, do not bind his principal. 7 Johns. 391.

As to the position, that the ratification of the acts of West bound the plaintiffs, although they were ignorant of their nature and invalidity; this has been already met by the argument before offered to the court. The plaintiffs in error did not know the law of Louisiana, nor had they an opportunity to know it.

The defendant in error claims, that the act of sale, which is proved by a notarial copy taken from the notarial register, is evidence, because such is the law of Louisiana as to copies of that kind. This may be the law there, but is not known to be the law by this court, and the party availing himself of the law should prove it to be such. The circuit court of the United
*624] *States are not bound to know the laws of the several states; and if they are called on to administer them in a case where they apply, the laws should be proved. This was not done.

Story, Justice (after stating the facts), delivered the opinion of the court.—The original suit was brought to recover back the purchase-money paid by the defendant in error for the slaves, and other compensation for the defect of title (as mentioned in the previous statement of the facts of the case). The jury found a verdict for the original plaintiff, for $2636.96, upon which judgment was rendered accordingly; and the present writ of error is brought to revise that judgment, upon certain bills of exceptions taken at the trial, on behalf of the plaintiffs in error.

The objections taken to the admissibility of the evidence were, in the first place, that the record in the case of the Heirs of Mrs Van Pradelles *v.* Hull, in Louisiana, was not evidence against the defendants in the present suit, except as to the judgment of the court in Louisiana. By the judgment, we are to understand, not that part of the record, which in a suit at the common law technically follows the *ideo consideratum est*, &c.; for that would be wholly unintelligible, without reference to the preceding pleadings and proceedings; but that which, in common, as well as legal language, is deemed the exemplification of a judgment; that is to say, all the pleadings and proceedings on which the judgment is founded, and to which, as matter of record, it necessarily refers. We are of opinion, that this objection was well taken. The suit was *res inter alios acta*, and the proceedings, and judgment therein, were no further evidence than to show a recovery against Hull, by a paramount title. There was error, therefore, in the circuit court, in refusing to sustain this objection.

The next objection was, that the copy of the original bill of sale of the slaves to Hull, on record in the notary's office, was not evidence, unless the plaintiff accounts for the non-production of the original. The validity of this objection depends upon this consideration, whether the non-production of the original was sufficiently accounted for. It was not accounted for by
*625] any proofs offered on behalf of the plaintiff; and unless *the circuit court could judicially take notice of the laws of Louisiana, there was nothing before the court, to enable it to say, that the non-production of the original was accounted for. We are of opinion, that the circuit court was bound to take judicial notice of the laws of Louisiana. The circuit courts of the United States are created by congress, not for the purpose of administering the local law of a single state alone, but to administer the laws of all the states in the Union, in cases to which they respectively

apply. The judicial power conferred on the general government, by the constitution, extends to many cases arising under the laws of the different states. And this court is called upon, in the exercise of its appellate jurisdiction, constantly to take notice of and administer the jurisprudence of all the states. That jurisprudence is, then, in no just sense, a foreign jurisprudence, to be proved in the courts of the United States, by the ordinary modes of proof by which the laws of a foreign country are to be established; but it is to be judicially taken notice of, in the same manner as the laws of the United States are taken notice of by these courts.

Under these circumstances, we are at liberty to examine the objection above stated, with reference to the known laws of Louisiana. Now, in Louisiana, as, indeed, in all countries using the civil law, notaries are officers of high importance and confidence; and the contracts and other acts of parties, executed before them, and recorded by them, are of high credit and authenticity. Some contracts and conveyances are not valid, unless they are executed in a prescribed manner, before a notary; others again, if executed by the parties elsewhere, may be recorded by a notary; and a copy of such record is in many cases evidence. Where a contract or other act is executed in a particular manner before a notary, the protocol or original remains in his possession *apud acta;* and the act is deemed, what is technically called, an "authentic act;" and a copy of such act, certified as a true copy, by the notary, who is the depositary of the original, or his successor, is deemed proof of what is contained in the original, for the plain reason, that the original is properly in the custody of a public officer, and not deliverable to the parties. This will abundantly appear, by a reference to the Civil Code of Louisiana, from article 2231 to 2250. Now, the bill *of sale, in the present case, is precisely in that predicament. It was executed before a notary, in the manner prescribed by the laws of Louisiana; the original is in his possession, and is an authentic act, *apud acta;* and therefore, the party is not entitled to the possession of it, but only to a copy of it. So that the absence of the original is sufficiently accounted for; and the copy being duly proved, was properly admissible in evidence. There was no error, therefore, in the circuit court, in admitting this evidence. [*626

And this constitutes an answer to the next objection: viz., "that to make the act of sale evidence, it must appear, by the laws of Louisiana, properly and legally proved, that the original act of sale, of which it purports to be a copy, is in the custody of a public depositary, and cannot be adduced in evidence." By the laws of Louisiana, as already stated, the original is in the hands of such a depositary; and therefore, the objection falls to the ground.

The next objection is, that the documents, and documentary proofs, contained in the record of the Louisiana suit above mentioned, are not evidence against the defendants. This has been already disposed of, under the first objection; and there was error in the circuit court in not sustaining the objection.

The next objection is, that the paper referred to in the testimony of Martin Blache, purporting to be letters-testamentary, granted by the court of probates of Louisiana to John K. West, are not legal evidence in the cause, against the defendants. We are of opinion, that the objection is

unfounded, and was rightly overruled by the circuit court. Blache swears, that he is the clerk and register of the court of probates; that the copy is a true copy of the original; that he cannot send the original, which is on file in the court of probates. Under such circumstances, the copy is the best evidence which the nature of the case admits of.

The next objection is, that the evidence of Mr. Winchester, with regard to the letters and the accounts of J. K. West, transmitted by him, is not admissible evidence in the cause. In our opinion, the circuit court was right in overruling this objection. Mr. Winchester was the attorney in fact of the defendants, and conducted, in their behalf, the correspondence with J. K. West; and the letters which passed between them *must be pre-
*627] sumed to have been brought fully to the knowledge of the defendants, and were important to establish a presumption of the ratification of the acts of West by the defendants, after the communication of them. How far they ought to avail for that purpose, was matter of fact for the consideration of the jury. The only question, with which we have to do, is their competency for this purpose.

The next and last objection, under this head, which properly should have preceded all the others, but was taken in a subsequent stage of the trial, is to the admissibility in evidence of the record from the parish court of the city of New Orleans, already referred to, for any purpose, on the ground, of its not being authenticated according to law. This objection was overruled by the circuit court, and, in our opinion, properly overruled. The record is authenticated in the precise manner required by the act of congress of the 26th May 1790, having the attestation of the clerk, and the seal of the court annexed, together with a certificate of the sole judge of the court, that the attestation is in due form of law.

We may now proceed to the consideration of the instructions asked of the court, in behalf of the defendants, in the farther progress of the cause, and refused by the court. With those asked by the plaintiff, in the actual posture of the cause, upon the present writ of error, we have nothing to do. The first instruction asked was, that there was no evidence in the cause to show, that John K. West had any authority from the defendants in the cause, to effect a sale of any property belonging to the estate of their testatrix, in Louisiana, except in conformity with the laws of the said state; and that unless the plaintiff shows a sale to the plaintiff (Hull) by West, in conformity with the said laws, and a subsequent recovery from Hull, he is not entitled to recover. We are of opinion, that this instruction ought to have been given, as prayed. Every authority given to an agent or attorney, to transact business for his principal, must, in the absence of any counter-proofs, be construed to be to transact it according to the laws of the place where it is to be done. A sale of slaves, authorized by an executrix to be made in Louisiana, must be presumed to be intended to be made in the manner required by the laws of that state to give it validity. And the purchaser, equally with the *seller, is bound, under such circumstances, to know
*628] what these laws are, and to be governed thereby. The law will never presume, that parties intend to violate its precepts; and indeed, the very terms of the letter of attorney under which the present sale was made, clearly point out, that it was in contemplation of the parties, that judicial, as well as extra-judicial, acts might be required to be done. The attorney is

to execute good and sufficient deeds, &c., for the purpose of transferring all the right and title of the heirs of the testatrix in her real and personal estate, to the purchasers; and generally to do, negotiate and perform all other acts, matters and things in the premises, for the effectual settlement of the estate, &c. Now, there could be no effectual settlement, unless a valid title to the slaves and other property sold, was given, according to the laws of Louisiana; and there is no evidence in the case, to show, that the defendants ever contemplated any sale, which should not be valid by those laws. The circuit court, therefore, erred in not giving the instruction.

The next instruction asked was, for the court to instruct the jury that, unless they believed, that John K. West strictly complied with the special instructions given him by the defendants, in the power of attorney of January 1816, and caused such legal proceedings to be instituted, as were necessary to effect a sale of the personal estate of which their testatrix died possessed, in Louisiana, and under such legal proceedings, made a sale of the slaves, being part of the personal estate, to the plaintiff (Hull), and that the slaves were subsequently recovered from the plaintiff, the plaintiff is not entitled to recover. For the reasons already given, this instruction ought also to have been given. This is not the case of a general agency, but a special agency, created by persons acting *en autre droit*. The purchaser was, therefore, bound to see, whether the agent acted within the scope of his powers; and at all events, he was bound to know, that the agent could not, in virtue of any general power, do any act which was not in conformity with the laws of Louisiana. The principals could never be presumed to authorize him to violate those laws; and the purchaser, purchasing a title, invalid by those laws, must have purchased it with his eyes open.

The next instruction asked was, for the court to direct the *jury, [*629
that if they should be of opinion, from the evidence, that the defendants did ratify the said sale of the slaves; yet, if they should be of opinion, that West did not, before such ratification, apprise the defendants of the fact, that the letters of administration were never taken out by him in Louisiana upon the estate of the testatrix, and of the fact that, by the laws of Louisiana, the executrices, the defendants, never could have claimed any property in the slaves so sold, and that the defendants, in ignorance of the existence of these facts, did ratify the said sale; then such ratification, being made without a full knowledge of all the circumstances material for them to know, before they made such ratification, is not binding upon them. The court refused to give this instruction, because the prayer did not arise from the facts of the case. But the court did direct the jury, that if the jury should believe, from the evidence, that the proceedings of their attorney were ratified by them, it was not material, whether they did or did not know, that West had taken out letters of administration on the estate of the testatrix. It is wholly unnecessary for us now to consider, whether the instruction, as prayed, ought to have been given or not; for we are of opinion, that the instruction actually given cannot, in point of law, be supported. No doctrine is better settled, both upon principle and authority, than this—that the ratification of an act of an agent previously unauthorized, must, in order to bind the principal, be with a full knowledge of all the material facts. If the material facts be either suppressed or unknown, the ratification is treated as invalid, because founded in mistake or fraud. Now, by the laws of Louis-

iana (Civil Code, art. 1681–82), testaments made in foreign countries, and other states of the Union, cannot be carried into effect on property in that state, without being registered in the court within the jurisdiction of which the property is situated; and the execution thereof is ordered by the judge; which may be done, if it be established, that the testament has been duly proved before a competent judge of the place where it was received. So that there is no doubt, that the due probate of the will of the testratrix, before the proper court of probate of Louisiana, was an indispensable preliminary to any sale of the property in that state. If West had not taken
*630] out letters of *administration on the estate of the testatrix, in Louisiana, it is clear, that he could have no authority to sell the slaves, or to bind the executrices.

For these reasons, we are of opinion, that the judgment of the circuit court ought to be reversed, and the cause be remanded to the circuit court, 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 Maryland, and was argued by counsel: On consideration whereof, it is the opinion of the court, that there was error in the said circuit court in refusing to sustain the objections made by the original defendants (now plaintiffs in error), contained in their first specification in the record, viz: "That the record in the case of *Donaldson* v. *Hull*, in the parish court of New Orleans, is not evidence in this cause against the defendants, except as to the judgment of the court in Louisiana." And also in their fourth specification, viz: "That the depositions and documentary proof contained in the record, in the cause of *Donaldson* v. *Hull* are not evidence against the defendants in this cause." And also, that there was error in the said circuit court in refusing to grant the first instruction prayed by the defendants, viz: "To direct the jury that there is no evidence in the cause, to show that John K. West had any authority from the defendants in this cause, to effect a sale of any property belonging to the estate of their testatrix, in Louisiana, except in conformity with the laws of said state; and that unless the plaintiff shows a sale to the plaintiff, Hull, by West, in conformity with said laws, and a subsequent recovery from Hull, he is not entitled to recover." And also, in refusing the second instruction prayed by the defendants, viz: "To direct the jury, that unless they believe that John K. West strictly complied with the special instructions given him by the defendants, in the power of attorney of January 30th, 1816, and caused such legal proceedings to be instituted as were necessary to effect a sale of the personal estate of which the testatrix died possessed in Louisiana; and under such legal proceedings, made sale of certain slaves,
*631] being part of the said *personal estate, to J. F. Hull, the plaintiff in this cause; and that the said slaves were subsequently recovered from the said Hull; that the plaintiff is not entitled to recover." And also, in giving the following instruction to the jury, viz: "That if the jury should believe from the evidence, that the proceedings of their attorney were ratified by them, it is not material, whether they knew, or did not know, that West had not taken out letters of administration on the estate of the testatrix." It is, therefore, considered by the court, that for these errors, the

judgment of the said circuit court be and the same is hereby reversed and annulled, and the cause is remanded to the said circuit court, with directions to award a *venire facias de novo*.

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*Edward Livingston, Appellant, *v.* Benjamin Story. [*632

Equity.—Bill of discovery.—Demurrer.

A bill of complaint was filed in the district court of the United States for the eastern district of Louisiana, to set aside a conveyance made by the complainant, of certain lots of ground in the city of New Orleans, and to be restored to the possession of the same, alleging that the deed by which he conveyed them was given on a contract for the loan of money, and that although in the form of a sale, it was given only as a pledge for the repayment of the money; and calling for an account of the rents and profits of the property. The defendant demurred to the bill, and assigned for cause, that the complainant, in the bill, had not made such a case as entitled him, in a court of the state of Louisiana, to any discovery touching the matters contained in the bill, nor to any relief in the district court; the ground of this demurrer was, that the district court of the United States of Louisiana had no power to entertain procedings and give relief in chancery; the district court sustained the demurrer, and dismissed the bill. The decree of the district court was reversed.

Provisions of the laws of the United States, establishing the courts of the United States in the district of Louisiana, and regulating the practice in those courts.

By the provisions of the acts of congress, Louisiana, when she came into the Union, had organized therein a district court of the United States, having the same jurisdiction, except as to appeals and writs of error, as the circuit courts of the United States in other states; and the modes of proceeding in that court, were required to be according to the principles, rules and usages which belong to courts of equity, as contradistinguished from courts of common law; and whether there were or not, in the several states, courts of equity proceeding according to such principles and usages, made no difference, according to the construction uniformly given by this court.

Congress has the power to establish circuit and district courts, in any and all the states of the Union, and to confer on them equitable jurisdiction, in cases coming within the constitution; it falls within the express words of the constitution.

The provisions of the act of congress of 1824, relative to the practice of the courts of the United States in Louisiana, contain the descriptive term, civil actions, which embrace cases at law and in equity, and may be fairly construed as used in contradistinction to criminal causes; they apply equally to cases in equity, and if there are any laws in Louisiana, directing the mode of proceeding in equity causes, they are adopted by that act, and will govern the practice in the courts of the United States.

If there are no equitable claims or rights cognisable in the courts of the state of Louisiana, nor any courts of equity, and no state laws regulating the practice in equity causes, the law of 1824 does not apply to a case of chancery jurisdiction, and the district court of Louisiana was bound to adopt the antecedent modes of proceeding, authorized under the former acts of congress.

*If any part of a bill in chancery is good, and entitles the complainant to relief or discovery, a demurrer to the whole bill cannot be sustained. [*633

It is an established and universal rule of pleading in chancery, that a defendant may meet a complainant's bill by several modes of defence; he may demur, answer and plead to different parts of the bill; so that if a bill for a discovery contain proper matter for the one, and not for the other, the defendant should answer the proper, and demur to the improper matter; and if he demurs to the whole bill, the demurrer must be overruled.

Appeal from the District Court for the Eastern District of Louisiana. On the 25th of July 1832, the appellant, Edward Livingston, filed a bill of complaint in the district court, by his solicitors; stating, that on or about the 25th of July 1822, being in want of money, he applied to Benjamin Story and John A. Fort, of the city of New Orleans, who agreed to lend him the sum of $22,936; of which a part only was paid in cash, part in a

note of John A. Fort, and $8000, parcel of the said sum, was agreed to be afterwards paid to one John Rust, for the purpose and in the manner afterwards stated. To secure the repayment of the money and interest, at the rate of eighteen per centum per annum, he conveyed to Fort and Story certain property, with the improvements on the same, situated on the Batture, in New Orleans, owned by him. When this property was so conveyed, Fort and Story delivered to him a counter-letter, by which they agreed to reconvey the property to him, on the payment of $25,000 (being the sum advanced and the interest), on the 1st day of February then next; but if the same was not paid on that day, the property should be sold; and, after paying the sum of $25,000, and the costs of sale, the residue should be repaid to him. At the time of the sale, the whole property was covered with an unfinished brick building, intended for fifteen stores; and a contract had been made with John Rust, to finish the buildings for $8000. Story agreed to pay the $8000 to Rust, and this was, with the interest at eighteen per cent. on it, a part of the $25,000 to be repaid on the 1st day of February 1823. The property was, at the time of the loan, worth $60,000, and was then worth double the sum.

Story and Fort took possession of the property, and the complainant went to New York on a visit, expecting the stores to *be finished by *634] his return, or that at least three of them would be in a condition to let; he having received an offer of rent for each of the three, which would have given a rate of interest equal to a principal of $10,000 each for the three smallest stores. The complainant stated that, on his return to New Orleans, he found little or nothing had been done to the stores; the $8000 had been paid to John Rust; and if the property had been sold in February, it would not have produced anything like its value. He, therefore, applied to Fort and Story for a further time to pay the money borrowed, which they would not consent to, but on the following conditions: that the property should be advertised for sale on the 2d day of June then next; that the sum due to them should be increased from $25,000 to $27,500; which sum was composed, first, of the said $25,000; secondly, of $1500 for interest, for the delay of four months, at eighteen per cent.; thirdly, $800 for auctioneer's commissions, of $50 for advertising, and of $200 arbitrarily added, without any designation; of which a memorandum was given by the said Fort and Story, and was ready to be produced; and that the counter-letter, so executed as aforesaid, to him, by the said Fort and Story, should be annulled. Being entirely at the mercy of Fort and Story, he was obliged to consent to these terms, in hope of relief when money should become plenty; but, on the contrary, the pressure became greater, and, on the 2d of June, in order to obtain a delay of sixty days, he was forced to consent to sign a paper by which it was agreed that the debt should be augmented to the sum of $27,830.76; and that if the same was not paid on the 5th of August, then the property should belong to the said Fort and Story, without any sale; but there was no clause by which he should be discharged from the payment of the sum so borrowed, as aforesaid; whereby he would have been liable to the payment of the sum so advanced, in case the property had fallen in value.

On the 5th day of August above mentioned, the said Fort and Story demanded, by a notary, the full sum of $27,830.76, which included the said

charge of $800 for auctioneer's fees for selling, although no sale had been made; *and all the other illegal charges above stated; and on non- [*635
payment, they protested for damages and interest on the sum; thereby showing their intent to hold the complainants responsible for the sum demanded, if the premises should, by any accident, become insufficient in value to pay the same. Fort and Story remained in possession of the said premises, until the death of the said John A. Fort, which took place some time in the year 1828; and after his death, the said Benjamin Story took the whole of the said property, by some arrangement with the heirs of John A. Fort; and was, and ever since had been, in the sole possession thereof, and the said John and Benjamin, in the lifetime of the said John, and the said Benjamin, after the death of the said John, had received the rents and profits of the said property to the amount at least of $60,000.

The bill stated, that the complainant was advised and believed, he had a right to ask and recover from the said Benjamin Story the possession of the said property, and an account of the rents and profits thereof; the conveyance of the same having been made on a contract for the loan of money, and although in the form of a sale, was, in reality, only a pledge for the repayment of the same; the act by which the complainant agreed to dispense with the sale being void and of no effect in law. The bill concluded as follows:

"And your orator prays, that if, on said account, it shall appear that there is a balance due to him, as he hopes to be able to show will be the case, that the said Benjamin Story may be decreed to pay the same to him, and to surrender the said property to him; and that if any balance be found due from your orator, that the said Benjamin Story may be decreed to deliver the said property to your orator, on his paying or tendering to him the said balance; and that your orator may have such other relief as the nature of his case may require; and that the said Benjamin Story, in his own right, and also as executor of the last will and testament of the said John A. Fort, or in any other manner representing the estate of the said John A. Fort, may be summoned to answer this bill; your orator averring that he is a citizen of the state of New York, and that the said Benjamin Story is a citizen of the state of Louisiana, now residing in New Orleans."

*Upon this bill, a *subpœna* was issued, directed to the marshal, [*636
commanding him to summon Benjamin Story to appear at the district court, on the 3d Monday in February 1834, "to answer a bill exhibited against him in the said court, together with certain interrogatories therewith filed by the complainants." A *subpœna* was also issued in the same terms, directed to Benjamin Story, executor of John A. Fort.

On the 17th day or February 1834, Benjamin Story came into court, and by his solicitor, L. Pierce, Esq., filed the following demurrer: "The defendant, by protestation, not confessing all or any of the matters and things in the complainant's bill to be true, in such manner and form as the same are therein set forth and alleged, does demur to the said bill; and for cause of demurrer shows, that the complainant has not by his said bill, made such a case as entitles him, in a court of equity, in this state, to any discovery from this defendant, touching the matters contained in the said bill, or any or either of such matters, nor entitles the said complainant to any relief in this court, touching any of the matters therein complained of. And for further

cause of demurrer to said bill, he shows, that by complainant's own showing, in the said bill, the heir of John A. Fort, who is therein named, is a necessary party to the said bill, inasmuch as it is therein stated, that all the matters of which he complains, was transacted with this defendant and John A. Fort; whose widow, the present Mrs. Luzenbourg, is the sole heir and residuary legatee; but yet the said complainant hath not made her party to the said bill, wherefore, as before, and for all the above causes, and for divers other good causes of demurrer appearing in the said bill, this defendant does demur thereto; and he prays the judgment of this honorable court, whether he shall be compelled to make any further and other answer to the said bill; and he humbly prays to be dismissed from hence, with his reasonable costs in this behalf sustained."

On the 20th of May 1834, the district court, by a decree, sustained the demurrer, and ordered the bill of the complainant to be dismissed. The complainant prosecuted this appeal.

*637] *The case was argued by *White* and *Key*, for the appellants; and by *Clay* and *Porter*, for the appellee.

For the complainant, it was contended.—1. That the district court of Louisiana has, by the constitution and laws of the United States, the same chancery powers as a circuit court of the United States within the other states. 2. That the bill filed, presents a case in which, by law, and the usages of a court of equity, the complainant is entitled to relief, and that the demurrer ought to have been overruled. 3. The bill of complaint presents a case which, according to the laws and practice of Louisiana, entitles the complainant to relief.

Key, for the appellant.—The bill states a case for a court of equity; and the sole inquiry is, whether the district court of Louisiana has, by the constitution and laws of the United States, the same chancery powers as other courts of the United States. This jurisdiction that court certainly has, unless it is taken away by the act of congress of 26th May 1824, ch. 181 (4 U. S. Stat. 62), relating to the proceedings in the courts of the United States in Louisiana. That act directs, that the modes of proceeding in the courts of the United States, shall be the same as in the courts of Louisiana. The district court has power by the law to regulate the practice in the court, where the rules of the state courts are not adapted to that court. The rules which the court may adopt, must be such as will not interfere with the rights of parties in the court, to all the remedies which, in other courts of the Union, are administered according to the constitution.

Relief in equity, when there is not a plain and adequate remedy in law, is among these rights. 4 Wheat. 212, 222, 115. It became the duty of the court to make adequate rules to apply such remedies. It will be contended by the appellees, that the operation of the act of 1824 was to take away equity jurisdiction. There is nothing in the letter of the law which does this; nor which will, in any way, authorize the inference that such was its purpose. The law, says the court, may, not that it must, adopt the state practice. As the constitution gives a right to relief in equity, the law should

*638] be *construed so as to enable a party to obtain that relief. In Louisiana, there are no courts of chancery; and therefore, no rules can be

invoked from the Louisiana courts, to regulate proceedings in equity cases. There could not be an intention by congress to adopt the rules of the state courts in such cases, as no rules having any application to cases of that description, existed.

The application made to the district court of the district of Louisiana was not termed a bill in equity or in chancery, but a bill of complaint; and under this, if, by the practice of Louisiana, relief could be afforded, why was it not given? Jurisdiction, even according to the principles asserted by the appellees, should have been taken, if any remedy could have been afforded in the courts of Louisiana. But in this case, the court took equitable jurisdiction of the bill; for it sustained the demurrer, and dismissed the bill. Cited, 3 Pet. 434, 446, 450; 2 Mason 270; 1 Gallis. 536.

One of the great benefits which, under the constitution, a party who goes into a court of equity has, is that of a discovery. This is obtained, by the right he has to put interrogatories to the defendant; and the practice of the chancery courts of England has been adopted in the courts of the United States, as affording the means of using this, as well as all other rights which exist under that practice. It is a right not depending on the will or consent of the court. But in the courts of the state of Louisiana, the right to a discovery from a defendant exists only by the consent of the court.

The complainant here presents a case showing wrongs, oppression, injustice and usury. He has, under the constitution, a right to present his case in a federal court, and he should there have had relief. These are constitutional rights, which should not have been denied to him; and yet his suit is dismissed, and no remedy is afforded to him.

Porter and *Clay*, for the appellee.—It is understood, that the question in this case is, whether the common law, and the equity forms of proceeding, shall be introduced into Louisiana. You cannot introduce the chancery law, unless you introduce the common law; and if this is done, it will produce great dissatisfaction in that state. *It is a singular question, whether a system of jurisprudence exists in a state, where it is not [*639 known or understood? Whether, in a community where the civil law prevails, a system of laws shall be introduced which are against their prejudices?

The constitution was formed, at a time when the common law prevailed in all the states which then composed the Union. In those states, there must, therefore, have been chancery law, for it is a part of the common law; and in reference to this state of things, in all those states, there were recognised and established a chancery and a common-law jurisdiction, and the principles and rules of courts of common law and courts of chancery. The third section of the third article shows, that the constitution did not introduce those principles, and those modes of proceedings. It found them existing, and provided for their administration. The terms of the constitution are, "all cases of law and equity, arising under the constitution." The difference between law and equity, requiring different tribunals for their application to cases, exists in no other country but in England and the United States.

Our proposition is, that there can exist no equity law but where the common law prevails. In those states, they are distinguishable from each

other, although part of the same law, and these distinctions are considered part of the common law; and different courts enforce these different systems. But in Louisiana, these distinctions do not exist. To talk of distinguishing law and equity, is as reasonable there, as to state that equity and equity differ. These views of the subject are aided by the act of congress of 1792, in addition to the act of 1789. The latter act provides for modes of proceeding in courts of equity, as contradistinguished from courts of law.

The jurisdiction of the courts of the United States is to be exercised according to what is given to those courts by the laws of the United States; not by the general provisions of the constitution. If the highest court under the constitution has other powers, those of the inferior courts exist only under acts of congress. The cases cognisable under the constitution, are those arising under the constitution and laws of the United States; and this is not such a case. By the constitution and laws of the Union, the
*640] courts of the *United States have power to decide rights in cases between citizens of different states, arising under the constitution and laws of the United States; but not others. Does the term "law and equity" run through all the provisions of the article? It is contended, that by a fair and grammatical construction, it does not.

This court will not take hold of all the powers which the constitution has declared to belong to the judiciary department, and make rules to execute those powers. Suppose, at the formation of the constitution, there had existed in some of the states a system of civil law, and no common law; would the common law have been introduced by the establishment of the constitution? The law would have been taken as it stood and was enforced; as no purpose existed to introduce new systems of law, but only to carry into effect the prevailing laws. The judiciary act provides, that jurisdiction shall be given to the courts of the United States in law and equity, concurrent with the courts of the state. But where there is no equity jurisdiction in a state, how can there be a concurrent jurisdiction? It would be a limitation of the powers of the courts of the United States, to say, they have no jurisdiction, except in cases of law or equity; as it would exclude the jurisdiction from cases arising under any laws. The language of the constitution, although employed at the period when no systems existed but those of law and equity, is ample for all cases.

As to the suggestion, that the district judge should have moulded the proceedings so as to give relief, it must be observed, that the case stood before the judge upon a special demurrer, assigning for cause that the plaintiff had departed from the whole course of proceeding in that court. It was not asked of the court below, that the proceedings should be amended, and the judge was bound to decide the case on the bill and the demurrer. But if a district court of the United States, sitting in Louisiana, has law and equity jurisdiction, and giving the doctrine its full effect, it is contended, that congress, in conferring equity jurisdiction on any court of the United States, has power to declare what shall be the form of the proceedings by which that equity jurisdiction is to be exercised.

The first proposition, that congress has power to provide forms of pro-
*641] ceeding for its equity courts, will not be doubted. *This court has more than once decided, as has been stated, that in relation to the

inferior courts, the judicial power extends no further than legislation has conferred it. If this be true, it follows, that congress can modify the means by which that power is to be exercised, as well as limit its extent.

The second proposition, that congress has given the United States equity court in Louisiana, forms of proceeding different from those given the courts of chancery in England, may not be so obvious, but it is equally true. The provisions of the act of congress of the 26th of May 1824, furnish the law on this subject. How stands the case on that law? All civil causes in the district court of the United States in Louisiana must, by the act of 1824, be conformable to the state practice. A suit in equity is a civil cause; but a suit in equity shall not be conformable to the state practice.

The first rule in the construction of statutes is, to follow the letter, unless the interpretation leads to an absurd and pernicious result. The act of 1824, which declares that the forms of proceeding in the United States court shall be the same in the state court, produces no such consequences. Would it not, therefore, be a violation of a rule, in the case now under consideration, that though the law said the practice in both courts should be the same; this court should pronounce they are not to be the same.

As to the inquiry, what is to be done, if there is no equity state court, nor any law regulating the practice in equity cases; this question is answered by the cases of *Robinson* v. *Campbell*, 3 Wheat. 212; *United States* v. *Howland*, 4 Ibid. 108; *Parsons* v. *Bedford*, 3 Pet. 433.

When it is said, that the proviso in the act of 1824, gives to the judge of the court of the United States power to modify the proceedings in the courts of Louisiana, and therefore, there is no imperative and absolute force given to the state proceedings; this is admitted to be true. It does leave the judge power to modify the state proceedings; but then it follows, that until he does modify them, they form the rule. Were it otherwise, the proviso would be the rule, and the general enacting clause, the exception.

*It is admitted, that no absolute repeal was made of the antecedent modes of proceeding, authorized by the former acts of congress. [*642
There is no absolute repeal of those laws, but there is a repeal *sub modo*, that is, the state forms of proceedings take place of the common law and equity remedies, unless the judge revives them. If the statute has not this force, it means nothing and effects nothing.

Now, though there must be courts of equity in each state, which, in the absence of any special legislation, are to be governed in their practice by that regulating the court of chancery in England; though state modes of proceeding have no force except so far as congress gives them force; though the judge may make rules to modify them, though former modes of proceeding are not so absolutely repealed, but that the judge may by rule preserve them; still, any or all of these postulates do not authorize the conclusion, that congress may not take the civil law proceedings of Louisiana for the forms of an equity court in Louisiana. They all stand by the side of our position, not opposite to it. The proposition is, that the congress of the United States may adopt what forms of proceedings it thinks fit, for the administration of justice in its equity courts, provided it preserves to the suitors the power of court over proof, and the capacity to extend relief, which distinguish a court of equity from a court of common law.

Congress has, clearly, by the act of 1824, adopted the Louisiana practice. What does that act say? The mode of proceeding in civil causes, in the United States courts, shall be conformable to the law directing the modes of practice of the state court, unless the judge modify them. Well, he has not modified them. Then, why should we not have the state practice? If our civil law proceedings give full effect to all powers of an equity court; if, in truth, they be the same; why should the fact of their being called law proceedings, deprive the appellee of the benefit of the act of 1824? It is not admitted, that an adverse answer can be given to this question. The truth is, that there are no law proceedings in Louisiana, as contradistinguished from those in equity; and the application of the term law proceedings to a procedure essentially that of chancery, is the cause of all the difficulty in this case. *If they were called proceedings in equity, it *643] appears, the act of 1824 would apply; but not being so called, it cannot. The ordinary courts of Louisiana are armed with the full powers of an equity tribunal. So true is this, that the counsel for the appellant is challenged to show the slightest discrepancy in any important particular; and it is believed, that if any one of the court were about to create a court of equity, not by a general reference to another system, but by a special enactment, he would take the Louisiana statute as a model; or, if he did not, his own legal accomplishments would induce him to draw up one in all respects similar.

There is a most important statute which has been overlooked. It is that of 1828, ch. 68. It is urged, that the national legislature, by the act of 1824, intended to change the former practice of the law, on the equity side of the district court, in Louisiana, and introduce the civil law practice into both; and that, in fact, it had done so. The act of 1828 is referred to, wherein it is declared, that the forms of proceeding in the courts of the United States, in all states admitted into the Union, since the year 1789, should be according to common-law and equity forms; but that the provision of the act should not be applied to the state of Louisiana. It appears, that in no more clear or unequivocal manner could congress have declared their opinion, that Louisiana had another system provided for her, and that it would be unwise and unjust, to give to her what was properly extended to others.

White, of Florida, for the appellant.—The act of congress organizing a district court for the territory of Orleans, conferred upon it the same jurisdiction as that which was exercised by the court of the Kentucky district. The act of 1812, providing for the admission of the state of Louisiana into the Union, declares, that the district court of the state of Louisiana, shall have the same powers and jurisdiction as the district court for the territory of Orleans. This law refers to the act which was based upon the act organizing a court of the United States for the Kentucky district, which, under the provisions of the act constituting it, had all the powers of a circuit court of the United States within the other states. *It may then be *644] assumed, that, by the laws of the United States, the district court of the state of Louisiana had, prior to the act of 1824, the same powers and jurisdiction, at law and in equity, as that possessed and exercised in all

respects by the circuit courts of the United States within the several states.

This jurisdiction is regulated by law, in pursuance of the constitution. The first section of the third article of the constitution declares, that the "judicial power of the United States shall be vested in a supreme court, and in such inferior courts as the congress may, from time to time, ordain and establish." The district court of Louisiana is, as it has been shown, one of these inferior courts ordained and established, in which this judicial power is vested. The second section, third article, declares, that "the judicial power shall extend to all cases in law and equity." From the moment of the establishment of the district court of Louisiana, there were vested in it, by the constitution, equity powers and jurisdiction; these powers and that jurisdiction cannot be changed or limited by any act of congress. The jurisdiction, not only of the supreme court, but of the inferior courts, is established by the constitution; and cannot be diminished, altered or limited, under the pretext of regulating the practice of the courts by congress. If, then, the act of 1824 was susceptible of the construction placed upon it by the learned counsel for the appellee, it would be a violation of the constitution of the United States. Congress have as much power to declare that any other provision of the constitution shall be dispensed with, or suspended, in any state of this Union, as to enact that the judicial power of the district court of Louisiana shall not extend to cases in equity; and the equity referred to has been construed by this court, to be that system we borrow from the parent country; in other words, that good, old, conscientious, honest system, based on the civil law, as understood and practised in England.

From this view of the powers conferred by the constitution and laws of the United States, it is proposed to establish these points: 1. That the district court of the United States, sitting in Louisiana, has equity jurisdiction. 2. That there are no equity proceedings in Louisiana as *contradistinguished from law; and that there is no law of the state of Louisiana, directing the mode of practice in equity cases, as contradistinguished from cases at law. [*645

It is not to be disputed, after admitting the equity jurisdiction of the district court, that its chancery powers are the same, its rule of decision the same, and its jurisdiction the same as those of the circuit courts of the United States in the other states. The character of the state law has no influence whatever upon the exercise of equitable jurisdiction by this court. Its remedies in equity are not to be according to the practice of the state court, but according to the principles of equity, as distinguished and defined in that country from which we derive our knowledge of these principles. The district court of Louisiana is, in fine, a thoroughly organized court of equity; and as perfectly competent to the administration of equity principles, as a court of chancery in England, or a court of equity in Virginia or New York. So it is in all the other states, by the judiciary act of 1789, made in execution of the constitution of the United States; and so it, consequently, is in the state of Louisiana, whose inhabitants enjoy the benefits of the same law and constitution, to be expounded in precisely the same way towards them, as towards the other states. It is also free from dispute, that, by the process act of 1792, which was extended to Louisiana, the

modes of proceeding in suits of equity, in the district court of Louisiana were not to be according to the practice of the state courts, but according to the principles, rules and usages which belong to courts of equity, as contradistinguished from courts of common law; subject to such alteration by the courts as might be thought expedient, &c.

The situation or condition of the district court of Louisiana, before the act of 1824 was passed, must be admitted, then, to have been as follows: It was a court of equity, in the most comprehensive sense of that expression, according to the principles of equity jurisdiction as defined and distinguished in England, with such limitations only as were to be found in the constitution and laws of the United States. The practice of the court, moreover, was such as prevailed in courts of equity, as distinguished from courts of law; and the rules of its practice were to be sought, like its jurisdiction, in the principles, *rules and usages of courts of equity, unless altered in the manner authorized by the act of 1792. Whether the district court of Louisiana, at any time, actually exercised its jurisdiction, according to this practice, is of no moment; the court possessed the faculty of exercising it in this way, whenever a suitor should lawfully appeal to it.

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It is in regard to a court of equity of this description, constituted by a law of the United States, to exercise its powers according to the laws and the constitution of the United States, that the act of the 26th of May 1824, is to be interpreted; and it is to be interpreted with the aid and influence of the admission, that the courts of Louisiana exercise no jurisdiction in equity, as distinguished from law, and have no practice applicable to such a distinction; and that there is no law of the state directing the mode of practice in such suits of equity. The act is to be interpreted as it ought to be, in a case where it is acknowledged, that the mode of practice prescribed by the law of Louisiana is applied to the cases in which proceedings are at law, and not in equity as distinguished from law; and that there is no law of the state nor practice of the courts, having any reference to a proceeding in equity as distinguished from law.

With this view of the equity jurisdiction, and modes of proceeding in equity, of the district court of the United States in Louisiana, before the act of the 26th of May 1824, we proceed to a brief consideration of that act. The act of 1824 does not absolutely repeal the antecedent modes of proceeding authorized in the district court of the United States, under the former acts of congress; nor give imperative force to the modes of proceeding in civil causes in Louisiana. This was decided in *Parsons* v. *Bedford*, and the counsel of the appellee admit the propriety of that decision. The act, in general terms, provides, that the mode of proceeding in civil causes, in the courts of the United States, in Louisiana, shall be conformable to the laws directing the mode of practice in the district courts of said state; but the judge of the United States court is authorized to make such provisions as may be necessary to adapt the state laws of procedure to the organization of such court of the United States, and to avoid any discrepancy, if any such should exist, between such state laws, and the laws of the United States.

The terms of the act are broad enough to comprehend every *description of civil causes; suits in equity as well as suits at law;

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and to require that all of them shall conform to the laws directing the mode of proceeding in the state courts; but whether suits in equity are or are not comprehended, must depend on the laws of Louisiana, which are made the guide, subject to the power of modification in the judge. If the laws of Louisiana contain no direction as to the mode of practice in suits of equity, as contradistinguished from suits of law, and if this distinction is, as has been stated, unknown to the courts of that state, then it is submitted, as the true construction of the act of May 1824, that the practice in equity suits must stand upon the process act of 1792, because there is no direction in the state laws to affect the practice in such suits. It cannot be reasonably contended, that if the state laws did not direct the mode of practice in the district courts of the state, in any respect, that, nevertheless, the practice of the United States courts, in equity suits, was to undergo a change, and to conform to the practice of the state courts. The conformity required, is that of the practice of the United States courts to the laws, directing the mode of practice in the state courts, and not to practice itself; and this is the plainer, from the power given to the judge, by the proviso, which is, to make such rules, &c., as shall avoid the discrepancy, if there be any, not between the practice of the state courts and that of the federal courts, but between such state laws and the laws of the United States. The intention of the act of 1824 was, in fine, to subject the practice of the United States courts to the directions of the law of the state, if there were any, as it was before subjected to the laws of the United States; merely providing, by a power in the judge, to render the laws of procedure conformable with the organization of the court, and to prevent discrepancy; but it was not the intention of the act, to change the practice, if there was no such direction. Now, if the state laws make no direction as to the mode of proceeding in the state courts, then the act of 1824 is wholly without effect; and if the state laws contain no direction as to suits in equity in the state courts, then the act is wholly without effect upon suits in equity in the United States courts. As there was no absolute repeal of the antecedent equity practice, by the act of 1824, that practice continues in force, until the state laws contain a *direction in regard to the practice in such suits in the state courts. [*648

The counsel for the appellee contend, that as the act of 1824 leaves the judge the power to modify the state proceedings, "it follows, that until he does modify them, they form the rule; and that were it otherwise, the proviso would be the rule, and the general enacting clause the exception." But this is plainly a *non sequitur;* for the state proceedings do not form the rule in equity, until the judge modifies them, unless the direction in the state laws applies to the practice of suits in equity. If it does not, no modification is necessary, because the state law, for want of a direction, does not apply at all.

The learned counsel also contend, that although there is no absolute repeal of antecedent modes of proceeding, authorized by former acts of congress, yet, "there is a repeal *sub modo;* that is, the state forms of proceedings take place of the common law and English remedies, unless the judge revives them." But this begs the very question. The argument for the appellant is, on the contrary, that there is no appeal, absolute or *sub modo*, of the antecedent modes, unless the state law contains a direction

in regard to the suits in which those antecedent modes of practice were authorized. If it is silent in regard to suits in equity, then the antecedent practice in equity is not repealed at all.

The counsel for the appellee state their proposition, in the following terms: "That the congress of the United States may adopt what forms of proceeding it thinks fit, for the administration of justice in its equity courts, provided it preserves to the suitors the power of the court over proof, and the capacity to extend relief, which distinguish a court of equity from a court of common law;" and "that congress has, clearly, by the act of 1824, adopted the Louisiana practice; for what does that act say? The mode of proceeding in civil causes in the United States court shall be conformable to the law directing the modes of practice in the state court, unless the judge modify them. Well, he has not modified them. Then, why should we not have the state practice?" The answer may be readily given. The proposition is not consistently pursued throughout. Congress has not, by
*649] the act of 1824, adopted the Louisiana practice, generally or *absolutely, as the proposition imports; nor does that act adopt the practice at all. The very terms quoted by the counsel are, that the proceedings in the United States courts are to be conformable to the laws directing the practice; and unless the laws direct the practice in equity suits in the state courts, they contain no direction to which the equity practice in the United States can conform; in other words, there is no law of Louisiana upon the subject of equity suits, and consequently, there is no law for the practice in equity suits to conform to. The state practice, therefore, is not to be followed in an equity cause, because it is the practice in suits at law, as distinguished from equity, and not the practice in suits in equity as distinguished from law; in regard to which latter suits, there is no law of Louisiana directing anything.

It may, perhaps, be said, that the arguments thus stated mistake the intention of the act of 1824, which was to make the practice in the courts of the United States, in suits of all kinds, conform to the directions of the law of Louisiana, in suits of any kind; and that this is shown by the terms of the law, which says that the mode of proceeding in such causes in the courts of the United States, shall be conformable to the laws directing the practice in the district courts of the state, without saying in what causes, whether of one description or another. It is submitted, however, that the act is most reasonably interpreted, in being held to give effect to the law of Louisiana, in cases to which it applies, and not in cases to which it does not apply. If the argument stated in the preceding paragraph is carried out, it will extend to this: that the law directing the practice in suits between ordinary parties in the state courts, is to govern in causes of admiralty and maritime jurisdiction in the United States courts—for these are certainly civil causes, and come as fully within the letter as suits in equity. It will extend even to this: that the state law directing the modes of proceeding in criminal causes, is to govern in the United States courts in civil causes—which is, of course, too extravagant to be maintained. But where is the line to be drawn, if it has not been truly drawn in the preceding remarks by the counsel for the appellee? The conformity which the act of
*650] 1824 intended to produce, is the conformity between corresponding or similar causes, and not between causes *having no correspond-

ence or similarity; and it refers to the law, and not to the practice of the state courts, for this very reason. If the reference had been to the practice of the state courts, in civil causes, and not to the law, it might be considered that the practice was rigorously adopted, however incongruous, and whether applicable or not; but when the reference is to the law directing the practice, then the reason, spirit, intention, scope and application of the law, altogether, form a part of it; and if it means to give no direction in regard to suits of a certain description, it is as to them as if it were no law.

The result of these remarks may be briefly stated as follows: the act of 1824 intended that the practice in the United States courts should follow the direction of the law of Louisiana regulating the practice of the state courts. That law does contain a direction in regard to suits at law, and to this direction, suits at law in the United States court must conform, subject to the power of modification in the judge. It does not contain a direction in regard to suits in equity; and therefore, such suits are to follow the antecedent modes of procedure authorized by former acts of congress. The rules of proceeding in the state court, however clearly the counsel for the appellee may have shown, that "they are fully adapted to a court of equity," are not the practice of the courts of the United States, because no law of congress has enacted that they shall be. It is not enough, to show that the state practice is adapted to a court of equity, it must also be shown that it has been adopted for equity suits in the United States court, by an act of congress.

On this point, however, of adaptation of the state mode of procedure to suits in equity, the counsel for the appellant will make a few remarks. That, by modifications, it may become adapted to such suits, need not be controverted; for the basis of the state procedure being petition and answer, if the power of modification is unbounded, it may, of course, be modified to the very point of adaptation. The act of 1824, indeed, authorizes the very end or result, by enacting, that the judge may make such rules and provisions as may be necessary to adapt the state laws of procedure to the organization of the federal court; and where the counsel for the appellee find a reason for their strenuous claim to the benefit of the state practice, *in preference to what they style the chancery practice of England, when [*651 the power of modification under the act of 1824 is large enough to produce a perfect similitude of the two, it is difficult to perceive.

That the practice of the state courts is not adapted, at present, to suits in equity, has not, it is believed, been shown, nor can it be. It must be useless, to point out all, or, indeed, any of the differences which exist between the two modes of procedure; the statement of a general principle will be sufficient to show it, and that is, that the remedies in equity result from the principles of equity, and that they must be sought, obtained and used in conformity to those principles. A mode of procedure which does not acknowledge the distinction, cannot give the remedies which depend upon the distinction. It may, without doubt, be made to give them, by modifications; but to say this, is to say, that in their present state, they cannot give them. Whether the act of congress might not safely have extended this mode of procedure to suits in equity alone, with a power of modification, is, however, not the question; for it may, perhaps, safely extend any mode of procedure, with the same modifying power; but it is, whether they have

extended it by the act of 1824; and that they have not, has, it is hoped, been already shown.

There is one remark, which it is deemed proper to make, in regard to proceedings in equity suits in the courts of the United States. The distinction between law and equity exists in the constitution, as well as in the organization of the federal courts. It cannot be lawful to confound it. Rights of the highest nature depend upon it. If the case is an equity case, its modes of proof and trial, as well as its decrees, are of one kind; if at law, they are of another. A plaintiff cannot submit the trial of facts, in a case at law, to the court; nor can the facts, in such a case, when tried by a jury, be reviewed by the court. These are great constitutional provisions, and they cannot be secured, without maintaining the distinction between suits at law and suits in equity; or without maintaining equity pleadings, which are essential to give effect to the distinction. The pleadings must show a case in equity, and not a case at law; they must be such as to enable the court to form the issue, and also to decide it; such also as to give
*652] the parties the benefit of *a review in the supreme court: the pleadings, the proofs and the decree, must all be so framed, as to show what is asked, what is the party's right to it in equity; what is granted, and that what is granted is within the competency of a court of equity; and that a code of procedure for cases at law will answer fully these ends, is not admitted, and has not been shown. That the principles of equity can be so applied in Louisiana as to give an effect to contracts and transactions in violation of the laws of the state, is a position that it was not expected to find in the argument for the appellees, manifesting so strong a regard for the legislature of that state. Those principles are of universal obligation, from their conformity to justice and conscience between the parties, and to the will of the legislature, which can never be presumed to authorize what is contrary to either; and therefore, can never be applied, except to promote probity and fair-dealing among men, and to aid the laws of the land in advancing both.

Thompson, Justice, delivered the opinion of the court.—The appellant, Edward Livingston, filed his bill of complaint in the district court of the United States for the eastern district of Louisiana, against the appellee, Benjamin Story, to set aside a conveyance made by him, of certain lots of land in the city of New Orleans, and to be restored to the possession of said lots; alleging that the deed was given on a contract for the loan of money. Although in the form of a sale, it was in reality a pledge for the repayment of the money loaned, and calling for an account of the rents and profits of the property. To this bill, the defendant demurred; and the court sustained the demurrer and dismissed the complainant's bill, and the cause comes into this court on appeal.

It will be enough for the purpose of disposing of the questions which have been made in this case, to state only some of the leading facts which are set forth and stated in the bill. The bill alleges, that on or about the 25th of July 1832, the defendant and John A. Fort loaned to him, the complainant, the sum of $22,936, to secure the payment of which, with
*653] interest at the rate of eighteen per cent. per annum, he conveyed to them at lot of ground in New Orleans, with the *buildings and im-

provements thereon. That a counter-letter or instrument was, at the same time, executed by the other parties, by which they stipulated to reconvey the property, on certain conditions. That the lot was covered with fifteen stores, in an unfinished state, and the object of the loan was to complete them. The property is stated to have been worth at that time $60,000, and is now worth double that sum. That the complainant, soon after the said transaction, left New Orleans, where he then resided, on a visit to the state of New York, expecting that, during his absence, some of the stores would have been finished, or in a state to let. That on his return, he found that Story and Fort had paid $8000 to a contractor, who had failed to finish the buildings, the rent of each of the three smallest of which would be the interest of $10,000 a year, when finished. A further time was requested for the payment of the money, which Story and Fort would not agree to, but upon condition that the property should be advertised for sale on a certain day named; that the sum due should be increased from $25,000 to $27,000, which sum was made up by adding to the $25,000 the following sums; $1500 for interest for the delay of four months, at eighteen per cent.; $800 for auctioneer's commissions; $50 for advertising, and $200 arbitrarily added, without any designation; and that he, the complainant, should annul the counter-letter given to him by Story and Fort. That the complainant, being entirely at the mercy of the said Story and Fort, consented to these terms, in hopes of being able to relieve himself before the day fixed for the sale of his property; but being disappointed, he was on that day, in order to obtain a delay of sixty days, forced to consent to sign a paper, by which it was agreed that the debt should be augmented to the sum of $27,830, and that if the same was not paid at the expiration of the sixty days, the property should belong to the said Fort and Story, without any sale. The bill contains some other allegations of hardship and oppression, and alleges, that the rents and profits of the property, received by Fort and Story, in the lifetime of Fort, and by Story, since the death of Fort, amounts, at least, to $60,000. The bill then prays that the said Benjamin Story may be cited to appear to the bill of complaint, and answer the interrogatories therein propounded.

*The defendant in the court below, demurs to the whole bill, and for cause shows, that the complainant has not by his said bill made [*654 such a case as entitles him, in a court of equity, in this state, to any discovery from this defendant, touching the matters contained in this bill, nor any or either of such matters; nor entitled the said complainant to any relief in this court, touching any of the matters therein complained of. The want of proper parties is also assigned for cause of demurrer. The court below did not notice the want of parties, but sustained the demurrer, on the other causes assigned.

The argument addressed to this court has been confined principally to the general question, whether the district court of the United States, in Louisiana, has equity powers; and, if so, what are the modes of proceeding in the exercise of such powers. The great earnestness with which this power has been denied, at the bar, to the district court, may make it proper briefly to state the origin of the district court of that state, and the jurisdiction conferred upon it by the laws of United States. When the constitution was adopted, and the courts of the Union organized, and their jurisdiction distributed, Louisiana formed no part of this Union. It is not rea-

sonable, therefore, to conclude, that any phraseology has been adopted, with a view to the peculiar local system of laws in that state. She was admitted into the Union, in the year 1812 ; and by the act of congress, passed for that purpose (2 U. S. Stat. 701), it is declared, that there shall be established a district court, to consist of one judge, to be called the district judge, who shall, in all things, have and exercise the same jurisdiction and powers, which, by the act, the title whereof is in this section recited, were given to the district judge of the territory of Orleans. By the act here referred to for the jurisdiction and powers of the court (2 U. S. Stat. 285), a district court is established, to consist of one judge ; and it declares, that he shall, in all things, have and exercise the same jurisdiction and powers which are by law given to, or may be exercised by, the judge of the Kentucky district. And by the judiciary act of 1789 (1 U. S. Stat. 77), it is declared, that the district court in Kentucky shall, besides the jurisdiction given to other district
*655] courts, have jurisdiction of all other causes, except of appeals *and writs of error, hereinafter made cognisable in a circuit court, and shall proceed therein in the same manner as a circuit court. And such manner of proceeding is pointed out by the process act of 1792 (1 U. S. Stat. 276), which declares, that the modes of proceeding, in suits of common law, shall be the same as are now used in the said courts, respectively, in pursuance of the act entitled, "an act to regulate process in the courts of the United States," viz., the same as are now used and allowed in the supreme courts of the respective states (1 U. S. Stat. 93), and in suits of equity, and those of admiralty and maritime jurisdiction, according to the principles, rules and usages which belong to courts of equity and courts of admiralty, respectively, as contradistinguished from courts of common law ; subject to such alteration by the courts as may be thought expedient, &c.

From this view of the acts of congress, it will be seen, that prior to the act of 1824, which will be noticed hereafter, Louisiana, when she came into the Union, had organized therein a district court of the United States, having the same jurisdiction, except as to appeals and writs of error, as the circuit courts of the United States, in the other states. And that in the modes of proceeding, that court was required to proceed according to the principles, rules and usages which belong to courts of equity, as contradistinguished from courts of common law. And whether there were or not, in the several states, courts of equity proceeding according to such principles and usages, made no difference, according to the construction uniformly adopted by this court.

In the case of *Robinson* v. *Campbell*, 3 Wheat. 222, it is said, that in some states in the Union, no court of chancery exists, to administer equitable relief. In some of the states, courts of law recognise and enforce, in suits at law, all equitable claims and rights which a court of equity would recognise and enforce ; and in others, all relief is denied, and such equitable claims and rights are to considered as mere nullities at law ; and a construction, therefore, that would adopt the state practice in all its extent, would at once extinguish in such states the exercise of equitable jurisdiction. That the acts of congress have distinguished between remedies at common law and in equity, and that to effectuate the purposes of the
*656] *legislature, the remedies in the courts of the United States are to be at common law or in equity, not according to practice of the state

courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of those principles. So also, in the case of the *United States* v. *Howland*, 4 Wheat. 114, the bill was filed on the equity side of the circuit court of the United States, in Massachusetts, in which state there was no court of chancery; and in answer to this objection, the court say, "as the courts of the Union have a chancery jurisdiction in every state, and the judiciary act confers the same chancery powers on all, and gives the same rule of decision, its jurisdiction in Massachusetts must be the same as in other states."

That congress has the power to establish circuit and district courts in any and all the states, and confer on them equitable jurisdiction, in cases coming within the constitution, cannot admit of a doubt. It falls within the express words of the constitution. "The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the congress may, from time to time, ordain and establish." Art. 3. And that the power to ordain and establish, carries with it the power to prescribe and regulate the modes of proceeding in such courts, admits of as little doubt. And, indeed, upon no other ground can the appellee, in this case, claim the benefit of the act of 1824. (4 U. S. Stat. 62.) The very title of that act is, to regulate the mode of practice in the courts of the United States, in the district of Louisiana; and it professes no more than to regulate the practice. It declares, that the mode of proceeding in civil causes, in the courts of the United States, that now are, or hereafter may be, established, in the state of Louisiana, shall be conformable to the laws directing the mode of proceeding in the district courts of said state. And power is given to the judge of the United States court, to make, by rule, such provisions as are necessary to adapt the laws of procedure in the state court, to the organization of the courts of the United States; so as to avoid any discrepancy, if any such should exist, between such state laws and the laws of the United States. The descriptive terms here used, civil actions, are broad enough to embrace cases at *law and in equity; and may very fairly be construed, as used in contradistinction to criminal causes. There are no restrictive or explanatory words employed, limiting the terms to actions at law. They apply equally to cases in equity; and if there are any laws in Louisiana, directing the mode of procedure in equity causes, they are adopted by the act of 1824, and will govern the practice in the courts of the United States. But the question arises, what is to be done, if there are no equity state courts, nor any laws regulating the practice in equity causes. This question would seem to be answered by the cases already referred to, of *Robinson* v. *Campbell*, and the *United States* v. *Howland*. And also by the case of *Parsons* v. *Bedford*, 3 Pet. 444. In the latter case, the court say, "that the course of proceeding, under the state law of Louisiana, could not, of itself, have any intrinsic force or obligation in the courts of the United States organized in that state, except so far as the act of 1824 adopted the state practice; that no absolute repeal was intended, of the antecedent modes of proceeding authorized in the courts of the United States, under the former acts of congress."

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If, then, as has been asserted at the bar, there are no equitable claims or rights recognised in that state, nor any courts of equity, nor state laws

regulating the practice in equity causes, the law of 1824 does not apply to the case now before this court; and the district court was bound to adopt the antecedent mode of proceeding, authorized under the former acts of congress: otherwise, as is said in the case of *Robinson* v. *Campbell*, the exercise of equitable jurisdiction would be extinguished in that state; because no equitable claims or rights which a court of equity would enforce, are there recognised. And there being no court of equity in that state, does not prevent the exercise of equity jurisdiction in the courts of the United States, according to the doctrine of this court in the case of the *United States* v. *Howland*, which arose in the state of Massachusetts, where there are no equity state courts. We have not been referred to any state law of Louisiana, establishing any state practice in equity cases; nor to any rules adopted by the district judge in relation to such practice; and we have some reason to conclude, that no such rules exist. For, in a record now before *us, from that court, in the case of *Sebastian Hiriart* v. *Jean Gassies Ballon* (*ante*, p. 156), we find a set of rules, purporting to have been adopted by the court on the 14th of December 1829, with the following caption: "General rules for the government of the United States court in the eastern district of Louisiana, in civil causes or suits at law, as contradistinguished from admiralty and equity causes, and criminal prosecutions; made in pursuance of the 17th section of the judiciary act of 1789, and of the first section of the act of congress of the 26th of May 1824, entitled, 'an act to regulate the mode of practice in the courts of the United States for the district of Louisiana.'" And all other rules are annulled; and these rules relate to suits at law and in admiralty only, and not to suits in equity. From which it is reasonable to infer, that the district judge did not consider the act of 1824 as extending to suits in equity; and if so, it is very certain, that the demurrer ought to have been overruled. For, according to the ordinary mode of proceeding in courts of equity, the matters stated in the bill are abundantly sufficient to entitle the complainant, both to a discovery and relief; and by the demurrer, everything well set forth, and which was necessary to support the demand in the bill, must be taken to be true. 1 Ves. sen. 426; 1 Ves. jr. 289. And if any part of the bill is good, and entitles the complainant, either to relief or discovery, a demurrer to the whole bill cannot be sustained. It is an established and universal rule of pleading in chancery, that the defendant may meet a complainant's bill by several modes of defence. He may demur, answer and plead to different parts of a bill. So that if a bill for discovery and relief contains proper matter for the one, and not for the other, the defendant should answer the proper, and demur to the improper matter. But if he demurs to the whole bill, the demurrer must be overruled. 5 Johns. Ch. 186; 1 Johns. Cas. 433.

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But if we test this bill by any law of Louisiana which has been shown at the bar, or that has fallen under our observation, the demurrer cannot be sustained. The objection founded on the alleged want of proper parties, because the heir and *residuary legatee of John A. Fort is not made a party, is not well founded. The bill states, that in the year 1828, after the death of Fort, the defendant, Benjamin Story, took the whole of the property, by some arrangement with the heirs of Fort; and that he ever since has been, and is now, in the whole possession thereof, and has

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received the rents and profits of the same. This fact the demurrer admits; whereby, Benjamin Story became the sole party in interest.

The causes of demurrer assigned, are general; that the complainant has not, by his bill, made such a case as entitles him, in a court of equity in that state, either to a discovery or relief. In the argument at the bar, there has been no attempt to point out in what respect the bill is defective, either in form or substance, as to the discovery, if it is to be governed by the ordinary rules of pleading in a court of chancery. And if the objection rests upon the want of the right in the complainant to call upon the defendant for any discovery at all, the objection is not sustained even by the laws of Louisiana. But on the contrary, it is expressly provided by a law of that state, that when any plaintiff shall wish to obtain a discovery from the defendant, on oath, such plaintiff may insert in his petition, pertinent interrogatories, and may call upon the defendant to answer them on oath; and that the defendant shall distinctly answer to such interrogatories, provided they do not tend to charge him with any crime or offence against any penal law; neither of which has been pretended in this case. 2 Mart. Dig. 158.

Nor has it been attempted to point out in what respect the bill of complaint is defective, either in form or substance, as to the matters of relief prayed. In this respect also, the bill, according to the ordinary course of proceeding in a court of chancery, is unobjectionable; and indeed, would be amply sufficient in the state courts, under the law of Louisiana, which declares, that all suits in the supreme court shall be commenced by petition, addressed to the court, which shall state the names of the parties, their places of residence, and the cause of action with the necessary circumstances of places and dates; and shall conclude with a prayer for relief adapted to the circumstances of the case. 2 Mart. Dig. 148. These are the *essential requisites in an ordinary bill in chancery. It can certainly not be pretended, that it is any objection, in the case before [*660 us, that the bill filed is called a bill of complaint, instead of a petition.

The sufficiency of the objections, therefore, must turn upon the general question, whether the district court of Louisiana has, by the constitution and laws of the United States, the same equity powers, as a circuit court of the United States has, in the other states of the Union; and we think it has been already shown that it has; but that, according to the provisions of the act of 1824, the mode of proceeding in the exercise of such powers, must be conformable to the laws directing the mode of practice in the district courts of that state, if any such exist; and according to such rules as may be established by the judge of the district court, under the authority of the act of 1824. And if no such laws and rules applicable to the case exist in the state of Louisiana, then such equity powers must be exercised according to the principles, rules and usages of the circuit courts of the United States, as regulated and prescribed for the circuit courts in the other states of the Union. The decree of the district court must, accordingly, be reversed; and the cause sent back for further proceedings.

McLean, Justice.—The inferior courts of the United States can only exercise jurisdiction under the laws of congress; and a general law giving equity jurisdiction will apply as well to the courts of the United States in

Louisiana, as in any other state in the Union. The same may be said as to a general law regulating the exercise of a common-law jurisdiction.

But as it regards the courts of the United States in Louisiana, congress have made an exception from the general law, by the act of 1824. This act provides, "that the mode of proceeding in civil causes in the courts of the United States, that now are, or hereafter may be, established in the state of Louisiana, shall be conformable to the laws directing the mode of practice in the district court of the said state: provided, that the judge of any such court of the United States may alter the times limited or allowed for differ-
*661] ent proceedings in the state *courts, and make, by rule, such other provisions as may be necessary to adapt the said laws of procedure to the organization of such court of the United States; and to avoid any discrepancy, if any such should exist, between such state laws and the laws of the United States." The proceedings in the state courts of Louisiana are conformable to the civil law; and the same course of proceeding under the above law, has been adopted in the district court of the United States in that state; and by the judgment of this court, this course of practice has been sustained.

The above act applies to all civil causes, and, of course, embraces all causes both at common law and in chancery; and its provisions apply as forcibly to an equitable jurisdiction, as to one exercised in accordance with the rules of the common law. The peculiar mode of procedure under the Louisiana practice, preserves, substantially, the same forms in affording a remedy in all cases. And whether the ground of action be in the principles of the common law, or in the exercise of an equitable jurisdiction, by this mode of proceeding an adequate remedy is given.

In "an act further to regulate process in the courts of the United States," passed in 1828, and which provides for "proceedings in equity, according to the principles, rules and usages which belong to courts of equity," &c., it is declared, that its provisions shall not be extended to any court of the United States in Louisiana. No stronger legislative provision could have been adopted to show that congress did not consider that the "principles, rules and usages which belong to courts of equity," were in force in that state. And this view was, in my opinion, correct, as the law of 1824 had made the federal court practice in Louisiana an exception to the general law on the subject. If the principles, rules and usages, which belong to courts of equity, are to be regarded in the district court of Louisiana, the same principle must adopt, in the same court, the rules and usages which belong to courts of common law. But the latter have been abrogated by the act of 1824, agreeable to the decision of this court; and it appears to me, this decision must equally apply to the former. If the act of 1824
*662] be *regarded, it must regulate the mode of proceeding in all civil causes, as contradistinguished from criminal ones.

This cause came on to be heard, on the transcript of the record from the district court of the United States for the eastern district of Louisiana, and was argued by counsel: On consideration whereof, it is ordered and decreed by this court, that the decree of the said district 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 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.[1]

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*Elisha Winn and others, Plaintiffs in error, *v.* William Patterson. [*663

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, and the land in controversy was in Franklin county): *Held*, that this is not the case of [*664 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.[2]

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

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[1] For further proceedings in this case, see 11 Pet. 351; 12 Id. 339; and 13 Id. 359.

[2] 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.* Tingey, 2 Cr. C. C. 128; Lemon *v.* Bacon, 4 Id. 466; Kerns *v.* Swope, 2 Watts 75.

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.

*665] The defendant objected to the evidence, and *the court overruled 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

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

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.

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. [*669

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 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. [*670

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,

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.

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,

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 copy before the court), *had been compared with the record of the original made by himself in Richmond county, and is a true copy. *674]

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 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 *675]

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 *primâ facie* proof of the genuineness and due execution of the original power, to be left to the jury, for their consideration of its weight and effect. [*676

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

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 cus-
*677] tody of the clerk, under a *subpœna* *duces tecum*, the original records 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

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 *bonâ 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

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 prop- *681] osition were true, then a grant *of 10,000 acres, which was void for 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-

inal grantee, or a *boná 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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*The Burdett. [*682

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.[1] [*683

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

The Burdett.

APPEAL from the Circuit Court of Maryland. The case is fully stated in the opinion of the court.

Butler, Attorney-General, and *Williams*, District-Attorney of the United States for the district of Maryland, for the appellants; *Meredith* and *Kennedy*, for the claimant of the brig Burdett.

McLEAN, Justice, delivered the opinion of the court.—This case was brought into this court, by an appeal from the circuit court of Maryland. The appellants, by the attorney of the United States, filed in the district court of Maryland, an information, on the 1st of October 1832, for the purpose of enforcing a forfeiture of the brig Burdett, her tackle, apparel and furniture, to the use of the United States, on the ground, that the brig, though registered as a vessel of the United States, was then, and still is, owned, in whole or in part, by a subject of a foreign prince, viz., by a certain J. J. Carrera, or a certain J. Carrera, a subject of the king of Spain, and resident abroad; which ownership was known to the persons owning or pretending to own the whole or a part of the brig, in violation of the act of congress, &c.

The vessel having been attached, a claim was filed by George G. Steever, in which he alleged, that the brig was originally built in the state of North Carolina, and purchased by him of the original owner, in May 1831, and thereupon registered in his name, as sole owner, he being a citizen of the United States; and denied, that the brig was, at the time she was registered, or at any time since, owned, in whole or in part, by Carrera, or by any other subject of any foreign prince or state. The claimant also averred, that at the time of obtaining her registry, the vessel was, and ever since
*684] had been, his sole property. *The vessel having been appraised at $6000, and security having been given by the claimant to abide by the final order of the court, she was restored to him.

On the hearing of the cause, the testimony and depositions of several witnesses were introduced, and much documentary evidence offered on the part of the United States. Several letters, proved to be in the handwriting of J. J. Carrera, were offered in evidence on the part of the United States, to the reading of which the counsel for the claimant objected, on the ground that Carrera was not a party to the case, which objection was sustained by the court. The district court dismissed the information, and that decree, on appeal, was affirmed by the circuit court.

In the argument, the counsel for the appellants take two grounds, on which they contend the decree of the circuit court should be reversed. 1. That the letters of Carrera were improperly rejected. He was shown by all the witnesses to be the accredited agent of the claimant, and his letters were, moreover, a material part of the *res gestæ*. 2. The evidence shows that the chief, if not the sole ownership of the brig, was in Carrera.

Much reliance is placed on the testimony of Chester and Cox, two of the witnesses, to establish not only the agency of Carrera, but other matters material in the case. The former states, that he lived three years in the house of Joseph Carrera, preceding the last of June 1832. He was there during the whole of the operations of the Burdett, at Havana. He states, that Steever sent an order to Colonel Tenant, of Baltimore, to purchase for him a vessel, which was to be sent to him at Havana, and if he was absent,

to the house of Carrera, in which the witness was a partner to a limited extent. In obedience to this order, the Burdett was sent, consigned to the house of Carrera, in the absence of Steever, who had left the Havana, a few days before the arrival of the vessel, under the command of Captain Nabb. He frequently conversed with Joseph Carrera, and his nephew, J. J. Carrera, respecting the Burdett, and never heard either of them assert any ownership or interest in the vessel. Carrera was made the ship's husband, and had positive orders from Steever, in his absence, to do with her as *if she were his own, and to employ her on freight to the best advantage. When Steever was near enough to communicate, he [*685 gave positive and specific orders. Witness has often seen his letters on the subject. The vessel performed several voyages under the orders of Carrera; and after her return from New York, having been on shore once or twice, some repairs were made under the direction of Captain Nabb, which Carrera was apprehensive might not be sanctioned by Steever. The witness thinks about $11,500, at six and eight months credit, were paid for the vessel.

Richard G. Cox states, that he is a clerk of Colonel Tenant's, and conducts all his business; and that the Burdett was purchased by Colonel Tenant, on the order of Steever, who was then at the Havana, and the vessel was sent there, subject to this order, and in his absence, to Carrera. Before the arrival of the vessel, Steever had sailed for Boston, and when he returned, being informed of the purchase, he paid Colonel Tenant $11,000, in part of the purchase-money. The vessel, including equipments, cost about $13,000. The rest of the purchase-money was paid by the house of Joseph Carrera. The witness has had correspondence with Carrera, respecting the vessel, and has insured her by orders from Carrera, on account of Steever. He has seen the correspondence with the house of Carrera, and has never heard or seen anything which goes to show that the Carreras had any interest in the vessel, or that Steever was not the owner.

William W. Russel, a merchant of the city of New York, states, that he was consignee of the brig Burdett, in December 1831, at which time Nabb was master. The vessel came from Havana and Matanzas, under orders from Joseph Carrera, with whom the witness corresponded respecting said vessel. The witness understood from the letter of the 15th of November 1831, brought by her to him, that she was owned by G. G. Steever, of Baltimore. Witness accounted with Joseph Carrera for the freight of the brig, but he has no knowledge that Carrera has any interest in her.

In a letter from Joseph Carrera to Russel, the above consignee, dated the 15th of November 1831, he says, "I have requested Captain Nabb to value on your good self, on his arrival; *and I beg leave to solicit your attention in procuring a good return freight to Havana for that vessel, [*686 as well as passengers, &c. And on reference to Mr. Steever's instructions, who, I presume, will have left Baltimore for Mexico, Captain Nabb is authorized to take a voyage to Europe, &c. Of a voyage to Europe, Mr. Steever's instructions are constructive, as regards the benefit to be derived from it. Whatever may be the destination of the Burdett from your port, I beg to request that you will advise Colonel Tenant, in the absence of Mr. Steever, to have insurance effected on the brig." And again, "my control over this vessel is limited to give her employment, and to address her to my friends,

wherever she may be found ; but where the owner can himself attend to her concerns, if he be so disposed, I shall feel obliged to you by tranferring her to him."

Another letter, signed by both the Carreras, dated Havana, the 11th of January 1832, to Mr. Russel, says, "I much regret that the prospect of procuring a full freight for this vessel, for this port, was not encouraging, &c. I rely, however, on your friendly exertions to give her the best employment," &c. And in another letter, dated the 24th of January 1832, to Mr. Russel, it is stated, "I have the pleasure of handing duplicates of my respects of the 11th current, and to own receipt of your regarded favor of the 27th and 30th ultimo, and 11th instant ; this last advising, that you intended to despatch the Burdett for this port, &c. I feel confident you have used your utmost exertion in giving to this vessel the best employment," &c. And in a letter from the same person to the same, dated the 8th of February 1832 : "The Burdett arrived on the 30th, in eleven days' passage. All the accounts relating to her will be examined and booked in conformity. I have not, as yet, determined on the direction to give the Burdett."

Mr. Russel wrote to Joseph Carrera, dated New York, December 31st 1831, "I acknowledge the receipt of your esteemed favor of the 12th ultimo, handed me by Captain Nabb of the Burdett, which vessel arrived on the 12th, after having been off the coast for seven days, and suffering some slight injury in her upper works. The extent of the damage will, I presume, however, not amount to a claim on the underwriters ; but should it prove otherwise, the necessary documents will *be forwarded to Colonel Tenant, in order that he may claim them." "I have to return you my thanks for the favor done me in the consignment of this vessel, which, however, will be promptly surrendered to Mr. Steever, should he be in this country, and be desirous of giving his personal attention to her concerns," &c. Another letter, dated New York, 27th December 1831, from the same to the same, states exertions used to procure a full freight for the Burdett. And there is contained in the record several other letters from Mr. Russel to J. Carrera, dated at New York, in January 1832, all of which relate to the freight of the Burdett.

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Certain letters from J. J. Carrera to Captain Nabb, numbered in the record, 1, 2, 3 and 4, were offered in evidence by the district-attorney, and were objected to by the claimant. The letter numbered 1, is dated at Havana, November 15th, 1831, and contains particular instructions to Captain Nabb, as to the voyage of the Burdett, the consignee in New York, and the subsequent employment of the vessel, after the discharge of her cargo. The letter numbered 2, and dated Havana, 26th November 1831, is of the same import.

Letter numbered 3, is dated Havana, 12th May 1832, in which Carrera says, "Your letters of the 13th and 23d April last have been received, and am sorry to hear of the damage the Burdett has experienced, in a tremendous gale of wind, near the Bermudas. The certificate of survey, as well as the estimate of repairs to be made on the Burdett, has been received ; the amount of repairs is enormous, but we must conform to it, if there should be no other remedy. No doubt the underwriters will have to reimburse the amount. I wrote to Colonel Tenant, a few days ago, authorizing him to arrange the business of the Burdett as well as he can, and for the best

of my interest. I entreat you to consult him on the business, and do for the best. The expenses and repairs are heavy, and surpass my expectations. Mr. Tenant has been authorized by me to pay the amount required to fit out the vessel; but if he thinks best to sell my four hundred boxes of sugar, he is at liberty to do so, for they are insured at Baltimore."

*In letter numbered 4, and dated at Havana, 28th June 1832, Mr. Carrera says, "I am in receipt of your valued favors of the 1st, 11th and 21st May last, by which you inform me of the last survey held on the brig Burdett, and that she was condemned, and to be sold at public auction; but, at the request of our friend, Colonel Tenant, the sale of the said vessel was postponed, and that the said Tenant had sent two gentlemen in order to have a private survey, &c. I am informed, that the Burdett's cargo for Hamburg had been shipped on board the brig John; this vessel having been chartered by yourself, with the approbation of Mr. Tenant, and that she was to sail, &c. By this time, I presume, you have seen Mr. Steever, and hope this friend will have succeeded in his claim against the underwriters for a partial or a total loss on said vessel. I beg of you to do all in your power, that we may be able to collect what is so justly due to the interested in that vessel." [*688

And the district-attorney offered to read other letters from Carrera to Captain Nabb, numbered on the record 5 and 6, if the claimant would withdraw his objections to the above letters being read as evidence; but the objections were not withdrawn, and the same was sustained by the court.

The first question for the consideration of the court is, whether the above letters were properly rejected by the court below. It is objected, that these letters contain but a part of the corespondence on the same subject and that the non-production of the whole is unaccounted for. The letters referred to were addressed by Carrera to Captain Nabb, and it may be, that some of the letters written by him, and also by Carrera, in relation to the same matter, are not produced. As this correspondence is not in the possession of the plaintiffs, it is impossible for the district-attorney to produce it.

If Carrera were to be treated as a mere agent, he might have been examined as a witness, and compelled to produce or swear to any letters in his possession, which have a bearing on the ownership of the vessel. But the forfeiture is attempted to be enforced, on the ground, that this same person is the owner of the vessel, in whole or in part. In this view, he would be required to swear in a matter *which concerns his own interest; as his oath, if received, would go directly to establish or to refute the important point of ownership of the vessel. It was for this reason, it is presumable, that Carrera was not examined as a witness. So far as the proof of acts done within the scope of his agency may be essential, it may be made by other evidence than his own oath. The proof of Carrera's agency, in reference to the Burdett, is clear; and to consider him in this light, is the most favorable view for the claimant which can be taken of the case. Carrera must have acted as agent, or as principal, in regard to this vessel. He planned her voyages, gave directions as to her freight, appointed consignees, and paid for the repairs of the vessel. That he did these things, as the agent of the claimant, is the only ground on which his right can be sustained; for if Carrera acted in any other capacity, it must [*689

be fatal to the claim of Steever. Under the circumstances of the case, it does not seem, that the objection, on the ground that all the correspondence was not produced, should have been sustained by the court. If the letters offered contained facts which were competent evidence in the case, the principal could not object; because the correspondence referred to, was either in his possession, or the possession of his agent.

But it is insisted, if the whole of the correspondence were produced, it would be inadmissible, because Carrera is no party in the case. 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.

But it is not material to decide the point raised on the objection of these letters. They may be considered as a part of the record, and as presenting all the facts which they contain, in connection with the other facts in the case, for the consideration of the court. And if on this broad view of the merits, the *prosecution shall not be sustained, it will become wholly unnecessary to determine any question as to the admissibility of evidence.

*690]

The object of the prosecution against the Burdett is to enforce a forfeiture of the vessel, and all that pertains to it, for a violation of a revenue law. This prosecution then is a highly penal one, and the penalty should not be inflicted, unless the infractions of the law shall be established beyond reasonable doubt. That frauds are frequently practised under the revenue laws, 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. A view of the evidence in this case, including the rejected letters, must create a suspicion of fraud in the mind of every one who reads it with attention. Steever went to the Havana, as supercargo of a vessel owned by Colonel Tenant. His means were limited. While at the Havana, he wrote to Colonel Tenant to purchase for him a vessel; and the Burdett was purchased, and sailed for Havana, with a letter to Steever, which, in his absence, was to be opened by Carrera; Steever being absent, the letter was opened by Carrera; who, from that time to the commencement of this prosecution, gave all necessary directions respecting the Burdett; with, as it would seem from the evidence, little or no interference by Steever. And in addition to this, with the exception of $1100, it appears, the Burdett was paid for by the house of Carrera. These facts, and others which are on the record, do authorize a suspicion that the vessel was purchased in the name of Steever, for the benefit of Carrera. And we think, that the proceeding instituted by the district-attorney, in this case, was justified from the facts which have been developed.

But the inquiry now is, not whether the prosecution was properly instituted, but whether the evidence makes out a forfeiture, in such terms as

to require its enforcement by the court. Admitting the facts which have been stated, as creating suspicion, are they conclusive? It apppears, that the vessel was *purchased by the order of Steever, and that she was dispatched to the Havana, subject to his order. That he made the [*691 first payment of $1100, and that he constituted Carrera his agent, to control the vessel, in every respect, as if she were his own, in the absence of Steever. And that in many of the letters of Carrera, respecting the vessel, her destination, her freight, or her repairs, he referred to Steever, as her owner, and instructed the consignee and other agents to apply to Steever for direction, if he were in the United States. That in all these cases, Carrera professed to act in subordination to the instructions of his principal. The vessel was entered in the name of Steever, and she was insured as his property. And as to the instructions given by Carrera, and the payments of money by him, not only on the contract of purchase, but also for repairing the vessel; they are not at all inconsistent with the allegations of the claimant. If Carrera acted *bonâ fide* as the agent of Steever, he might be expected to give the instructions he did give, and, out of the profits of the vessel, make the payments which he did make.

It is said, that these professions of Carrera, as to his agency, &c., were made as a cover to the transaction. This, possibly, may have been his motive; but are not the facts consistent with an innocent motive? And if a fair construction of the acts and declarations of an individual do not convict him of an offence—if the facts may be all 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 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 the 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.

After a full and mature examination of all the facts in this case, whilst we admit the acts of the claimant are not clear of suspicion; we are forced to the conclusion, that the evidence does not authorize a forfeiture of the vessel. The decree of the circuit court is, therefore, affirmed.

Decree affirmed.

*Domingo Urtetiqui, Plaintiff in error, *v.* John N. D'Arcy, Henry Didier and Domingo D'Arbel, Defendants in error.

Citizenship.—Passport.

The plaintiffs instituted a suit in the circuit court of the United States for the district of Maryland, stating themselves to be citizens of the state of Maryland, and that the defendant was an alien, and a subject of the king of Spain; the defendant pleaded in abatement, that one of the plaintiffs, Domingo D'Arbel, was not a citizen of Maryland, nor of any of the United States, but was an alien, and a subject of the king of Spain; upon the trial of the issue joined on this plea, the plaintiffs produced and gave in evidence, under the decision of the circuit court, a passport granted by the secretary of state of the United States, stating D'Arbel to be a citizen of the United States: *Held*, that the passport was not legal evidence to establish the fact of the citizenship of the person in whose favor it was given.[1]

The defendant in the circuit court offered in evidence the record, duly certified, of the district court of the United States for the district of Louisiana, containing the proceedings in a suit which had been originally instituted against D'Arbel, in a state court of Louisiana, and on his affidavit that he was an alien, and a subject of the king of Spain, had been removed for trial to the district court, under the authority of the act of congress authorizing such a removal of a suit against an alien into a court of the United States; the record was introduced, as containing a copy of the affidavit of D'Arbel in the state court, upon which the case was removed: *Held*, that this was legal evidence.

Error to the Circuit Court of Maryland. The defendants in error instituted an action of *assumpsit* in the circuit court, and in the declaration, stated themselves to be citizens of Maryland, and that the defendant was a subject of the king of Spain. The declaration contained the common counts. The defendant below, Domingo Urtetiqui, pleaded the general issue, and also a plea in abatement, alleging that Domingo D'Arbel, one of the plaintiffs, was not, at the impetration of the writ, a citizen of the United States, or of any one of them. To this plea, there was a replication, and an issue thereon. On the trial of the cause, upon other issues joined, exceptions were
*693] taken to the ruling of the court; but as the cause was *decided in this court exclusively upon the questions raised on the plea in abatement, they are omitted in this report.

The exceptions taken by the defendants in the circuit court were the following: The plaintiff in the circuit court having offered evidence to prove that Domingo D'Arbel was an inhabitant of Louisiana, before and on the 30th of April 1803, and continued to be an inhabitant thereof, until the year 1818 or 1819—further to support the issue on their part, on the plea of abatement, and to prove the citizenship of D'Arbel, offered in evidence a passport granted by John Quincy Adams, then secretary of state, on the 22d March 1824, to the said D'Arbel, as a citizen of the United States. To the admissibility of this passport, as legal or competent evidence of the American citizenship of the said D'Arbel, the defendant below objected; but the court overruled the objection, and permitted the same to be read to the jury.

The defendant, to support his plea in abatement, and for the purpose of showing the admission of D'Arbel, under oath, that he was, on the 8th of May 1817, a subject of the king of Spain, offered in evidence a record of the

[1] A passport, containing a statement of a person's age, is not evidence thereof; for, though an official document, it is made up from his own declarations, or those of some other person on his behalf. Kobbe *v.* Price, 14 Hun 55

district court of the United States, for the eastern district of Louisiana, in a cause, wherein John K. West, curator of James Neil, was plaintiff, and Domingo D'Arbel was defendant, which had been removed, under and by virtue of the 12th section of the act of 1789, from the district court of the state of Louisiana, for the first judicial district, upon the petition of the said D'Arbel, supported by affidavit, that he was, on the 8th of May 1817, a subject of his most catholic majesty, the king of Spain. The record offered in evidence, set out the transcript or record from the state court, certified under seal by the deputy-clerk of said court, and also the proceedings in the district court of the United States thereupon, and the said record was certified in due form, as containing "a full, faithful and true copy of the transcript" from the state court, "and also of the proceedings which have taken place in said cause," in the district court of the United States. The defendant below also proposed to give in evidence, that the D'Arbel mentioned in the record was the same D'Arbel, one of the plaintiffs in this cause. The plaintiffs objected to the evidence so offered, and the *court refused [*694
to permit the record to be read in evidence, for the three following reasons: 1. It is *res inter alios acta*. 2. The transcript from the court of the state of Louisiana is certified by Stephen Pedesclaux, deputy-clerk, without any official seal. 3. The clerk of the district court of the United States certifies, that the foregoing nine pages (meaning the record) contain a full, faithful and true copy of the transcript from the first judicial district court of the state of Louisiana, in the case wherein John K. West, curator of the estate of James Neil, is plaintiff, and Domingo D'Arbel is defendant, &c. The certificate is in effect the copy of a copy.

The defendant below, to support his plea in abatement, also gave in evidence, by competent witnesses, that D'Arbel had declared himself to have been a native Frenchman, and born near the borders between France and Spain; whereupon, the plaintiffs prayed the court, that if the defendant offers no other evidence than what was then before the jury, in support of his plea in abatement, the plaintiffs were entitled to the verdict, if the jury believed the plaintiffs' evidence; which prayer the court granted.

The defendant excepted to the decisions of the court on the evidence offered by the plaintiffs, and to the ruling of the court on the prayers of the defendant; and the court sealed a bill of exceptions. A judgment having been entered on the verdict of the jury, in favor of the plaintiff, the defendant prosecuted this writ of error.

The case was argued by *Kennedy* and *Meredith*, for the plaintiff in error; and by *Johnson* and *Taney*, for the defendants.

For the *plaintiff* in error, it was contended, upon the first exception, that the passport granted by the secretary of state to M. D'Arbel, was not admissible evidence. Passports are not authorized by any act of congress, and even when they are used in foreign countries, they are, from the comity of nations in amity with each other, admitted as *primâ facie* evidence of what they purport. They do no more *than request that the person [*695
to whom the passport is given, may be permitted to pass freely, and that he may have all lawful aid and protection as a citizen of the United States. It is denied, that the passport was evidence, any more than a mere certificate of a claim by D'Arbel of citizenship. It may show an application

to the department of state; but the circuit court allowed it to be read as legal evidence of citizenship. It is not judicial evidence, as it was not given under any law. Protections are not *per se* evidence. 3 W. C. C. 529. Such a paper has never been admitted to prove the facts stated in it. Passports are issued in the department of state, on request; and not upon evidence to support the assertion of citizenship on which they are granted. But if such evidence were required and furnished, unless by some direction or authority of a statute, they would not be evidence of the fact of citizenship. It was not intended, that a passport should be judicial evidence, either here or abroad. It is a political document, addressed to foreign powers and foreign agents. Commanders of fleets and generals of armies grant them, and they pass for what they are worth. The practice of the department of state cannot change the law of evidence.

Upon the second exception, it was argued, that the record of the proceedings in the case in the district court of the United States, removed from the state court by D'Arbel, was legal evidence of the declaration made on oath by him, to obtain the removal of the cause. It was introduced only to show the oath taken by D'Arbel. This was his mere declaration, and as such could be proved by the paper itself, as a declaration could be proved by a person who heard it. It is his own act, and as the record is certified according to the act of congress, the contents of it were evidence. D'Arbel had filed the proceedings in the district court, from the state court, and he was the only person who could do so; and to obtain the consent of the court to receive them, he made the affidavit. It is not the proceedings in the state court which are evidence, but those in the United States court, which were there, upon the affidavit of D'Arbel, under *authority of
*696] the act of congress; and the proceedings of the state court became those of the district court. The removal of the proceedings in such a case to a court of the United States, from a state court, is like the removal of a case by *certiorari*, which takes up the whole record, and they become matter of record in the court to which they go. The term "process," in the act of congress, means all the proceedings. No new declaration is filed in the federal court, and the court may remand the case, if its removal has not been legal. Cited, 1 Wheat. 304, 345; 3 Story on the Constitution 608; Pet. C. C. 44; 1 Paine 410; 4 W. C. C. 286. The objection that the record was *res inter alios acta*, would apply to all declarations made under any circumstance. The record is not to affect the right of any one but D'Arbel, and to prove the fact of his alienage. Suppose, he had declared he was an alien, it would equally affect the rights of his copartners, and yet the right to prove such a declaration will not be denied.

As to the third exception, it was argued, that it took from the jury the consideration of all the evidence in the case, and directed the jury to consider the plaintiffs' evidence only. This was an interference with the province of the jury.

Johnson and *Taney*, for the defendants in error, contended, on the first exception, that the passport was proper evidence. Documents of this description are made evidence, by usage. The document is respected by foreign nations; it is granted by a high officer of the government, and it contains his official declaration of the fact stated in it, the citizenship of the

person named in it. The laws of nations recognise passports as evidence of the national character they assert. Acts of congress recognise passports. (1 U. S. Stat. 118 ; 2 Ibid. 205.) The last act imposes a penalty on consuls for granting passports to persons not entitled to them. The form, manner and evidence on which a passport shall be granted, are not regulated by any particular law, but the court will judicially take notice of the usage of the government to issue them. It is the universal usage of nations to grant them, and to respect them as protections, according to the law of nations.

*Upon the second exception, the counsel contended, that the record was not evidence in the case. Whether a cause shall be [*697 removed from a state to a federal court, depends on the state court, and the record of the action of the state court, presented as it was in this case, would not be evidence. No inquiry is made in the court of the United States, as to alienage, that is made in the state court; and the affidavit is only to satisfy the state court of the fact alleged. The affidavit and the petition form no part of the record, and do not properly go up to the district court. If this position is correct, the certificate and seal of the district court of Louisiana, however regular under the act of congress, were no proof of the affidavit. If such affidavit could be evidence, it should have been proved by the seal of the state court. As to the construction of the act of 1789 ; cited, 12 Johns. 153 ; 4 Hen. & Munf. 173 ; 3 Mason 457. If an affidavit is made to a plea in abatement in the circuit court, would it be evidence in another court? Certainly not. But when this affidavit was made, D'Arbel was in fact a citizen of the United States, by the operation of the cession of Louisiana, whatever may have been his opinion on the subject. He swore, in the affidavit, to a legal proposition, and he was in error as to his rights and relations to the United States.

But if the affidavit in the record is evidence against D'Arbel, the question here is, whether it shall be admitted to affect the other plaintiffs below. It will have the effect to drive them from their action in the circuit court ; and as this will be the consequence of its admission, this court will consider it to have been properly excluded in the circuit court.

Thompson, Justice, delivered the opinion of the court.—This case comes up on a writ of error from the circuit court of the Maryland district. It is an action of *assumpsit*. The declaration contains the common money counts, and also counts for goods sold and delivered, work, labor and services, and an *insimul computassent*. There is an averment in the declaration, that the plaintiffs are citizens of the state of Maryland, and the defendant an alien and subject of the king of Spain. The defendant pleaded the general issue, and also a plea in abatement, alleging that Domingo D'Arbel, one of the *plaintiffs, was not, at the commencement of the suit, a citizen of the [*698 United States, or any one of them ; to which there was a replication, and issue thereupon joined. And by an agreement contained in the record, all errors in pleading are waived on both sides ; and the cause comes here on five bills of exception taken at the trial ; three of which relate to matters arising under the plea in abatement, and the other two upon the merits.

The question arising upon the first exception, turns upon the admissibility in evidence of the passport given by the secretary of state, introduced to prove the citizenship of Domingo D'Arbel. The record states, that the plain-

tiffs, further to support the issue on their part, on the plea in abatement to the jurisdiction of this court filed in this cause, offered in evidence the following paper, purporting to be a passport from the secretary of state of the United States, and which was admitted to be an original paper from the department of state, signed by John Quincy Adams, then secretary of state of the United States; and having also offered evidence, that the several indorsements on said paper, were respectively in the handwriting of the several persons signing the same; and that the said persons were the respective officers of the government of Mexico, as they style themselves in the said indorsements, at the periods at which the same were made. It was also admitted, that at the date of the said passport, said D'Arbel was then in Mexico, and that the said passport was applied for, and obtained for him, at his instance, and by his request, by one of the co-plaintiffs, who transmitted the same to the said D'Arbel, into whose possession it came, and by whom it was used; the only proof of said use being the said indorsements so made thereon. The passport is as follows: "United States of America. To all to whom these presents shall come, greeting. I, the undersigned, secretary of state of the United States of America, hereby request all whom it may concern, to permit safely and freely to pass, Domingo D'Arbel, a citizen of the United States, and in case of need, to give him all lawful aid and protection. Given under my hand, and the impression of the seal of the department of state, at the city of Washington, the 22d day of March 1824, in the forty-eighth year of the independence of these United States. JOHN QUINCY ADAMS."

*699] *To the admissibility of which paper in evidence, the defendant by his counsel, objected; the same not being legal or competent evidence of the American citizenship of said D'Arbel. But the court were of opinion, and so decided, that the said paper was legal and competent evidence of said citizenship, and the same was admitted. There is some diversity of opinion on the bench, with respect to the admissibility in evidence of this passport, arising, in some measure, from the circumstances under which the offer was made, and its connection with other matters which had been given in evidence. Upon the general and abstract question, whether the passport, *per se*, was legal and competent evidence of the fact of citizenship, we are of opinion, that it was not. There is no law of the United States, in any manner regulating the issuing of passports, or directing upon what evidence it may be done, or declaring their legal effect. It is understood, as matter of practice, that some evidence of citizenship is required, by the secretary of state, before issuing a passport. This, however, is entirely discretionary with him. No inquiry is instituted by him to ascertain the fact, of citizenship, or any proceedings had, that will in any manner bear the character of a judicial inquiry. It is a document, which, from its nature and object, is addressed to foreign powers; purporting only to be a request, that the bearer of it may pass safely and freely; and is to be considered rather in the character of a political document, by which the bearer is recognised, in foreign countries, as an American citizen; and which, by usage and the law of nations, is received as evidence of the fact. But this is a very different light, from that in which it is to be viewed in a court of justice, where the inquiry is, as to the fact of citizenship. It is a mere *ex parte* certificate; and if founded upon any evidence produced to the secretary of state,

establishing the fact of citizenship, that evidence, if of a character admissible in a court of justice, ought to be produced upon the trial, as higher and better evidence of the fact. But whether the circuit court erred in admitting the passport in evidence, under the circumstances stated in the exception, this court is divided in opinion, and the point is of course undecided.

*The defendant, in order to support the issue on his part, on the plea in abatement, for the purpose of showing the admission of the said D'Arbel, under oath, that he was a subject of the king of Spain, on the 8th day of May, 1817, offered in evidence a document or paper, purporting to be a record of certain proceedings in a cause in a district court of the state of Louisiana, in and for the first judicial district of that state, in which John K. West, curator of the estate of James Niel, was plaintiff, and the said Domingo D'Arbel was defendant; which proceedings contain a petition presented to the state court, for the purpose of removing the cause into the district court of the United States; and in which petition it is alleged, that Domingo D'Arbel is a subject of his most catholic majesty, the king of Spain; and on this ground claimed to have his cause removed into a court of the United States, pursuant to the act of congress. To which petition is annexed the oath of the said D'Arbel, that the facts contained in the petition are true, and that he is a subject of his most catholic majesty, the king of Spain. To the admission of this evidence, the plaintiffs' counsel objected, and the court sustained the objection. The exception embraces some matters upon which the court expressed no opinion; and need not, therefore, be here noticed. So far as relates to the admissibility of this evidence, the objection is stated as follows: "The plaintiffs object to the giving in evidence the record so offered, for the purpose for which it is offered by the defendant. First, because, if the jury find the facts stated in the plaintiff's first prayer, then they are bound to find a verdict for the plaintiff, on the plea in abatement; and secondly, because, if not concluded, the said record purports only to give a copy of a copy of the petition and affidavit alleged to have been filed in the said case, in the said record mentioned, and a copy of a copy of the said case, as it purports to have been in the state court; which objection the court in part sustained, and rejected the record so offered in evidence." In this, we think, the court erred. We do not perceive any well-founded objection, in any point of view, to the admission of this record, for the purpose for which it was offered, viz., to prove the declaration of Domingo D'Arbel, under oath, that he was a Spanish subject. It did not in any manner affect the rights of any other party to the judgment; and *was no more objectionable, than the declaration or confession of D'Arbel, made in any other manner, or on any other occasion. But it did not lie in the mouth of D'Arbel to object to this evidence, as a part of the record of the district court of the United States. It was his own act, placing it on the record of that court; and that record was duly authenticated according to the act of congress. This document or record, as it is called, begins with the following caption or memorandum: "United States of America, Eastern District of Louisiana, ss. Be it remembered, that on the 24th day of May, in the year 1817, into the district court of the United States in and for the then Louisiana district, came Domingo D'Arbel, by his attorneys, and filed the following transcript or record, to wit:" Then follow the record and proceeding in the state court,

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containing the petition and affidavit of D'Arbel that he was a Spanish subject. Thus, it will be seen, that this record or proceeding in the state court, was introduced into the United States district court, by D'Arbel himself, as the ground upon which he claimed a right to have his cause tried in a court of the United States. It was, therefore, evidence offered by him originally in the district court of the United States, and it does not lie with him now to say, that that record was not duly authenticated, when introduced by him into the United States district court. It was not offered in evidence in the present case, as coming directly from the state court; and all objections to the authentication by the clerk of the state court, even if well founded, are misapplied. This record, as offered to the circuit court on the trial of this cause, came from the district court of the United States, and the proceedings and oath relied upon, were there introduced by D'Arbel himself. Whether the district court of the United States was bound to receive this as satisfactory evidence of the right of D'Arbel to remove the cause from the state court, is not at all material. It was received by the United States district court as sufficient, and the cause was removed and proceeded in accordingly. But there can be no doubt, that the United States court had a right to examine and decide for itself upon the grounds on which D'Arbel claimed to have his cause removed into the United States court. That court had a right to decide upon its own jurisdiction, and remand the cause, if *702] sufficient grounds *for a removal were not shown. It cannot surely be in the power of the state court, to compel the United States court to assume jurisdiction.[1]

The third exception on the part of the defendant is to the ruling of the court upon the plaintiff's prayer, which is as follows: The evidence having been given, as set forth in the two prior exceptions by the plaintiffs, which is to be considered as forming a part of this exception; the defendant, further to support the issue, on the plea in abatement, gave in evidence, by competent witnesses, that the said D'Arbel declared himself to have been a native Frenchman and born near the borders between France and Spain; and that the said D'Arbel, mentioned in the foregoing evidence, is the same D'Arbel, mentioned in the commission aforesaid. Thereupon, the plaintiffs prayed the court, that if the defendant offers no other evidence on the issue joined on the defendant's plea of abatement, than there is now before the jury; that then the plaintiffs are entitled to the verdict, if the jury believe the plaintiffs' evidence; which prayer was granted by the court. This prayer is rather obscurely stated, and the real point intended to be raised is not very apparent. Evidence had been given both as to the defendant and plaintiff; and the prayer would seem to ask the court to instruct the jury, that the plaintiffs were entitled to the verdict, if the jury believed the plaintiffs' evidence, and the court so instructed the jury. If this is the interpretation to be given to the prayer, the instruction was erroneous. The evidence given by the defendant was taken entirely from the consideration of the jury, and the verdict was made to depend upon their belief of the plaintiff's evidence. But the decision upon this exeption is not very important, as it will not affect the result upon the present writ of error; and it

[1] But the affidavit is *primâ facie* evidence of the jurisdictional fact of citizenship. Heath *v.* Austin, 12 Bl. C. C. 320.

is not likely it will arise, in the same form, on another trial: and this remark applies to the two remaining exceptions on the merits arising on the accounts offered in evidence, and the decision and instructions given by the court thereupon. Questions of law and fact, growing out of the prayers and instructions on this part of the case are so blended, and presented in such a shape, that it is extremely difficult to decide upon them; and as the cause must go back, and as these matters may not be presented on *another trial, under the same aspect, these questions may become immaterial, and we pass them by, without any decision. The judgment of the circuit court is reversed, and the cause sent back, with directions to issue a *venire de novo*. [*703

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 Maryland, and was argued by counsel: On consideration whereof, it is adjudged and ordered by this court, that the judgment of the said circuit court in this case be and the same is hereby reversed, and that the said cause be and the same is hereby remanded to the said circuit court, with directions to award a *venire facias de novo*.

Ex parte GEORGE MILBURN. [*704

Habeas corpus.—Criminal process.

As the jurisdiction of the supreme court is appellate, it must be shown to the court, that the court has the power to award a *habeas corpus*, before one will be granted.

George Milburn was imprisoned in the jail of the county of Washington, upon a bench-warrant, issued by the circuit court of the United States for the district of Columbia, to answer an indictment pending against him for keeping a faro bank, an offence which, by an act of congress, is punishable by imprisonment at hard labor in the penitentiary of the district. He had been arrested on a former *capias*, issued on the same indictment, upon which he gave a recognisance of bail, with sureties, in the sum of one hundred pounds, Maryland currency, according to the statute of Maryland, conditioned to appear in court at the return-day of the process, &c.; he did not appear, and the recognisance was forfeited, and a *scire facias* was issued against him, and his sureties, returnable to December term 1833. At the same term, another writ of *capias* was issued against him, returnable immediately, and returned *non est inventus*; at June vacation 1834, another writ of *capias* was issued against him, returnable to November term 1834, on which he was arrested, and from which arrest he was discharged on a *habeas corpus*, by the chief justice of the circuit court, on the ground, that the writ of *capias* improperly issued; on a return of this discharge by the marshal, a bench-warrant was issued by order of a majority of the judges of the circuit court, and on which he was in custody. He applied for a writ of *habeas corpus* to this court, to obtain his discharge: *Held*, that he was properly in custody. The rule for the *habeas corpus* was refused.

A RULE to show cause why a *habeas corpus* should not be awarded, to bring up the body of George Milburn, in confinement in the jail of county of Washington, in the District of Columbia. (*a*) The case, as stated in the opinion of the court, was as follows:

(*a*) When the petition in this case was presented to the court, a *habeas corpus* was asked to be issued, and it was proposed to argue the question of the right of the petitioner to his discharge, on the return af the *habeas corpus*.

MARSHALL, Ch. J., said:—As the jurisdiction of the supreme court is appellate, it must first be shown that the court has the power in this case to award a *habeas corpus*. A rule was granted to show cause why a *habeas corpus* should not be issued.

Ex parte Milburn.

"This is an application to the court, by petition, for a writ of *habeas corpus* to bring up the body of George Milburn, now imprisoned in the jail
*705] of Washington county, in the district of *Columbia, upon a bench-warrant issued against him by the circuit court of this district, to arrest him to answer to an indictment, now pending in the same court against him, for keeping a faro bank, an offence which, by the act of congress of the 2d of March 1831, ch. 37, is punishable by imprisonment and labor in the penitentiary of the district. The main grounds for the application (for it is not necessary to go into the minute facts) are, that the party was arrested on a former *capias*, issued on the same indictment, upon which he gave a recognisance of bail, with sureties, in the sum of one hundred pounds, Maryland currency ($266.67), according to the statute of Maryland, passed in October 1780, ch. 10 (which is in force in this district), conditioned to appear in court on the return-day of the process, to attend the court from day to day, and not to depart therefrom without leave of the court. At the return-day he did not appear, and the recognisance was forfeited, and a *scire facias* issued against him and his sureties, returnable to November 1833. At the same term, another writ of *capias* on the indictment, was issued against him, returnable immediate, which was returned *non est inventus*. Afterwards, in June 1834, in vacation, another writ of *capias* was issued by the district-attorney, upon the same indictment, returnable to November term 1834, upon which the party was arrested, and from which, upon a writ of *habeas corpus*, he was discharged by Mr. Chief Justice CRANCH, of the circuit court, upon the ground, that the writ of *capias* improperly issued. The marshal having returned this matter specially to the circuit court, at the November term 1834, upon motion of the district-attorney, the present bench-warrant was issued, by the order of the majority of the court, and upon which the party is now in custody."

The case was argued by *Brent* and *Jones*, for the relator; and by *Key*, district-attorney, contrà.

Brent stated, that two points presented themselves for the consideration of the court. 1st. Whether the bench-warrant, under which the relator is in confinement, is legal. 2d. Whether the case had not, previously to the
*706] *issuing of the bench-warrant, been finally adjudged by a competent tribunal.

The attention of the court is requested to the fact, that the process is not an *alias*, but appears as an original proceeding. It is in the same term with the first process; and is entirely novel in its character, in the courts of the United States, and of England. An *alias* always issues after the return of the first writ, as having been inoperative. This is not sanctioned by law or practice. 4 Chitty's Crim. Law 213–17, 224–5; 4 Burn's Justice 48–9. In Dalton on the Duties of Sheriff, it is laid down, that in criminal cases, where an indictment is found, the practice is to issue a *capias*, then an *alias* and a *pluries* writ. If this is the law, the writ in this case was illegal; and did not authorize the marshal to take the relator; and his imprisonment is illegal.

There is another objection to the issuing of the writ. When it issued, there was no such suit in court. The United States had, by their own act, discontinued the case. 4 Burn's Justice 42. The principle established by

this court, in the case *Ex parte Watkins*, 7 Pet. 568, that no one can be twice arrested for the same cause, entirely protects the defendant from imprisonment, after his discharge by Chief Justice CRANCH. No other writ, not an *alias*, can be issued, after that discharge. 1 Tidd's Prac. 196; 4 Burr. 2502; 3 East 309; 7 Pet. 568. In the case before the court, the record shows, that a *capias* issued on the indictment against Milburn; that he was taken by virtue of it, and he was thus in the custody of the law, before the circuit court. He was, afterwards, by the judgment of the chief justice of the court, the case being regularly before him, discharged. The United States had their remedy upon the recognisance given by him and his sureties; and the case, as to all other matters, was out of court, and at an end.

Under the law of Maryland, of 1780, ch. 10, when a defendant is in custody for an offence, found by an indictment, less than felony, the sheriff must take bail in less than one hundred pounds. The *capias* is returned with the recognisance; and if he does not appear, the recognisance is prosecuted to judgment. Although the keeping a faro table is punishable by imprisonment *in the penitentiary, yet it is not a felony. The relator having done all the law required, on the original *capias;* he [*707 could not be required to do more. After the most diligent search into precedents, and a reference by the chief justice of the circuit court to the most distinguished members of the bar of Maryland, no case has been found, where the principle has been asserted and maintained, which is claimed by the United States. If the law was otherwise, a case would have been found to maintain it. The law of Maryland requires, that the recognisance shall be sued out. It says nothing about further proceedings against the defendant, who has suffered the recognisance to be forfeited. It is different in the case of felony. Within forty-four years, not an instance has occurred in the courts of Maryland, where an *alias* capias has issued, in a case less than felony. All the counsel at the bar of Maryland appear to have considered, that under the act of 1780, everything that could be done, on the neglect of the person charged with a misdemeanor to attend, was to forfeit the recognisance, and sue it out. The opinion of Chief Justice CRANCH, who has been familiar with the law and practice of Maryland for forty years, and who is the chief justice of the circuit court, delivered in this case, is referred to, and it will be found to sustain these positions.

The last reason why relief should be given to the relator is, that the discharge by Judge CRANCH, the chief justice of the circuit court, during vacation, is a *res judicata*, between the United States and the prisoner. Under the act of congress organizing the courts of the district of Columbia, the chief justice, in vacation, acts as, and has all the powers of, a circuit court. The act of congress gives him the power to award a *habeas corpus;* and his discharge of a prisoner brought before him, is a bar to another arrest, in the same manner as if it had been given by the circuit court, during its session.

Key, for the United States.—It is not, by the practice of the courts of Maryland, required, that a *capias*, returned "*non est*," shall be followed by an *alias capias*. It is the course of proceeding, to adopt any practice to bring in a defendant. Original writs of *capias* are issued, after others have

not *produced an arrest. There is no necessity for any other form of proceeding, as, under the law of Maryland, there is no such thing as outlawry.

STORY, Justice, stated, that, as he understood the counsel for the relator, it is contended, that wherever there has been an arrest for a misdemeanor, and a recognisance entered into by the person charged, and the party has forfeited it, he can never be again prosecuted for the offence.

THOMPSON, Justice.—Is it possible, that the law of Maryland considers, that where there has been a forfeiture of a recognisance, in a case less than felony, it is in the nature of a penalty paid for the offence?

Key.—This is the doctrine claimed by the relator.

Brent, read the act of assembly of Maryland, before cited.

Jones, for the relator.—The court is referred to the opinion delivered by Chief Justice CRANCH, for the local laws of Maryland (4 Cr. C. C. 552); under which proceedings on criminal cases are conducted in the county of Washington. In that opinion, the court will also find a statement of the practice in such cases. They are as claimed by the relator.

This case rests on the highest principles known in the administration of justice, that no one is to be twice punished for the same offence. In England, when there is a second arrest, the recognisance is always released. No case has been found, except where there has been an escape, where, if a bail-bond, or a recognisance, has been given, you may take again. The exception, in the case of escape, shows that, in general, there is no such right. The arrest in this case is not only irregular, but it is a contempt of the law. The party who has been twice arrested, was in actual custody, at the time of the second arrest. He was under bail, and bail, by the authorities, is nothing more than "a living prison," in which the party is kept; there is, *therefore, no reason why an authority should be produced, to show
*709] the present imprisonment illegal, the defendant being in the custody of his bail, under the first recognisance, although it has been forfeited. The first recognisance should be remitted, or he will be twice punished.

What is the difference between a civil and a criminal action, when the defendant has been admitted to bail? A civil suit for the same cause of action, cannot be instituted, after bail given, unless after discontinuance of the prior suit, and a discharge of the bail. This action on the bail-bond, must be against all the parties who have become bail, unless under special circumstances. Saunders on Pleading, 187; 13 Johns. 424.

In Virginia, the practice is different, by a special statute; but according to the common law, the default of appearance is an insuperable bar to another action on the original case. If there is no statutory provision to the contrary, the operation of bail, in both cases, will be the same. When you admit to bail, *eo nomine*, you admit all the consequences of bail. 2 Chit. 109; Highmore on Bail 200. A *scire facias* issues alike in criminal as in civil cases. The legislature of Maryland, in fixing the amount of bail to be taken, after arrest for a misdemeanor, have taken an average of the sums to be required in all such cases. They have considered the justice of the state as satisfied by the amount so fixed. In England, there is a wider

discretion ; but in Maryland, it may be less, but cannot be greater than one hundred pounds.

This court, in a review of all the authorities cited, will be satisfied, that wherever there has been a suit on a forfeited recognisance, a second arrest cannot take place, without a discontinuance of the suit. This has not been done in the case now before the court. The contrary practice comes within the rule, that no one shall be twice punished for the same criminal action.

STORY, Justice, after stating the facts of the case, delivered the opinion of the court.—The points principally relied on at the argument are, in the first place, that the party is not liable to be arrested to answer the indictment, after having given a recognisance of bail ; *although the recognisance has been forfeited, and the party has not appeared and answered, and been tried on the indictment ; in the next place, that the discharge upon the habeas corpus before Mr. Chief Justice CRANCH, is a bar to any subsequent arrest. [*710

We are of opinion, that neither of these grounds can, in point of law, be maintained. A recognisance of bail, in a criminal case, is taken to secure the due attendance of the party accused, to answer the indictment, and to submit to a trial, and the judgment of the court thereon. It is not designed as a satisfaction for the offence, when it is forfeited and paid ; but as a means of compelling the party to submit to the trial and punishment which the law ordains for his offence. And *à fortiori*, it cannot be deemed to apply to a case like the present, of a penitentiary offence ; for that would be to suppose, that the law allowed the party to purge away the offence, and the corporeal punishment, by a pecuniary compensation. There is nothing, in our opinion, in the Maryland statute of 1780, ch. 10, to change this construction of the law.

The other ground is also unmaintainable. A discharge of a party, under a writ of *habeas corpus*, from the process under which he is imprisoned, discharges him from any further confinement under the process ; but not under any other process, which may be issued against him, under the same indictment.

For these reasons, we are of opinion, that the party is rightfully in custody under the bench-warrant of the circuit court ; and therefore, that the petition for the writ of *habeas corpus* ought to be denied. The rule, therefore, to show cause is discharged ; and the motion for the *habeas corpus* is overruled.

Writ refused.

*Colin Mitchel, Robert Mitchel, in his own right, and as Assignee of the estate and effects of the mercantile house heretofore trading under the firm of Carnochan & Mitchel, and as Trustee of the creditors of said firm, and also of Richard Carnochan, William Calder, Benjamin Marshall, Benjamin W. Rogers, John P. Williamson, the heirs and legal representatives of John McNish, deceased, and James Innerarity, Appellants, *v.* United States.

Florida land-claims.—Spanish treaty.—Indian lands.

A claim to lands in East Florida, the title to which was derived from grants by the Creek and Seminole Indians, ratified by the local authorities of Spain, before the cession of Florida by Spain to the United States, confirmed.

It was objected to the title claimed in this case, which had been presented to the superior court of Middle Florida, under the provisions of the acts of congress for the settlement of land-claims in Florida, that the grantees did not acquire, under the Indian grants, a legal title to the land: *Held*, that the acts of congress submit these claims to the adjudication of this court as a court of equity; and those acts, as often and uniformly construed in its repeated decisions, confer the same jurisdiction over imperfect, inchoate and inceptive titles, as legal and perfect ones, and require the court to decide, by the same rules, on all claims submitted to it, whether legal or equitable.

By the law of nations, the inhabitants, citizens or subjects of a conquered or ceded country, territory or province, retain all the rights of property which have not been taken from them by the orders of the conqueror; and this is the rule by which we must test its efficacy, according to the act of congress, which we must consider as of binding authority.

A treaty of cession, in a deed or grant by one sovereign to another, transfers nothing in which he had no right of property; but only such right as be owned, and could convey to the grantee. By the treaty with Spain, the United States acquired no lands in Florida, to which any person had lawfully obtained such a right, by a perfect or inchoate title, that this court could consider it as property, under the second article, or which had, according to the stipulations of the eighth article of the treaty, been granted by the lawful authorities of the king; which words, "grants" or "concessions," were to be construed in their broadest sense, so as to comprehend all lawful acts which operated to transfer a right of property, perfect or imperfect.

The effect of the clauses or the confirmation of grants made was, that they confirmed them presently, on the ratification of the treaty, to those in possession of the lands; which was declared to be that legal seisin and possession, which follows title, is co-extensive with the right, and continues till it is ousted by an actual adverse possession, as contradistinguished from residence and occupation.

*712] *The United States, by accepting the cession, under the terms of the eighth article, and the ratification by the king, with an exception of the three annulled grants to Alagon, Punon Rostro and Vargas, can make no other exceptions of grants made by the lawful authorities of the king.

The meaning of the words, "lawful authorities," in the eighth article, or "competent authorities," in the ratification, must be taken to be "by those persons who exercised the granting power, by the authority of the crown." The eighth article expressly recognises the existence of these lawful authorities in the ceded territories, designating the governor or intendant, as the case might be, as invested with such authority; which is to be deemed competent, till the contrary is made to appear.

By "the laws of Spain," is to be understood the will of the king, expressed in his orders, or by his authority, evidenced by the acts themselves; or by such usage and customs in the provinces, as may be presumed to have emanated from the king, or to have been sanctioned by him, as existing authorized local laws.

In addition to the established principles heretofore laid down by this court, as the legal effect of an usage or custom, there is one which is peculiarly appropriate to this case. The act of congress giving jurisdiction to this court to adjudicate on these causes, contains this clause in reference to grants, &c., "which was protected and secured by the treaty, and which might have been perfected into a complete title, under and in confirmity to the laws, usages and customs of the government under which the same originated." This is an express recognition of any

known and established usage or custom in the Spanish provinces, in relation to the grants of land, and the title thereto, which brings them within a well-established rule of law—that a custom or usage, saved and preserved by a statute, has the force of an express statute, and shall control all affirmative statutes in opposition, though it must yield to the authority of negative ones, which forbid an act authorized by a custom or usage thus saved and protected; and this is the rule by which its efficacy must be tested, according to the act of congress, which must be considered of binding authority.

In the case of the United States *v.* Arredondo, 6 Pet. 691, the lands granted had been in the possession and occupation of the Alachua Indians, and the centre of the tract was an Indian town of that name; but the land had been abandoned, and before any grant was made by the intendant, a report was made by the attorney and surveyor-general, on a reference to them, finding the fact of abandonment; on which, it was decreed, that the land had reverted to and become annexed to the royal domain.

By the common law, the king has no right of entry on land, which is not common to his subjects; the king is put to his inquest of office, or information of intrusion, in all cases where a subject is put to his action; their right is the same, though the king has more convenient remedies in enforcing his. If the king has no original right of possession to lands, he cannot acquire it, without office found, so as to annex it to his domain.

The United States have acted on the same principle, in the various laws which congress have passed in relation to private claims to lands in the Floridas; they have not undertaken to decide for themselves on the validity of such claims, without the previous action of some tribunal, special or judicial; they have not authorized an entry to be made on the possession of any person in possession, by color of a Spanish grantor title, nor the *sale of any lands, as part of the national domain, with any intention to impair private rights. [*713
The laws which give jurisdiction to the district courts of the territories to decide in the first instance, and to this, on appeal, prescribe the mode by which lands which have been possessed or claimed to have been granted pursuant to the laws of Spain, shall become a part of the national domain; which, as declared in the seventh action of the act of 1824, is a "final decision against any claimant, pursuant to any of the provisions of the law."

One uniform rule seems to have prevailed in the British provinces in America, by which Indian lands were held and sold, from their first settlement, as appears by their laws—that friendly Indians were protected in the possession of the lands they occupied, and were considered as owning them by a perpetual right of possession in the tribe or nation inhabiting them, as their common property, from generation to generation, not as the right of the individuals located on particular spots. Subject to this right of possession, the ultimate fee was in the crown and its grantees; which could be granted by the crown or colonial legislatures, while the lands remained in possession of the Indians; though possession could not be taken, without their consent.

Individuals could not purchase Indian lands, without permission or license from the crown, colonial governors, or according to the rules prescribed by colonial laws; but such purchases were valid, with such license, or in conformity with the local laws; and by this union of the perpetual right of occupancy with the ultimate fee, which passed from the crown by the license, the title of the purchaser became complete.

Indian possession or occupation was considered with reference to their habits and modes of life; their hunting-grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its exclusive enjoyment in their own way and for their own purposes, were as much respected, until they abandoned them, made a cession to the government, or an authorized sale to individuals. In either case, their rights became extinct, the lands could be granted disincumbered of the right of occupancy, or enjoyed in full dominion by the purchasers from the Indians. Such was the tenure of Indian lands, by the laws of Massachusetts, Connecticut, Rhode Island, New Hampshire, New York, New Jersey, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina and Georgia.

Grants made by the Indians, at public councils, since the treaty at Fort Stanwix, have been made directly to the purchasers, or to the state in which the land lies, in trust for them, or with directions to convey to them; of which there are many instances of large tracts so sold and held, especially in New York.

It was a universal rule, that purchases made at Indian treaties, in the presence and with the approbation of the officer under whose direction they were held, by the authority of the crown, gave a valid title to the lands; it prevailed under the laws of the states, after the revolution, and yet continues in those where the right to the ultimate fee is owned by the states or their

grantees. It has been adopted by the United States, and purchases made at treaties held by their authority have been always held good, by the ratification of the treaty, without any patent to the purchasers from the United States. This rule in the colonies was founded on a settled
*714] rule of the law of England, that by his prerogative the king was the universal occupant of *all vacant lands in his dominions, and had the right to grant them at the pleasure, or by his authorized officers.

When the United States acquired and took possession of the Floridas, the treaties which had been made with the Indian tribes, before the acquisition of the territory by Spain and Great Britain, remained in force over all the ceded territory as the laws which regulated the relations with all the Indians who were parties to them, and were binding on the United States, by the obligation they had assumed by the Louisiana treaty, as a supreme law of the land, which was inviolable by the power of congress. They were also binding as the fundamental law of Indian rights, acknowledged by royal orders, and municipal regulations of the province, as the laws and ordinances of Spain in the ceded provinces, which were declared to continue in force, by the proclamation of the governor in taking possession of the provinces; and by the acts of congress, which assured all the inhabitants of protection in their property. It would be an unwarranted construction of these treaties, laws, ordinances and municipal regulations, to decide, that the Indians were not to be maintained in the enjoyment of all the rights which they could have enjoyed under either, had the provinces remained under the dominion of Spain; it would be rather a perversion of their spirit, meaning and terms, contrary to the injunction of the law under which the court acts, which makes the stipulations of any treaty, the laws and ordinances of Spain, and these acts of congress, so far as either apply to this case, the standard rules for its decision.

The treaties with Spain and England, before the acquisition of Florida by the United States, which guarantied to the Seminole Indians their lands, according to the right of property with which they possessed them, were adopted by the United States; who thus became the protectors of all the rights they had previously enjoyed, or could of right enjoy under Great Britain or Spain, as individuals or nations, by any treaty, to which the United States thus became parties, in 1803.

The Indian right to the lands as property was not merely of possession, that of alienation was concomitant; both were equally secured, protected and guarantied by Great Britain and Spain, subject only to ratification and confirmation, by the license, charter or deed from the governor, representing the king. Such purchases enabled the Indians to pay their debts, and compensate for their depredations on the traders resident among them to provide for their wants; while they were available to the purchasers, as payment of the considerations which at their expense had been received by the Indians. It would have been a violation of the faith of the government to both, to encourage traders to settle in the province, to put themselves and property in the power of the Indians, to suffer the latter to contract debts, and when willing to pay them by the only means in their power, a cession of their lands, withhold an assent to the purchase, which, by their laws or municipal regulations, was necessary to vest a title. Such a course was never adopted by Great Britain in any of her colonies, nor by Spain, in Louisiana or Florida.

The laws made it necessary, when the Indians sold their lands, to have the deeds presented to the governor for confirmation. The sales by the Indians transferred the kind of right which they possessed; the ratification of the sale by the governor must be regarded as a relinquishment of
*715] the title of *the crown, to the purchaser, and no instance is known, where permission to sell has been "refused, or the rejection of an Indian sale."

In the present case, the Indian sale has been confirmed, with more than usual solemnity and publicity; it has been done at a public council and convention of the Indians, conformable to treaties, to which the king was a party, and which the United States adopted; and the grant was known to both parties to the treaty of cession. The United States were not deceived by the purchase, which they knew was subject to the claim of the petitioner, or those from whom he purchased; and they made no stipulation which should put it to a severer test than any other; and it was made to a house which, in consideration of its great and continued services to the king and his predecessor, had deservedly given them high claims as well on his justice as his faith. But if there could be a doubt, that the evidence in the record did not establish the fact of a royal license or assent to this purchase, as a matter of specific and judicial belief, it would be presumed as a matter of law, arising from the facts and circumstances of the case, which are admitted or unquestioned.

As heretofore decided by this court, the law presumes the existence, in the provinces, of an

officer authorized to make valid grants; *à fortiori* to give license to purchase and to confirm; and the treaty designates the governor of West Florida as the proper officer to make grants of Indian lands by confirmation, as plainly as it does the governor of East Florida to make original grants, or the intendant of West Florida to grant royal lands. A direct grant from the crown of lands in a royal haven, may be presumed on an uninterrupted possession of sixty years; or a prospective possession of crown lands for forty years.

The length of time which brings a given case within the legal presumption of a grant, charter or license, to validate a right long enjoyed, is not definite, depending on its peculiar circumstances.

After the case had been fully heard in the superior court of Middle Florida, the judge of that court, in examining the evidence in the case, with a view to its decision, considered that he had discovered in the date of the water-mark in the paper on which one of the original Spanish documents had been written, a circumstance which brought into doubt the genuineness of the instrument; no objection of this kind had been made, during the argument of the cause; and after the supposed discovery, no opportunity was permitted, by the court of Florida, to the claimants, to explain or account for the same; after the appeal had been docketed in this court, the appellants asked permission to send a commission to procure testimony, which it was alleged, would fully explain the circumstance, and offered to read *ex parte* depositions to the same purpose. This is refused, because, in an appellate court, no new evidence can be taken or received, without violating the best established rules of evidence. Under such circumstances, it would be dealing to the petitioner a measure of justice incompatible with every principle of equity, to visit upon his title an objection which the claimant was not bound to anticipate in the court below, which he could not meet there, and which this court were compelled to refuse him the means of removing by evidence. We will not say, what course would have been taken, if his title had depended on the date of the paper alluded to; as the case is, it is only one of numerous undisputed documents, *tending to establish the grant, the validity of which is but little, if it could be in any degree, affected by the date of the permission. [*716

Appeal from the Superior Court of Middle Florida. The appellants, on the 18th day of October 1828, presented to the superior court of Middle Florida, their petition, under the authority of the sixth section of the act of congress passed on the 23d of May 1828, entitled an act supplementary to the several acts providing for the settlement and confirmation of the private land-claims in the territory of Florida; and of the act of 1824, referred to in the said act, authorizing claimants in Missouri to institute proceedings to try the validity of their titles.

The appellants claimed title to a tract of land, containing 1,200,000 acres, in the territory of Florida; the greater part of which was situated between the rivers Appalachicola and the St. Mark's, comprehending all the intervening sea-coast, and the islands adjacent. The title was asserted to be held under deeds from the Creek and Seminole Indians, to Panton, Leslie & Company, to John Forbes & Company, and to John Forbes, and confirmed by the authorities of Spain. These lands, the petitioners alleged, were granted by the Indian tribes, as an indemnity from the Spanish government and from those Indians, for losses sustained by them in prosecuting a trade with the Indians, under the special and exclusive license of Spain. The Indian grants were dated on the 25th May, and the 22d August 1804, and the 2d August 1806, and were alleged to have been confirmed by Governor Folch, the governor of the province.

The facts of the case, and all the documents on which the title of the petitioners was claimed to rest, with the evidence in the case, are fully stated in the opinion of the court.

The answer of the district-attorney stated, that the commissioners under the act "for the settlement of private land-claims, and for the confirmation thereof," were instructed to report, and not to decide upon large claims;

that the claim of the petitioners was reported upon by the commissioners, *717] and *their report laid before congress—but it was denied, that the documents presented to the said commissioners and by them reported were, by the said report, "admitted to be genuine." The title of the appellant is invalid. Congress did not confirm or adopt the report of the commissioners upon this claim, but referred all claims, not annulled by the treaty of cession, nor by the decree of the king of Spain ratifying the same, nor reported by the commissioners as ante-dated or forged, to the decision of the judiciary. The cause was heard in the superior court of Middle Florida, on the evidence adduced by the petitioners and the United States, and on public documents, all of which were sent up with the record; and was finally disposed of by a decree of the judge of that court, entered on the 2d of November, 1830, dismissing the petition. The petitioners appealed to this court. The appeal was entered to January term 1831.

At the former terms of this court, on the motions of the counsel for the United States, the case was postponed to enable the government of the United States to procure papers from Madrid and from Havana, which were considered important and necessary in the cause. These motions were always resisted by the counsel for the appellants. At January term 1834, the case was continued, under an order of the court, that it should not be argued before the 2d of February 1835. On the 9th of January, Mr. Butler, Attorney-General of the United States, moved the court to postpone the hearing of the case, until later in the term than the day fixed for the same; alleging that the documents which had been expected from Havana, had not arrived and that the government had dispatched a special messenger for them, whose return was expected before the 25th of February, during the term. The court refused to hear the motion, until the case should be called, on or after the 2d of February. Afterwards, on the 9th of February, the motion was renewed on the part of the United States, by the Attorney-General, and was overruled; the court not thinking it necessary to hear the counsel for the appellants against it.

*718] *The cause then came on, and was argued by *White*, and *Berrien* for the appellants; and by the *Attorney-General* and *Call*, for the United States.

For the *appellants*, the following points were submitted to the court: 1. That the Indian sales of 1804 and 1811, and the several acts in confirmation thereof, by the governor of West Florida, vest in the grantees a full and complete title to the land in controversy. 2. That the king of Spain was bound, in good faith, to indemnify the house of Forbes & Co., for the losses sustained by them in their traffic with the Indian tribes; that the satisfaction of the claims of that house, which was effected by these sales, and the consequent release of the obligation of the king of Spain to indemnify them, constituted a sufficient consideration to the Spanish crown for any right of pre-emption or otherwise which it might have had in these lands. 3. That these sales, having been made with the knowledge, assent and previous approbation of the authorities of Louisiana and West Florida; having been subsequently ratified and confirmed by the civil and military governor of the latter province; having been notified to the captain-general of Cuba, and by him to the king, and not having been disapproved by either; that

these several acts and omissions amount to an acquiescence on the part of the king of Spain and his legitimate authorities; which, according to the laws and usages of that kingdom, would vest a valid title in the grantees. 4. That the decision of the captain-general of Cuba, on the petition of John Forbes, setting forth his title to these lands, and praying leave to sell the same, was a judicial decision upon the validity of that title, by the highest legitimate authority of that captain-generalcy, to which West Florida was an appendage; and cannot be drawn into question in any other tribunal. 5. That the grantees, and those claiming under them, have had legal possession, in good faith, by just title, since the date of the respective grants, which constitute a title by prescription, under the laws of Spain. 6. That the title thus subsisting in the grantees, by the aforesaid sales and acts of confirmation, by the acquiescence, *after notice, of the king of Spain and his legitimate authorities, by the judicial decision of the captain-general of Cuba, and by the right of prescription, at the date of the delivery of the Floridas to the United States; was a valid and legal title, which was recognised and confirmed by the treaty of cession. [*719

For the United States, it was contended, by *Butler* and *Call:* —

I. Admitting it to be true, for the sake of argument: 1. That the house of Forbes & Co. had rendered important services to the Spanish government, and had well-founded claims on its bounty; 2. That the king of Spain was bound, in good faith, to indemnify the house for the losses sustained by them in their traffic with the Indians; 3. That the government of the United States had knowledge of the existence of that house, of its claims on Spain, and of the title on which the present suit is founded; 4. That the vacant and ungranted lands in the Floridas, even if the present claim be confirmed, will yet be more than the government of the United States, at the time of the cession, expected to receive; and 5. That other equitable circumstances exist, which entitle the claim to a favorable regard: Still, it is contended, on the part of the United States, that no valid reason can be found, in either or all of these circumstances, for reversing the decree of the court below.

That decree must be affirmed, unless it can be shown, that the claimants, at the time of the cession, had a legal right to the lands in question; acquired either: 1. By virtue of a grant or concession, made before the 24th of January 1818, by his catholic majesty, or by his lawful authorities; or, 2. By virtue of some other valid title, known to, and recognised by, the laws of Florida.

II. The most important of the suggestions above referred to, viz., the alleged liability of the king of Spain to indemnify Forbes & Co. for their losses, &c., is not correct in point of fact. Neither the law of nations, nor any special promise, nor any existing treaty, imposed on him any such obligation. *Besides, if such obligation existed, the duty of auditing and settling the accounts belonged alone to the intendancy of the province; and the Spanish government could not be bound for the payment of any particular demand, on the mere admission of the Indians. [*720

III. The claim, in the present case, though of land within the territorial limits of the Floridas, does not profess to be founded on any original substantive grant, made by the king of Spain or his officers; but on cessions

made by Indian tribes, and on alleged ratifications and confirmations thereof, and acquiescence therein, by the Spanish authorities. In this respect, the present case differs from all the cases hitherto submitted to this court.

IV. The Indian deeds to Panton, Leslie & Co. did not, either in themselves, or with the confirmation thereof by Governor Folch, convey to the grantees therein named, any legal right to the lands in question. 1. According to the laws of Spain, in force in the Floridas, the absolute title in the soil, in all the lands described in the deeds, was, at the execution thereof, exclusively vested in the crown of Spain. The Indians, by those laws, were regarded as having no title whatever, except in and to such tracts as were left in their possession by the Spanish authorities, in conformity to the laws of the Indies; and no part of the premises in question were so allotted. 2. If the title of the Spanish crown was qualified, in respect to lands in the Floridas, by any Indian right of occupancy, that right existed only in favor of such Indian tribes, if any, as actually inhabited the lands, and as had not previously surrendered it; and the Spanish crown possessed the absolute and exclusive right to extinguish it. 3. The lands in question were, in fact, at the time of the cessions, vacant and uninhabited, and therefore, no Indian right of occupancy could exist therein. 4. The original Indian right of occupancy, if any ever existed, from the shores of the Gulf, as far as the flowing of the tide up the bays, rivers and inlets, in the premises in question, was extinguished by solemn compact between the government of Great Britain and the Indians, in the year 1765; and by the treaty of 1783, Spain *721] succeeded to all the rights of soil and *sovereignty, previously possessed by the British crown. As to the greater part of the lands described in them, the Indian deeds were, therefore, invalid. 5. The deeds were executed by Indians, residing, with a trivial exception, within the territorial limits of the United States. The cessions were not the act of the Seminole nation, every town and village of which was interested in the Indian right of possession. 6. The Indians could not sell to the subjects of Great Britain and within the jurisdiction of Spain, on which was erected the fortress of St. Mark's, then occupied and garrisoned by the troops of Spain, and since ceded and delivered by the Spanish government to the United States. 7. William Panton and John Leslie, of the house of Panton, Leslie & Co., were both dead, and no such firm existed in Florida, as that of Panton, Leslie & Co., at the time of executing the several deeds, and at the time of their confirmation by Governor Folch. 8. Panton, Leslie & Co. were foreigners; they had not taken the oath of allegiance to the crown of Spain, without which they could receive no grant of land in Florida, from the subordinate officers of the government. 9. There is no proof that the governors-general of Louisiana authorized or approved the purchases in question. 10. The original acts of confirmation of the Indian sales, by Governor Folch, to the house of Panton, Leslie & Co., and to the house of John Forbes & Co., have not been produced by the petitioners, nor their absence satisfactorily accounted for. There is no evidence, then, that any formal titles were given by Governor Folch, to the grantees, for the land in question. 11. Governor Folch had no power to ratify and confirm the Indian cessions in question: (1.) Because the power to ratify such cessions was not within the scope of his general authority; nor had he any special

authority to ratify the same. (2.) Because the lands, with a small exception, were situated within the province of East Florida, and out of his jurisdiction. (3.) Because the royal order of 1798 vested in the intendants the exclusive power of granting and conceding all kinds *of land; and at the date of the supposed grants, Juan Ventura Morales was intendant of West Florida. [*722

V. If the titles executed by Governor Folch could be considered as original substantive grants (which is by no means admitted), they would still be invalid, by reason of their repugnancy to the laws, ordinances, usages and regulations of the Spanish government. As to the lands in East Florida, they must certainly be invalid.

VI. The facts and circumstances attending this case, and relied on by the appellants, do not amount to any such acquiescence on the part of the king of Spain, and his lawful authorities, as would, according to the laws and usages of that kingdom, vest a valid title in the grantees. And all presumption of such acquiescence is conclusively rebutted, by the subsequent grants actually made by the king himself.

VII. No title by prescription exists in this case.

VIII. The permission granted by the captain-general of the island of Cuba, to the house of John Forbes & Co., to sell the lands in controversy to Colin Mitchell, related only to the lands described in the cession of 1804, and was not a judicial decision on the validity of the title. It created no estate, either in the grantees, or those claiming under them.

IX. The captain-general of the island of Cuba had no jurisdiction over the lands in Florida. The royal domain of Florida was under the exclusive control and superintendence of the intendancy.

X. The various circumstances and arguments relied on by the appellants, being, for the reasons above stated, each of them insufficient, in itself, to sustain the present claim, they must, from the peculiar nature of this case, be equally insufficient, in the aggregate.

XI. The United States have a clear title to the fortress of St. Mark's and its appurtenances, which, even if the claim be allowed in other respects, must be excepted by definite bounds therefrom; and should have been so excepted in the petition.

On the 14th of March, the case having been argued, and the opinion of the court being about to be delivered by Mr. Justice BALDWIN; *Butler* and *Call*, for the United States, moved to postpone the final disposition of the case until next term.

*The *Attorney-General* stated, that the messenger who had been dispatched to Havana, had, on the day preceding, returned to the city of Washington, and had brought with him documents of great importance to the just decision of the case; and that information had been received by the department of state, that other documents, showing the action of the government of Spain in relation to titles to lands in Florida, were preparing in Havana, by the consul of the United States there, who had been specially commissioned for the purpose, which would be received before the next session of the court. These documents were represented by the agent at Havana, to be very important in the cause. The motion was opposed by *White*, *Ogden*, *Berrien* and *Webster*, of counsel for the appellants; and [*723

supported by *Call* and *Butler*. The motion was held under advisement until the 17th of March, when—

MARSHALL, Ch. J., said :—The court has taken into its serious and anxious consideration, the motion made on the part of the government to continue the cause of *Mitchell* v. *United States* to the next term. Though the hope of deciding causes to the mutual satisfaction of parties would be chimerical, that of convincing them that the case has been fully and fairly considered, that due attention has been given to the arguments of counsel, and that the best judgment of the court has been exercised on the case, may be sometimes indulged. Even this is not always attainable. In the excitement produced by ardent controversy, gentlemen view the same object through such different *media*, that minds not unfrequently receive therefrom precisely opposite impressions. The court, however, must see with its own eyes, and exercise its own judgment, guided by its own reason.

The motion is founded on the expectation, that by the next term, admissible evidence may be obtained, which will shed much light on this cause, and change essentially its present character. This motion is opposed, on the ground, that the delays have already been excessive; that a further continuance for twelve months would affect one of the parties most *injuri-
*724] ously ; and that no rational foundation is laid, for the opinion, that new and important additions will or can be made to the information the record at present contains.

The cause was docketed on the 2d of February 1831. On the 26th of the same month, a motion was made on the part of the United States, to bring on the cause for argument at that term. This motion was opposed, and was overruled. The reasons of the court are not recollected ; but the motion was in opposition to a positive rule, and must for that cause alone have been rejected. In March 1832, the parties were willing to bring on the cause, but the court thought it too late in the term to take it up, and it was continued. In 1833 and in 1834, the cause was continued, on the motion of the attorney for the United States, supported by the same arguments which are now urged.

This cause was commenced in the district court of the United States for the territory of Florida, in October 1828. The degree of intelligence which has beem employed in preparing the record for a final decision, gives the most absolute assurance, that from the commencement of the controversy, it must have been perceived that the case depended essentially on the sanction given by the authorities of Spain to the grants made by the Indians. It was perceived, that great efforts were made in the district court, by both parties, for the establishment of this fact. A vast mass of evidence has been collected on it, and is to be found in the record. An inspection of that evidence goes far to establish the opinion, that it cannot be materially varied.

The government has unquestionably made great exertions ; we believe, all that could be made, to obtain any additional documents which the case may furnish. No difficulty has been opposed by the Spanish government to the inquiries of the American agents. On the contrary, every facility has been given to them. We cannot doubt, that the most important documents would be the most immediately forwarded. Those which have

arrived, have been inspected. They are not believed to vary the case; many of them are undoubtedly important, but they were already in the record, and have been considered. The transfer of all sales of crown lands from the *political to the treasury department, from the governor to the intendant, and the ordinance by which this change was effected, [*725 were already in possession of the court, and had been maturely considered. The documents referred to were chiefly in the record.

We are not satisfied, from the communications of the agent of the United States, that the additional papers to which he alludes, and which he hopes to obtain, can materially affect the merits of the case. With this strong impression on our minds, we should not be justified in granting a still further continuance. The opinion of the court will be delivered.

Baldwin, Justice, delivered the opinion of the court.—The land in controversy is claimed by the United States, in virtue of the treaty of cession by Spain, by which the territory and sovereignty of the two Floridas were acquired, in consideration of $5,000,000, paid in extinguishment of certain claims of the citizens of the United States on the government of Spain. Colin Mitchel claims, by deeds from various tribes of Indians belonging to the great Creek confederacy, to Panton, Leslie & Co., to John Forbes & Co., and to John Forbes, confirmed by the local authorities of Spain, whose right has become vested in him by sundry mesne conveyances, to which it is unnecessary to refer, as the regular deraignment of whatever title was vested in the original grantees to the present claimants, is not questioned. The lands are in four separate tracts, extending from the mouth of the river St. Mark's, outside of the islands along the sea-coast, to the west end of St. Vincent's island, west of the mouth of the river Appalachicola; thence to that river, about five miles from its mouth, up the same for many miles; thence by a back line to a point on the western bank of the St. Mark's, above the old fort of that name, and down the said river to the sea. It is unnecessary to refer to the boundaries of the separate tracts, or the particular designation of the lines and points of the whole body of lands, as they are not a subject of controversy in this case; the quantity, as estimated by the claimant, is 1,250,000 acres, and by the Spanish officers, 1,391,000 arpents. The history of the claim is this:

*The commercial house of Panton, Leslie & Co. had long been [*726 established at St. Augustine, in East Florida; it had extensive connections and great credit, in England, and its operations were very great. After Spain had taken possession of the Floridas, in virtue of the treaty of peace, of 1783, the king, by a royal order, gave them license to carry on and continue their commercial operations in those provinces and Louisiana. As they were an English house, an oath of allegiance was required, which was taken by Mr. Panton, and by Mr. Leslie for himself and the other members of the firm, who were not in the province in 1786, with which the Spanish government was satisfied, as a compliance with the royal orders of the same year. This house conducted its affairs to the entire satisfaction of the successive governors-general of Louisiana and the local authorities of the Floridas, rendered important services to the crown, met with many and great losses, amounting, by the estimate of the Marquis of Casa Calvo, then

governor-general of Louisiana, in 1800, to $400,000. Five of his predecessors had recommended the awarding some indemnity to the house; they had made repeated claims upon the crown, the justice of which had been acknowledged by all the local authorities, during all the changes of administration, in their numerous despatches to the ministry, which had been submitted to the king. They concurred in representing to the king the great importance and services of the house, as a political instrument of the government; that they had a right to indemnity from the king; that the situation of the house was such, that they must sink under their losses, if it was not afforded; and that it must be sustained and preserved, as indispensable to retain any control over the Indians, and secure the possession of the provinces intrusted to their care. In consequence of the repeated solicitations of the house to the king for compensation, a royal order was directed to the captain-general of Cuba, on the subject of the indemnities proper to be given them; in reply to which, among other propositions made by the
*727] governor-general of Louisiana, was a grant *of twenty leagues square of royal lands, west of the Mississippi, or a loan of $400,000 without security. This shows the sense of that high officer of the value of the services of the house, the extent of their losses in their exertions in favor of the government, with the measure of remuneration which he considered to be due of right, in 1800. Among the losses sustained by the house, was a large amount due by the Seminole Indians, prior to 1800; and for robberies of their stores in 1792 and 1800, by members of that tribe, headed by the celebrated adventurer Bowles, exceeding, in all, $60,000; of which they were unable to procure any payment from the Indians, but who had expressed a willingness to make compensation by a grant of their lands.

Early in 1799, the house made an application to the governor-general of Louisiana, for leave to purchase from the Indians as much land as would satisfy the above claims, which was favorably received by both him and his successor. Negotiation with the Indians was followed by a deed of cession from them, in 1804, of the large tract containing 1,200,000 arpents. This deed was confirmed at a general council of the nation and its chiefs, held at Pensacola, in 1806, in the presence of Folch, Governor of West Florida, in all the form and solemnity which Indians could give it. This governor had previously given leave to make the purchase, on a petition presented to him by the house, in January 1804, setting forth the circumstances of the case; which was granted on only one condition, that they should not dispose of the lands, without notice to, and knowledge of, the government; and in December 1806, gave his full confirmation to the grant of the Indians made to Panton, Leslie & Co. Another application was made to the same governor, in 1807, for his permission to make an additional purchase from the same Indians, which was granted in December 1810, on condition, that the house should cede the whole, or part, of the lands to the king, if he should want them, at the price at which they acquired them, and not dispose of them, without notice to the government.
*728] In the following *year, the Indians granted the other tracts between the rivers Wakulla and St. Mark's, including the fort, which was also confirmed by the governor, at a great public council of the Indians at Pensacola; this tract contained by estimation 97,000 arpents. At the same

time, another tract on the sea-coast, including some islands at and west of the mouth of the Appalachicola, was in like manner granted by the Indians, and confirmed by the governor, to John Forbes & Co., the successor of Panton, Leslie & Co., containing 65,000 arpents. At the same time and place, there was granted and confirmed to John Forbes, an island in the Appalachicola, containing 6800 arpents, for which no consideration was paid; the grant being a gratuity by the Indians to Forbes, in consideration of his services and friendship rendered and shown to them for years before. It is not deemed necessary to recite more specially the various original deeds from the Indians, or those made in councils, after the lines had been marked which designated the boundaries of the respective grants, nor the grants of the governor of West Florida, confirming them by titles in form, delivered to the parties; they are in form and substance alike, and no question has arisen on their terms.

Those of the Indians recite the considerations which led to the grants, convey the lands, with a warranty of their title, by ascertained boundaries, those of the governor ratify and confirm the grants in full and direct dominion, and in full property, put the grantees in possession, and promise to defend and maintain it, all of which he declares is done by using the powers vested in him. They are drawn up in great form; contain a perfect recognition of the Indian grants, and give to them all the validity which he could impart to them. They are made in the name of the king, executed and attested in all due formality, and their authenticity proved as public documents, and by the testimony of witnesses to the official signatures. The claims of the house upon the Indians, *for debts due since [*729
1789, and depredations committed, were notorious to the government and inhabitants of Pensacola, as were the purchases; and their confirmation by the Indians, at which 2000 are computed to have attended, in 1811, is proved as fact by witnesses present in the different councils; so is the fact of the ratification by the governor. The original deeds, and the demarcation of lines and boundaries were made in the presence of the commandant at St. Mark's, exercising the offices of lieutenant-governor and sub-delegate of the intendancy, or were approved by him; every act done in relation to the cessions and their ratification, from the first application to the governor-general in 1799, to their consummation in 1811, was public and notorious to both Indians and whites. Governor Folch reported all his proceedings to the captain-general of Cuba, by whom they were approved, who declared that the king would confirm them, and, as some of the witnesses say, declared that he had confirmed them. From the time of the first cession, in 1804, the Indians acknowledged the validity of the grants, were satisfied with them, called the land the white land, or the land of the whites, asked permission from the house to hunt upon them, and with the exception of some occasional depredations, respected their possession and property. Their title, too, was equally respected by the local government, and all the officers of the king, nor from him to the lowest does there appear to have been expressed any dissatisfaction at any of the acts of Governor Folch, or the least doubt of the perfect validity of the title; though the claim of the house to the whole land conveyed, was perfectly known and evidenced by a partial actual possession, taken at an early period, and continued till the cession of the provinces. There is no evidence in the record, that either

the Indians, the governor, or intendant, ever made a cession, grant, order of survey, or gave permission to settle within the boundaries of any of the grants. It is also a circumstance of no small consideration, that notwithstanding the long and inveterate controversy *between the governor and intendant about their powers to grant lands, even in small tracts, there was none in relation to these. Yet the intendant had full notice of them, spoke of them, but made no objection, or preferred any complaint to the captain-general or the king, although the quantity of land thus granted to this house was nearly double the whole amount of the grants of royal lands made by the government of West Florida. It was also proved, that in the opinion of those who know the land, as well as the officers of government, it was not worth, at the time, the amount of the just claims of the house on the Indians; that the grants were taken as the only means of their indemnification, and that the purchase was much less advantageous to them than to the king, who thereby became absolved from a claim not only too just to deny, but too large to satisfy, with convenience. It is also proved, that the Indians who made the cessions occupied the lands for hunting-grounds; were deemed the owners of them, as Indian lands, and had three settlements upon them previously, and that the country was claimed by the Seminoles. The lines were marked, by persons appointed by the governor, in presence of the Indians, who consented to them, and the governor gave formal possession to the house, according to the plats of the several grants exhibited to him, which the witnesses declare to have corresponded with the lines marked upon the ground, and those recited in the deeds and petitions.

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In opposition to this mass of documentary and parol testimony, in support of the allegations of the petitioners, that the grants were in fact made and confirmed, in the manner, and for the reasons and considerations set forth, no direct evidence appears in the record. Some of the witnesses were examined as to the supposed influence of the house with Governor Folch, but the imputation was negatived, and the proceedings throughout declared to have been in good faith.

So far then as the merits of the case depend on the genuineness of the deeds and documents, the facts of the grants and confirmations by the Indians and governor, the marking the lines and possession of the land, the good faith of the whole *transaction, the absence of fraud, the authority of the Indian chiefs, as representatives of their respective tribes, we entirely concur in opinion with the court below. That the grants were made *bonâ fide*, for a valuable consideration, of the adequacy of which the Indians were competent judges, if they had any right in the lands which they could convey; that the ratification of the governor was fairly and fully made, and for good and sufficient reasons, of which he was the judge, if he had competent authority to give effect and validity to Indian cessions of the land in controversy. The view which the learned judge took of these questions, after a through, searching examination of the documents and evidence, is so entirely satisfactory, that we have only to express our assent to the conclusions at which he arrived.

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There is, however, one subject which was considered by him, into which we do not feel at liberty to inquire, which is the water-mark in the paper on which the governor's permission of the 7th of January of 1804, was

written, noticed and commented on at large by the judge. This objection was not made in the court below, at the hearing, or in the argument, so that no opportunity was afforded to the petitioner to produce any evidence on the subject, or to his counsel to answer the objection. This court also refused to grant him a commission to take testimony to explain and account for the water-mark, or permit him to read the *ex parte* evidence offered to explain it; because, in an appellate court, no new evidence could be taken or received, without violating the best-established rules of evidence and law. Under such circumstances, it would be dealing to the petitioner a measure of justice, incompatible with every principle of equity, to visit upon his title an objection which he was not bound to anticipate in the court below, which he could not meet there, and which this court were compelled to refuse him the means of removing by evidence. We will not say, what course would have been taken, if his title had depended on the date of the paper alluded to; as the case is, it is only one of numerous undisputed documents tending to establish the grant, the validity of which is but little, if it could be, in any degree, affected by the date of the permission.

It is objected by the counsel of the United States, that the *original acts of the confirmation of the Indian sales by Governor Folch, [*732 are not produced, and that the copies in evidence are not legal proof of such acts. This objection seems to us not to be well founded in fact or law. The original Indian deeds were procured by the agent of the United States, from the public archives in Havana, and are now before us. The deeds of confirmation were made according to the rules of the civil law, adopted by Spain, and in force in Florida and Cuba; the original is a record, and pre served in the office, which cannot be taken out; a *testimonio* or copy is delivered to the party, which is deemed to be, and is certified as, an original paper, having all the effect of one, in all countries governed by the civil law. Such is proved to be the law of those colonies, as a fact, by Mr. White; such is the form of the certificates in this case, varying in phraseology somewhat, but agreeing in substance and effect, in perfect accordance with the civil law adopted in Louisiana, and recognised by this court in the case of *Owings* v. *Hull*, decided at the present term (*ante*, p. 607). We, therefore, consider those now produced as original deeds of confirmation by the governor, duly certified and proved.

It is objected, that the deeds of 1804 and 1806, to Panton, Leslie & Co., were inoperative to pass the lands, they having died previously. It is in proof, as a fact, that Forbes & Co. were the successors in business and interest to Panton & Co. This change of the name and partners of the house, after the death of Mr. Panton, was known to the officers of the local government and the king, who by a royal order in 1805, and another in 1807, directed it should have no effect on their privileges. To the king, it mattered not, whether the lands were conveyed to the house as a firm, or to the partners *nominatim;* they, it seems, preferred considering the lands as a part of the general effects of the patrnership, and received the deeds accordingly; as it concerned only them, and as there has been produced no law of Spain invalidating such a grant, the objection cannot be sustained.

Another objection, on account of an oath of allegiance not *having [*733 been taken by the grantees, is removed by the evidence already referred to, and need be no further considered.

It is objected, that the grant of 1811 is invalid, because it comprehends the fort of St. Mark's, then actually occupied by the troops of the king. It is in full proof, that the site of St. Mark's and the adjacent country was within the territory claimed by the Seminole Indians. It is not certain from the evidence, whether it was purchased from the Indians, or merely occupied by their permission; there seems to be no written evidence of the purchase, but no witness asserts that possession was taken adversely to the Indian claim, and it is clearly proved to have been amicably done. Whether the Indians had a right to grant this particular spot then, or not, cannot affect the validity of the deeds to the residue of the lands conveyed in 1811. The grant is good, so far as it interfered with no prior right of the crown, according to the principles settled by this court in numerous cases arising on grants by North Carolina and Georgia, extending partly over the Indian boundary, which have uniformly been held good, as to whatever land was within the line established between the state and the Indian territory. *Danforth* v. *Wear*, 9 Wheat. 673; *Patterson* v. *Jenckes*, 2 Pet. 216; and *Winn* v. *Patterson*, decided by the supreme court of the United States, January 1835 (*ante*, p. 663). As to the land covered by the fort and appurtenances, to some distance around it, it becomes unnecessary to inquire into the effect of the deeds, as the counsel of the petitioner have, in open court, disclaimed any pretensions to it.

Another objection is of a more general nature, that the grantees did not acquire a legal title to the lands in question. But it must be remembered, that the acts of congress submit these claims to our adjudication as a court of equity; and, as often and uniformly construed in its repeated decisions, confer the same jurisdiction over imperfect, inchoate and inceptive titles, as legal and perfect ones, and require us to decide by the same rules on all claims submitted to us, whether legal or equitable. Whether, therefore, the title in the present case partakes of the one character or the other, it remains only for us to inquire, whether that of the petitioner is such, in our
*734] opinion, that *he has, either by the law of nations, the stipulations of any treaty, the laws, usages and customs of Spain, or the province in which the land is situated, the acts of congress or proceedings under them, or a treaty, acquired a right which would have been valid, if the territory had remained under the dominion and in possession of Spain. In doing so, we shall not take a detailed review of the leading cases on Spanish grants, already decided by this court, in relation to those lands which formed a part of the royal domain, in contradistinction to those which may be considered as Indian lands, claimed by Indians, by their title, whatever it may be. Those comprehended within the claim of the petitioners being of the latter description, as they contend, and thereupon rest their title, it will suffice to state some general results of former adjudications, which are applicable to this case, are definitively settled, so far as the power of this court can do it, and must be taken to be the rules of its judgment. They are these:

That by the law of nations, the inhabitants, citizens or subjects of a conquered or ceded country, territory or province, retain all the rights of property which have not been taken from them by the orders of the conqueror, or the laws or the sovereign who acquires it by cession, and remain under their former laws, until they shall be changed. That a treaty of ces-

sion was a deed or grant by one sovereign to another, which transferred nothing to which he had no right of property, and only such right as he owned and could convey to the grantee. That by the treaty with Spain the United States acquired no lands in Florida to which any person had lawfully obtained such a right, by a perfect or inchoate title, that this court could consider it as properly under the second article, or which had, according to the stipulations of the eighth, been granted by the lawful authorities of the king; which words, "grants," or "concessions" were to be construed in their broadest sense, so as to comprehend all lawful acts which operated to transfer a right of property, perfect or imperfect. 6 Pet. 710; 7 Ibid. 86, 88; 8 Ibid. 445, 449, 450, 486. That the effect of the clauses of confirmation of grants made was, that they confirm them presently on the ratification of the treaty, to those in possession of the lands, which was declared *to be—that the legal seisin and possession which follows a title, is co-extensive with the right, and continues till it is ousted [*735 by an actual adverse possession, as contradistinguished from residence and occupation. 6 Pet. 743; 8 Cranch 229–30; 4 Wheat. 213, 233; 4 Pet. 480, 504, 506; 5 Ibid. 354–5. That the United States, by accepting the cession, under the terms of the eighth article, and the ratification by the king, with an exception of the three annulled grants to Alagon, Punon Rostro and Vargas, can make no other exceptions of grants, made by the lawful authorities of the king. 8 Pet. 463–4. That the meaning of the words "lawful authorities," in the eighth article, or "competent authorities" in the ratification, must be taken to be "by those persons who exercised the granting power, by the authority of the crown." That the eighth article expressly recognises the existence of these lawful authorities in the ceded territories, designating the governor, or intendant, as the case might be, as invested with such authority, which is to be deemed competent till the contrary is made to appear. 8 Pet. 449–53. That by "the laws of Spain," is to be understood the will of the king, expressed in his orders, or by his authority, evidenced by the acts themselves, or by such usages and customs in the province as may be presumed to have emanated from the king, or to have been sanctioned by him, as existing authorized local laws. 6 Pet. 714–16.

In addition to the established principles heretofore laid down by this court, as to the legal effect of a usage or custom, there is one which is peculiarly appropriate to this case. The act of congress giving jurisdiction to this court to adjudicate on these causes, contains this clause in reference to grants, &c., "which was protected and secured by the treaty, and which might have been perfected into a complete title, under and in conformity to the laws, usages and customs of the government under which the same originated." 6 Pet. 708–9. (4 U. S. Stat. 52.) This is an express recognition of any known and established usage or custom in the Spanish provinces, in relation to the grants of land and the title thereto, which brings them within a well-established rule of law—that a custom or usage saved *and preserved by a statute has the force of an express statute, [*736 and shall control all affirmative statutes in opposition, though it must yield to the authority of negative ones, which forbid an act authorized by a custom, or usage thus saved and protected (4 Inst. 86, 298); and this is

the rule by which we must test its efficacy, according to the act of congress, which we must consider as of binding authority.

In taking possession of Florida, pursuant to the treaty, and in establishing a government in and over it, congress have acted on the same principles as those which were adopted by this court in the former cases. In the act of 1821, for carrying the treaty into execution, congress authorizes the vesting the whole power of government in such person as the president may direct for the maintaining the inhabitants in the free enjoyment of their property. (3 U. S. Stat. 637.) The governor thus appointed, by his proclamation in the same year, announces to the inhabitants that he has been invested with all the powers, and charged with all the duties heretofore held and exercised by the captain-general and of the intendant of the island of Cuba, over the Floridas, and the governor thereof; recites the foregoing act of congress, declares that they shall be maintained and protected in the free enjoyment of their property, &c., and that all laws and municipal regulations which were in existence at the cessation of the late government remain in full force. Pamphlet of 1822, p. 113. The 10th section of the act of 1822, contains the same pledge for the protection of property, and the 13th continued in force the existing laws, till altered by the local legislature then organized. (3 U. S. Stat. 658–9.) The formal act of the surrender of the Floridas by Spain to the United States, was made by the commandants of both of the provinces, by the authority of the captain-general of Cuba, under a royal order. Pamphlet, p. 110.

These are most solemn acts of both governments, which, as the proceedings under the treaty of cession, are made a rule for our guide in deciding on the validity of the title to lands in the provinces; they have all been ratified and approved by the king and congress, affording the highest possible evidence of the true meaning of both the high contracting parties to
*737] the treaty. They point directly to the kind of government *which existed before the cession, as being vested in the captain-general and intendant of Cuba, and the governors of the provinces, as the supreme legislative, executive and judicial power, subordinate to the king only; and as it became, afterwards, in the hands of the governor alone, by act of congress; subordinate only thereto, while under both, the government was administered in conformity to the local laws and municipal regulations. It cannot, therefore, be doubted, that among the other powers of the former government, that of granting lands was invested in some of its officers, nor that such officers were the governor, the intendant, or captain-general, as the case might be; thus exhibiting a union of opinion between the king of Spain as well as the legislative and judicial departments of this government, as to the meaning of the treaty, which cannot be without its influence, on its true construction and bearing on the rights of parties now before this court, sitting in an appellate court of equity, directed to decide "in conformity to the principles of justice" and the laws and ordinances of the government under which the claim of the petitioner originated, they must be our guide.

Colin Mitchel claims the land in controversy as a purchaser from Panton, Leslie & Co., John Forbes & Co., and John Forbes, who were purchasers from the Seminole or Tallapoose Indians, *bonâ fide*, for a valuable consideration paid by one party, and received by the other, by force of contract, accompanied with the legal seisin and possession of the whole, and actual *pedis*

possessio of a part, under a claim of right and title to the whole by grant. The equity of the parties from whom Mitchel purchased, commenced in 1789, 1790, 1792, when the depredations were first committed and the debts contracted which formed the consideration of the Indian deeds; the debts increasing till 1800, and the depredations then renewed. A claim early made on the Indians for compensation, and on the government of Spain for indemnity, continued, till an agreement for the cession of lands by the former was made in 1800, and carried into effect in 1804 and 1806; when it was carried into grant, ratified and confirmed by the Indians, the governor of West Florida, and captain-general of Cuba, without an interfering claim, till the cession to the United States in 1820, 1821. On the other hand, the United States claim the land *by purchase from the king of Spain, made *bonâ fide*, for a valuable consideration fully paid, but with full [*738 and direct notice of the equity of Forbes & Co., and the purchase in the name of Panton, Leslie & Co., of which Forbes was partner, which notice was as early as 1804. The earliest equity claimed by the United States was in January 1818, when the cession was first proposed; the first agreement to convey by Spain was in 1819, the date of the treaty; and the final grant was made in 1820, the date of the ratification; and possession first taken in 1821, pursuant to the conveyance of the treaty.

Thus viewing the contending parties, we proceed, as a court of equity, to inquire, whether at the time the cession by the treaty took effect in favor of the United States, there was a right of property in Colin Mitchel to the lands included in his grants, or whether they had been previously granted by the lawful authorities of the king. That they were granted in fact, is incontestable; and they were private property, if there was a grant competent by law to vest a title. It is contended by the United States, that the acts of Governor Folch, in the permissions to purchase from the Indians, and the ratifying and confirming their deeds, are void, as the lands were not in West Florida, over which province alone he had any jurisdiction.

There seems no doubt, that, under the British government, the river Appalachicola remained the boundary between East and West Florida, as it was so established by proclamation of the king in 1763 (1 Laws U. S. 444), but it does not appear, that Spain had adopted it in administering the government of those provinces, by any royal order, or that such was a common opinion of the inhabitants; on the contrary, it appears, that so early as 1785, Don Galvez, then governor-general of Louisiana, considered the district of St. Mark's de Appalachy as a dependency of his government, and in 1786, placed it under care of the government of West Florida, and ordered the establishment of a post there, by a detachment from the garrison of Pensacola, which acts were approved by a royal order, in March 1787. These orders were acquiesced in by the governor of East Florida, who appears to have exercised no jurisdiction within that *territory, or to [*739 the west of it, after 1786. There is abundant evidence in the record, that that post, the circumjacent territory, with what lies between it and the Appalachicola, was a dependency on, and subject to, both the civil and military jurisdiction of the governor of West Florida, and was so considered by all the officers of the government, the captain-general, and the king, as appears from many documents. The fact of the exercise of jurisdiction over that territory by the governor of West Florida is also established by

the concurring testimony of many witnesses, as is also the fact of its surrender by him to the United States as a part of the territory under his command. (Laws of 1832, Pamphlet 112.) But evidence of the fact, still more conclusive, and its most solemn recognition by both governments, is to be found in the formal act of surrendering the sovereignty and possession of the province by Spain to the United States. The governor of West Florida "placed the commissioner of the United States in possession of the country territories, and dependencies of West Florida, including the fortress of St. Mark's, with the adjacent islands, dependent on said province." (White 198; Pamphlet Laws 112.) So it was accepted and is yet held by the United States, and so we must consider it as understood by congress in the various laws passed since the cession, and the proceedings therein authorized under the treaty in reference to East and West Florida. The boundary between them must be taken to be that which existed under Spain, from 1785 till 1821, as incontestibly proved, and most solemnly admitted by the United States, up to which the powers of the governor of West Florida, whatever they might be, could be exercised in their plenitude, both as a government *de facto* and a government *de jure*. It becomes needless to inquire whether, after these solemn acts, it is competent for the United States now to contest the existence of such boundary; it suffices for this case, that it is abundantly established by all the evidence, which is uncontradicted, and that the lands in controversy are situated within West
*740] Florida, according to the boundaries recognised by both *governments. This objection cannot, therefore, be allowed to prevail.

It is next contended, that the power to grant lands in West Florida was not vested in the governor, but was confided exclusively to the intendant; this is clearly proved to be the settled law of that province as to royal lands, which were the property of the crown, and is admitted by the counsel of the petitioner. But the reverse is, we think, equally apparent, as to Indian lands, until their right had been abandoned, and the land become annexed to the royal domain by a process in the nature of an office at common law. (White 25, 40, 42, 79, 43, 47, 215.) The relations between the Indians and the government of Spain, were considered as matters of the deepest political concern, in no wise connected with its fiscal operations; the commerce with the Indians was, as a political instrument, intrusted exclusively to the governors, as clearly appears by their correspondence with each other, the captain-general of Cuba, and the ministry in the mother country, and regulated by royal orders, with which the intendancy had nothing to do. (White 35.) It was a part of the governor's oath, as prescribed by the laws of the Indies, "that you shall take care of the welfare, increase and protection of the Indians." He was their protector, whose duty it was to examine whether claims upon them were well founded, and if so, contribute by all possible means to their being paid, but not to lend his sanction, or allow the smallest injury to be done to them. The fact of the supervision of Indian sales of their land, by the governors of provinces and commandants of posts, in acts of confirmation and putting the purchasers in possession, is very clearly established by the report of the land commissioners of the United States in Louisiana. It was exercised by Don Galvez, governor-general of Louisiana, as early at least as 1777, in confirming an Indian sale of the great Houma tract on the Mississippi (1 Laws U. S. 551, 552, 554), and there is no evi-

dence that this power was ever intrusted to or conferred on any other officer, nor that it was ever exercised by any other. It was an authority expressly delegated to them by the laws (White 232–4), and so reported by the commissioners, *proved also as a fact by the former secretary of the province, and Governor Folch. It cannot, indeed, be well ques- [*741 tioned, that the governors and commandants of posts where the appropriate officers for these purposes, in the absence of any evidence of confirmation by intendants, with positive evidence of their approbation by the captain-general of Cuba, in making formal acts of confirmation, without objection by the intendant-general of Cuba, or by local intendants. When to these considerations is added another, arising from the circumstance of there being no instance of the rejection of disaffirmance of a deed confirming an Indian sale, by any of the superior authorities in the provinces, or by the king, as is clearly established, and admitted in the argument, we cannot feel authorized to declare, that Governor Folch usurped any powers vested in the intendant, in any of his acts relating to these lands.

The confirmation of similar grants, made by acts of congress, or by boards of commissioners acting under their authority, are also powerful evidence of the lawful exercise of the authority of these officers; and being proceedings under the treaty and laws, they are made a rule by which, among others, we may adjudicate on the claims of the present parties; in doing which, we cannot sustain this objection, without overlooking such a concurrence of evidence of various descriptions, as leaves no reasonable cause of a doubt of the authority of Governor Folch; especially, when we connect with his first permission to make the purchase of 1804, the condition attached to it, that the lands should not be disposed of, without the giving notice to, and knowledge of, the government; and to that of 1811, that it should be conveyed to the king, if required, at the price at which it was purchased, and the mode in which that condition was performed and released. Pursuant to these conditions, John Forbes applied to the captain-general of Cuba, in 1817, for permission to sell the land to the petitioner, which being referred to the assessor-general, for his advice, he reported that the lands had been transmitted actually and lawfully in full property to Mr. Forbes, with a conditional title, or "*titulo oneroso*," for which acquisition competent permission was given by Governor Folch, who *delivered titles of con- [*742 firmation subsequently; whereupon, a formal permission was given by the captain-general to make the sale, which was a direct approbation of all the proceedings authorized by that governor, as well as that he was the officer designated for such purpose. Such a confirmation by an officer subordinate only to the king, performed so long after the acts done by the governor of a province, who was under the control of a captain-general, must be referred to his legitimate authority competent for the purpose. It was done also on the deliberate advice of an officer responsible to the crown, which makes the presumption very strong, if not irresistible, that every thing preceding it had been lawfully and rightfully done. (White, 25, 40, 43, 47, 49.) This proceeding is in the nature of an inquest of office, in analogy to the writ of *ad quod damnum*, which, by the common law, precedes the grant of any charter, license or patent of the king, of anything which may be injurious to his or the rights of others, on which an inquest is taken, on whose report the king acts, on the advice of the proper officer or tribunal,

makes the grant or withholds it, as advised. (3 Bl. Com. 259 ; 17 Vin. Abr. 171, 176 ; 7 Day's Com. Dig. 80.) The report of the assessor-general seems to have been acted on, as an inquisition at common law, finding that there was no obstacle to the making use of the powers intrusted to the captain-general. We should feel it to be an assumption of much responsibility, to declare that on the evidence in this record, and the law arising upon it, that either of the officers referred to usurped powers not vested in them, or exercised them against, or without, the authority of the king.

The counsel of the United States pressed in argument the decision of this court in the case of *Arredondo*, as an affirmance of the right of the intendant of the province, or of Cuba, to grant Indian lands. In that case, the lands granted had been in the possession and occupation of the Allachua Indians, and the centre of the tract was an Indian town of that name. But the land had been abandoned, and before any grant was made by the intendant, a report was made by the attorney and surveyor-general, on a reference to them, finding the fact of abandonment, on which it was decreed that the land had reverted to and become annexed to the royal domain. *Con-
*743] sidering this to be a judicial act, in the nature of an inquest of office, and the decree of the intendant as making the fact a *res adjudicata*, we did not feel at liberty to look behind it for the evidence on which it was founded ; the consequence of which was, that by the judgment of a competent tribunal, the land was part of the royal domain, subject to the disposition of the intendant. There is no pretence of a similar proceeding having been had in relation to these lands, nor could there well be, in opposition to the evidence in the record, especially the report of the assessor-general, in 1817, that they were the lands of the Seminoles, at the time of the cession by them, and the confirmation by Governor Folch. By the common law, the king has no right of entry on lands, which is not common to his subjects ; the king is put to his inquest of office, or information of intrusion, in all cases where a subject is put to his action ; their right is the same, though the king has more convenient remedies in enforcing his. If the king has no original right of possession to lands, he cannot acquire it, without office found, so as to annex it to his domain. (2 Inst. 46 ; Sav. 8, 9, pl. 20 ; Hob. 347 ; Hardr. 460 ; 7 Day's Com. Dig. 77 ; Gilbert's Ex. 109 ; 3 Bl. Com. 257 ; Fitz. N. B. 90 *b* ; 4 Co. 58 *b* ; 16 Vin. 552 ; 3 Co. 10, 11 ; 9 Ibid. 95, 96, 98 ; Hardr. 51–2 ; Plowd. 236, 486 ; 1 Co. 42 ; 5 Ibid. 52 *b* ; Plowd. 229–30.) Such, too, seems to be the law of Spain in the Floridas and Cuba, as appeared in the case of *Arredondo*, and as it must have been understood by the Spanish authorities, when they acknowledged the Indian right to lands in the harbor of Pensacola to be an existing one, in 1816. Nor is there any evidence in the record, that their right ceased to be respected, or that lands which had been in their possession became annexed to the royal domain, till some official proceeding, founded on the law of Spain, in the nature of an office by the common law, had taken place under the proper authority. (White, 25, 40, 37.)

The United States have acted on the same principle, in the various laws which congress have passed in relation to private claims to lands in the Floridas ; they have not undertaken to decide for themselves on the validity of such claims, without the previous action of some tribunal, special or judi-

cial. They have not authorized an entry to be made on the possession of *any person in possession, by color of a Spanish grant or title, nor the sale of any lands, as part of the national domain, with any intention to impair private rights. The laws which give jurisdiction to the district courts of the territories to decide in the first instance, and to this, on appeal, prescribe the mode by which lands which have been possessed or claimed to have been granted pursuant to the laws of Spain, shall become a part of the national domain, which, as declared in the seventh section of the act of 1824, is a "final decision against any claimant, pursuant to any of the provisions of the law." [*744

Another objection is made to the title of the petitioner, on the allegation that, by the treaty of Picolata, between Great Britain and the Creeks, in 1765, the Indians had ceded all the lands in controversy between the sea and flow of the tide, in virtue of which they became the property of the crown, and passed to Spain by the treaty of 1783. The fifth article of the treaty of Picolata, made to prevent encroachments on the lands or hunting-grounds of the Creeks, stipulates that the boundary of the province of East Florida "shall be all the sea-coast, so far as the tide flows, in the manner settled with the great Tomachiches, by the English," with all the country particularly described therein, which they grant and confirm to the king. As this refers to a treaty or compact made with this chief, its meaning must be sought in it; and unless something can be found there, which will make the expression more definite than the general terms "all the sea-coast, so far as the tide flows," it will require great latitude of construction, as to an Indian cession, to extend it from the St. Mary's around the peninsula of Florida to the mouth of the Appalachicola. The tract of country ceded lies on the sea-coast, east of a point formed by a line run from the source of the St. John's, which is its southern boundary; the western boundary is a line run from the junction of the Ocklawaugh with the St. John's, northwardly to the St. Mary's, nearly parallel to the sea-coast, at an average distance of about thirty miles west. It would be stretching the meaning of this treaty very far, to embrace within it an extent of sea-coast and contiguous land within the flow of the tide, to its whole extent, when the extent of the lands ceded, west of a line from the mouth of the Ocklawaugh to *the sea, was so small. Before we could do it, it must appear to have been so previously settled between the English and Tomachiches, as is referred to in the treaty of Picolata. From the account given in McCall's History of Georgia, the treaty with Tomachiches was held in 1733, and the cession of the sea-coast was only between the Altamaha and Savannah, extending west to the extremity of the tide-water. (1 McCall's Hist. 37.) As this is the act referred to, it must be taken in connection with the subsequent treaty to make it certain by the reference (6 Pet. 739) which entirely removes the objection, and shows the cessions of the sea-coast to be confined to that part which is between the St. Mary's and St. John's rivers. [*745

The report of the surveyor-general, in 1817, is very full on the subject of the boundaries between the British government and the Indians in East and West Florida. He says, "with regard to East Florida, I have never been able to discover that there has ever been any treaty or agreement with the natives of that province, concerning the limits of their possession, nor in that of the Spanish authority." As the surveyor-general had referred to

the treaty of Picolata in his report, it is clear, that it was construed by the Spanish government as it now is by this court.

We now come to consider the nature and extent of the Indian title to these lands. As Florida was for twenty years under the dominion of Great Britain, the laws of that country were in force as the rule by which lands were held and sold; it will be necessary to examine what they were, as applicable to the British provinces, before the acquisition of the Floridas by the treaty of peace, in 1763. One uniform rule seems to have prevailed, from their first settlement, as appears by their laws; that friendly Indians were protected in the possession of the lands they occupied, and were considered as owning them, by a perpetual right of possession, in the tribe or nation inhabiting them, as their common property, from generation to generation, not as the right of the individuals located on particular spots. Subject to his right of possession, the ultimate fee was in the crown and its
*746] grantees, which could be granted by the *crown or colonial legislatures while the lands remained in possession of the Indians, though possession could not be taken, without their consent. Individuals could not purchase Indian lands, without permission or license from the crown, colonial governors, or according to the rules prescribed by colonial laws; but such purchases were valid, with such license, or in conformity with the local laws; and by this union of the perpetual right of occupancy with the ultimate fee, which passed from the crown, by the license, the title of the purchaser became complete.

Indian possession or occupation was considered with reference to their habits and modes of ife; their hunting-grounds were as much in their actual possession as the cleared fields of the whites; and their right to its exclusive enjoyment in their own way, and for their own purposes, were as much respected, until they abandoned them, made a cession to the government, or an authorized sale to individuals. In either case, their right became extinct, the lands could be granted disincumbered of the right of occupancy, or enjoyed in full dominion by the purchasers from the Indians. Such was the tenure of the Indian lands by the laws of Massachusetts (Indian Laws, 9–10, 15–19, 21); in Connecticut (40–2); Rhode Island (52, 55); New Hampshire (60); New York (62, 64, 71, 85, 102); New Jersey (133); Pennsylvania (138); Maryland (141, 143–5); Virginia (147–8, 150, 153–4); North Carolina (163–4, 58); South Corolina (178–9); Georgia (186–7); by congress (Appendix, 16); by their respective laws, and the decisions of courts in their construction. (See cases collected in 2 Johns. Dig. 15, tit. Indians; and Wharton's Dig. tit. Land, &c. 488.) Such, too, was the view taken by this court of Indian rights, in the case of *Johnson* v. *McIntosh* (8 Wheat. 571, 604), which has received universal assent.

The merits of this case do not make it necessary to inquire whether the Indians within the United States had any other rights of soil or jurisdiction; it is enough to consider it as a settled principle, that their right of occupancy is considered as sacred as the fee-simple of the whites. (5 Pet. 48.) The principles which had been established in the colonies were adopted by the king, in the proclamation of October 1763, and applied to the pro-
*747] vinces acquired by the treaty of peace, and *the crown lands in the royal provinces, now composing the United States, as the law which should govern the enjoyment and transmission of Indian and vacant lands.

After providing for the government of the acquired provinces (1 Laws U. S. 443–4), it authorizes the governors of Quebec, East and West Florida, to make grants of such lands as the king had power to dispose of, upon such terms as have been usual in other colonies, and such other conditions as the crown might deem necessary and expedient, without any other restriction. It also authorized warrants to be issued by the governors, for military and naval services rendered in the then late war. It reserved to the Indians the possession of their lands and hunting-grounds ; and prohibited the granting any warrant of survey or patent, for any lands west of the heads of the Atlantic waters, or which, not having been ceded or purchased by the crown, were reserved to the Indians ; and prohibited all purchases from them, without its special license. The warrants issued pursuant to this proclamation, for lands then within the Indian boundary, before the treaty of Fort Stanwix, in 1768, have been held to pass the title to the lands surveyed on them, in opposition to a Pennsylvania patent afterwards issued. (*Sims* v. *Irvine*, 3 Dall. 427–56.) And all titles held under the charter or license of the crown to purchase from the Indians have been held good, and such power has never been denied ; the right of the crown to grant being complete, this proclamation had the effect of a law in relation to such purchases; so it has been considered by this court. (8 Wheat. 595–604.) Settlements made by permission of the commanding officers of posts on lands not ceded by the Indians, have been held to give a pre-emption to lands in a proprietary government, and warrants and patents for such lands have been uniformly held good, when knowingly made by the proprietary or his officers, as lands not purchased from the Indians. (See Wharton's Dig. tit. Lands 488.) This proclamation also directed that purchases from Indians should be made at a public council or assembly, in the presence of the governor or commander-in-chief of the colony, and be purchased for the king and in his name. (1 Laws 447.)

The Indian deeds made at the treaty of Fort Stanwix were to the king, in trust for the grantees. (Colony Titles 82–98.) *Grants made by the Indians at public councils have since been made directly to the [*748 purchasers, or to the state in which the land lies, in trust for them, or with directions to convey to them, of which there are many instances of large tracts so sold and held, especially in New York. (Indian Treaties 13–38.)

It was a universal rule, that purchases made at Indian treaties, in the presence and with the approbation of the officer under whose direction they were held, by the authority of the crown, gave a valid title to the lands ; it prevailed under the laws or the states, after the revolution, and yet continues in those where the right to the ultimate fee is owned by the states or their grantees. It has been adopted by the United States, and purchases made at treaties held by their authority have been always held good by the ratification of the treaty, without any patent to the purceasers from the United States. This rule in the colonies was founded on a settled rule of the law of England, that by his prerogative, the king was the universal occupant of all vacant land in his dominions, and had the right to grant it at his pleasure, or by his authorized officers. (Hob. 322 ; Co. Litt. 1, 41 *b* ; 4 Bac. Abr. tit. Prerog. 153 ; 7 Day's Com. Dig. 76.)

The authority of the proclamation is in the right of the king to legislate over a conquered country, which as Lord MANSFIELD says, was never denied

in Westminster Hall, or questioned in parliament. If a king comes to a country by conquest, he may alter its laws; but if he comes to it by title and descent, it must be with consent of parliament. He is intrusted with making the treaty of peace; he may yield up the conquest, or retain it on what terms he pleases. These powers no man ever disputed; neither has it hiterto been controverted, that the king might change part or the whole of the law or political form of government of a conquered dominion. He comes in place of the king of Spain, the former sovereign. (Cowp. 204, 213, in a case arising under this proclamation.) The proclamation of October 1763, then, must be taken to be the law of the Floridas, till their cession by Great Britain to Spain, in 1783, superseding, during that period, the laws of Spain which had been before in force in those provinces, so far as they were repugnant; and according to the established principles of the
*749] *laws of nations, the laws of a conquered or ceded country remain in force, till altered by the new sovereign. The inhabitants thereof also retain all rights not taken from them by him in right of conquest, cession, or by new laws. It is clear, then, that the Indians of Florida had a right to the enjoyment of the lands and hunting-grounds reserved and secured to them by this proclamation, and by such tenure and on such conditions as to alienation as it prescribed, or such as the king might afterwards direct or authorize. The Indians had also a right to the full enjoyment of such rights of property as the king might choose to impart to them, by any regulation, by treaty, or promise made to them by his authority.

By the treaty of Mobile, in 1765, the boundary of the lands or hunting-grounds reserved and claimed by the Chickasaw and Choctaw Indians was settled, a cession was made to the king, reserving to themselves full right and property in all the lands northward of such boundary. The treaty of Pensacola, in the same year, established the boundary with the upper and lower Creeks, who made a cession of lands, which they granted and confirmed to the king, and a similar treaty was made with the Creeks, at Picolata, in East Florida, in the same year. By thus holding treaties with these Indians, accepting of cessions from them, with reservations, and establishing boundaries with them, the king waived all rights accruing by conquest or cession, and thus most solemnly acknowledged that the Indians had rights of property which they could cede or reserve, and that the boundaries of his territorial and proprietary rights should be such, and such only, as were stipulated by these treaties.

This brings into practical operation another principle of law settled and declared in the case of *Hall* v. *Campbell*, that the proclamation of 1763, which was the law of the provinces ceded by the treaty of 1763, was binding on the king himself, and that a right or exemption once granted by one proclamation, could not be annulled by a subsequent. (Cowp. 213.) It cannot be necessary to inquire, whether rights secured by a treaty approved by the king are less than sacred under his voluntary proclamation.

*750] *By the treaty of Augusta, in 1773, a cession was made to the king of certain lands, for a specified consideration, which was to be paid to persons to whom the Cherokees and Creeks were indebted, and to defray the expenses of the treaty. This cession was made under an asserted claim of a right of property by the Creeks to the ceded lands, and a boundary was established between their remaining lands and those of the king in

Georgia. By a subsequent treaty at Augusta, in 1783, and at Shoulderbone, in 1787, the obligation of the Indians to pay their debts is mutually recognised. By the treaty of Fort Schuyler, in 1788, the obligation of the Indians to make compensation for injuries committed by them, is also admitted, as is also the case in treaties with the United States. (1 Laws 371, 407, 409, 410.) It may, then, be considered as a principle established by the king, that the Indians were competent judges of the consideration on which they granted their lands; that they might be granted for the payment of debts, and that this principle has been fully recognised by the United States. It can hardly be contended, that while such cessions by the Creeks were valid in Georgia, on one side of a then imaginary line, they would be void on the other side, in Florida, as to lands held under the same law, and by the same tenure. Whether the grants were made to the king directly, and the debts or injuries which formed their consideration be paid by him to the persons to whom they were due, or compensation made through him, or directly to the parties by a grant to them, must be a matter purely in the discretion of the king, or the officer whom he had authorized to accept or confirm the cessions by his license. Such were the relations between the Indians and Great Britain, as established by the proclamation of 1763, and confirmed by subsequent treaties between them, from 1765 to 1779, during the period of her dominion over the Floridas. This liberality and kindness to them, with respect for their rights of property in their lands or hunting-grounds, would seem to have arisen more from a sense of justice than motives of mere policy, when we consider the position of Great Britain between the treaty of 1763 and the commencement of the revolution. The undisputed sovereign of the whole territory from the Gulf of Mexico to that *of St. Lawrence, she had little to fear from the rival or hostile policy of [*751 Spain, the only neighbor to her colonies, and who had been humbled during the preceding war, and weakened to such a degree that she was no longer formidable in Louisiana. It was far different with Spain. On taking possession of the Floridas, after the independence of the United States had been established, with such a formidable, and rival, if not hostile, neighbor along the whole line of a narrow and weak province, the friendship of the Indians was a most important consideration. It would have been lost, by adopting towards them a less liberal, just or kind policy than had been pursued by Great Britain, or acting according to the laws of the Indies in force in Mexico and Peru. It was soon found necessary not only to respect their rights, as they had been enjoyed for twenty years before, but to place them on the permanent foundation of treaties and direct guarantees by the king. The most solemn assurances of both were given.

A treaty was accordingly held in Pensacola, in 1784, with the Tallapoosas or Seminoles, the object of which was declared to be to make the subjects of the king enjoy the fruits of peace, by which the Indians acknowledge themselves his subjects, promising to obey the laws in those points which were compatible with their character and circumstances, conforming themselves to the usages and municipal customs which are established, observing their contracts with the traders in good faith, and promising to observe "those orders exacted by reason, equity and justice, the principal basis of this congress." By the 13th article, the officers of the crown promised, in the royal name, the security and guarantee of the lands

which the Indians hold, according to the right of property with which they possessed them, on the sole condition that they are comprehended within the limits of the king as the sovereign.

In 1793, another treaty was held at the Walnut Hills, with the same Indians (among others), it was declared to be a treaty of friendship and warranty between them and the king, who was declared their immediate protector and mediator between them and the American states, in order to regulate their boundaries with them, and preserve the Indians in the possession of their lands. They were referred to the governor of West Florida, "as *representing the king in it," by the 5th article, with a stipulation in the 15th, that the points negotiated would be determined on by the commissaries of the king, with the approbation of the governor of that province, with the same force as if expressed in the treaty. By the 19th article, the Spanish and Indian nations approved and ratified all which was contained in it, and mutually promised and swore a mutual guarantee, the Indians declaring themselves under the protection of the king, he assuring them of his protection in all cases where they wanted it. This treaty also ratified all former treaties made from 1784. They were also approved by the king, and thereafter considered by the highest officers of the government in Florida, Louisiana and Cuba, as solemn guarantees to the Indians of all the rights they held under Great Britain. This right was occupancy and perpetual possession, either by cultivation, or as hunting-grounds, which was held sacred by the crown, the colonies, the states, and the United States; while the unauthorized settlement of the whites, on royal or proprietary lands, gave them not even the right of premption, unless by special laws, or custom and usage, sanctioned by proprietary officers. (See Wharton's Dig. *ut supra.*)

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But Spain did not consider the Indian right to be that of mere occupancy and perpetual possession, but a right of property in the lands they held under the guarantee of treaties, which were so highly respected, that in the establishment of a military post, by a royal order, the site thereof was either purchased from the Indians, or occupied with their permission, as that of St. Mark's. The evidence of Governor Folch, given in 1827, on the nature of the Indian title, is very strong and full, and the high respect paid to it by all the local authorities, so late as 1816, is strikingly illustrated in a report of the surveyor-general of West Florida. It seems, that in that year, an application was made for permission to buy lands on the other side of the Bay of Pensacola, to which the reply of the governor and sub-intendant was, if the lands are situated on the side from Yellow Water hitherward, "I am pursuaded they belong to the Indians, even our own *careening-ground, which is in front of this town," which, according to another report from the surveyor-general, belonged, by the treaties with England, to the Indians, and who refers to the limited space of province left to the government, and the necessity of recurring to negotiations with the Indians to obtain some of the lands; which are the best in the vicinity of Pensacola.

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When their right is thus regarded as to their lands in the immediate vicinity of the seat of government of the province, at so late a period, it cannot be doubted, that it was considered by the officers of the king as at least equally valid, in a far distant part, remote from any habitation of

the whites, save those connected with the house of Panton or Forbes. Although it may be conceded, as a principle of national law, that when Spain took possession of these provinces, the king could establish whatever form of government or system of laws he pleased; consider, by the law of power, though not of right, the Indians as his subjects, or as mere savages, with whom there should be no relations but those of peace and trade, and who held no rights otherwise than at the pleasure of the government, or according to the laws in force in other provinces; yet, it was his orders to his officers, to confirm those relations which had previously existed, to consider, treat and protect the Indians as his subjects, and to give them new and most solemn pledges of his protection, in all their rights, as individuals; and as nations or tribes, competent parties to treaties of mutual guarantee, for his, as well as their protection, in those provinces, which had not before been done in any of his dominions.

This was not done for slight reasons, but for such as would seem, in the opinion of all the great officers of the provinces, to have led to these treaties, and strong stipulations, as indispensable to secure their possession. But their obligation on the king did not depend on the motives which led to their adoption; they bound his faith, and when approved by him, became the law of the provinces, by the authority of royal orders, which were supreme, and bound both king and Indians as contracting parties, in this respect, as nations on a footing of equality of right and power. The consequence was, that when once received into his protection as individuals, they *became entitled, by the law of nations and of the provinces, on the same footing as the other inhabitants thereof, to the benefits of the [*754
law and government, which, in every dominion, equally affect and protect all persons and all property within its limits, as the rule of decision, for all questions which arise there (Cowp. 208), as in this case it must be as to the right of property in the Indians. The situation of the Florida Indians was well known to the United States, as is most clearly indicated in the fifth article of the treaty with Spain, in 1795: "so that Spain will not suffer her Indians to attack the citizens of the United States, nor the Indians inhabiting their territory." As thus considered by the United States and Spain, they were called "her Indians," while those in the United States were considered as the mere inhabitants of their territory, as the practical result of the respective treaties, which were recognised as subsisting ones between the then contracting parties and the Indians; of the stipulations of which and their effect, the United States could not have been otherwise than well informed at that time, as to the right of property in Indian lands in the Floridas. When they acquired these provinces by the treaty of cession, it was not stipulated, that any treaty with the Indians should be annulled, or its obligation be held less sacred than it was under Spain; nor is there the least reference to any intended change in the relations of the Indians towards the United States. They came in the place of the former sovereign, by compact, on stipulated terms, which bound them to respect all the existing rights of the inhabitants, of whatever description, whom the king had recognised as being under his protection. They could assume no right of conquest which may at any time have been vested in Great Britain or Spain, for they had been solemnly renounced, and new relations established between them, by solemn treaties; nor did they take possession on any

such assumption of right; on the contrary, it was done under the guarantee of congress to the inhabitants, without distinction, of their rights of property, and with the continued assurance of protection, They might, as the new sovereign, adopt any system of government or laws for the territory, consistent with the treaty and the constitution; but instead of doing so, all former laws and municipal regulations which were in existence at
*755] the cession, were *continued in force. It was not necessary for the United States, in the treaty of cession, to enter into any new stipulation to protect and maintain the Indians, as inhabitants of Florida, in the free enjoyment of their property, or as nations, contracting parties to the treaties of Pensacola and Walnut Hills, with Spain, in 1784 and 1793; for by the sixth article of the Louisiana treaty between France and the United States, they had promised "to execute such articles and treaties as may have been agreed on between Spain and the nations or tribes of Indians, until, by mutual consent, other suitable articles shall have been agreed upon." (1 Laws 137.) These were the treaties which guarantied to the Seminole Indians their lands, according to the right of property with which they possessed them, and which were adopted by the United States, who thus became the protectors of all the rights they had previously enjoyed, or could of right enjoy, under Great Britain or Spain, as individuals or nations, by any treaty to which the United States thus became parties in 1803.

When they acquired and took possession of the Floridas, these treaties remained in force over all the ceded territory, by the orders of the king, as the law which regulated the relations between him and all the Indians who were parties to them, and were binding on the United States, by the obligation they had assumed by the Louisiana treaty, as a supreme law of the land, which was inviolable by the power of congress. They were also binding as the fundamental law of Indian rights, acknowledged by royal orders and municipal regulations of the province, as the laws and ordinances of Spain in the ceded provinces, which were declared to continue in force by the proclamation of the governor in taking possession of the provinces, and by the acts of congress, which assured all the inhabitants of protection in their property. It would be an unwarranted construction of these treaties, laws, ordinances and municipal regulations, were we to decide, that the Indians were not to be maintained in the enjoyment of all the rights which they could have enjoyed under either, had the provinces remained under the dominion of Spain. It would be rather a perversion of their spirit, meaning and terms, contrary to the injunction of the law under which we act, which makes the stipulations of any treaty, the laws and ordinances of
*756] Spain, *and these acts of congress, so far as either apply to this case, the standard rules for our decision.

On these considerations, we are clearly of the opinion, that the Indians who claimed the lands in question had, under the government of Great Britain and Spain, a right of property in them, which could not be impaired, without a violation of the laws of both, and the sanctity of repeated treaties; that these rights continued to the time of the cession; are guarantied by the treaty and acts of congress in relation to the Floridas, in perfect conformity with its stipulations and faith, unless the Indians had previously made a binding transfer to the parties under whom the petitioner claims them.

The remaining question is, whether he has become invested with the right of the Indians, either in virtue of their deeds, or by the grant of the lawful authorities of the king, pursuant to the laws, usages and customs of the Spanish government of the province. The proclamation of 1763 was undoubtedly the law of the province till 1783; it gave direct authority to the governors of Florida to grant crown lands, subject only to such conditions and restrictions as they or the king might prescribe. These lands were of two descriptions; such as had been ceded to the king by the Indians, in which he had full property and dominion, and passed in full property to the grantee; and those reserved and secured to the Indians, in which their right was perpetual possession, and his, the ultimate reversion in fee, which passed by the grant, subject to the possessory right. The proclamation also authorized the union of these rights, by a purchase from the Indians, and taking possession, with the leave and license of the crown, in favor of an individual, or by the governor, at an Indian council, for and in the name of the king. This proclamation was also the law of all the North American colonies in relation to crown lands. The grants of the governors were universally considered as made by the king through his authorized representatives; and when the authority to grant those lands of the crown, the right to which was perfect by the union of the rights of possession and reverson, was complete, it is scarcely possible, that their authority would be more limited as to those in which the king had only a remote ultimate fee. As a matter of policy, it was for the benefit of the king and colony, to substitute the possession, settlement and *cultivation of the whites, for the mere occupancy of the Indians in the pursuit of game; and it cannot be imagined, without clear proof, that the autograph of the king, or his order in council, should be indispensable for a license or permission to purchase, when a patent was valid, without either. There is no evidence in the record, nor in the history of the colonies, that such a distinction existed, in law or usage, but is in direct collision with all the colonial laws relating to purchases from the Indians, as well as the course pursued at treaties, when deeds were made to purchasers, with the consent of the governor, or to the king, state, or United States, for their use, or in trust to convey to them. There is no evidence or reason, to induce the belief, that Spain acted in any other manner in the confirmation of Indian deeds; the usage of her local governors and commandants of posts in such confirmation, is in precise conformity to that of the other colonial officers of Great Britain, and was also in conformity to the existing laws of Spain. From the confirmation of the Houma grant, in 1777, by the governor-general of Louisiana, to that of the captain-general of Cuba of this, in 1811, during forty years, no instance appears of a direct confirmation by the king, or of his ever having required any other act than the approbation of the local governor, to give perfect validity to the purchase. [*757

Independently of these considerations, there is another, founded on the treaty at the Walnut Hills, with the Creek and Tallapoosa Indians, held by the then governor of West Florida, under the authority of the governor-general of Louisiana. The governor of that province is, in the fifth article, declared to be "as representing the king in it." Such a stipulation in a treaty of friendship and warranty would bind the king, in good faith, not to disavow his acts, declared to be done in the royal name and authority.

It would be an imputation on his faith to his acknowledged subjects, plighted by repeated guarantees, to suppose that he intended by the treaty of cession, to exclude from confirmation those lands which his white subjects had purchased from the Indians, under the sanction of treaties, with the approbation and formal confirmation of his highest officers; and to confirm only those grants of the royal domain, which had been made at the mere will of his governors, for such consideration only as they might
*758] prescribe. If there could be any *foundation for such an imputation in any case, the history, terms and consideration for the present grants would at once repel it; and when we consider that the United States accepted of the cession, with a knowledge that they had been made, as well as the circumstances under which they were made, connected with the quantity of land embraced within them, without excepting them from confirmation, we can have little doubt, that it was the meaning and intention of both contracting parties to the treaty, to place them on the same footing as the grants of lands belonging to the royal domain.

There is nothing in the treaty which authorizes a distinction between such grants, which operate by their own force, as a transfer of the full property in royal lands, held by the crown under cessions from the Indians; or deeds of confirmation, which give validity to grants conveying the Indian right, in confirming the transfer, by the license of the king, in the person of his representative. The governor was equally the lawful authority of the king for the one purpose as the other; though he had, by his royal order, transferred the power to grant royal lands, from the governor to the intendant; he had not affected the authority of the former, to confirm grants made by the Indians in such form as to validate the title conveyed. Whether this act of the governor operated by way of confirmation or grant, is immaterial; it gave such effect to the purchase, that the lands became the property of the purchaser, so that they could not revert to the crown by the abandonment of the Indians, or any judicial process known to the law of England or Spain, which in substance and effect were the same. When we look, too, to the very remote contingent interest which the king could have to these lands, consistently with his guarantee to the Indians, there can be no reason perceived, why deeds or grants, operating to confirm in full property to the purchasers from the Indians, lands thus guarantied to them, should not be held in a court of equity as valid as original grants of the royal domain.

The Indian right to the lands as property, was not merely of possession; that of alienation was concomitant; both were equally secured, protected and guaranteed by Great Britain and Spain, subject only to ratification and confirmation by the license, charter or deed from the governor representing
*759] the *king. Such purchases enabled the Indians to pay their debts, compensate for their depredations on the traders resident among them, to provide for their wants; while they were available to the purchasers as payment of the considerations which at their expense had been received by the Indians. It would have been a violation of the faith of the government to both, to encourage traders to settle in the province, to put themselves and property in the power of the Indians, to suffer the latter to contract debts, and when willing to pay them by the only means in their power, a cession of their lands, withhold an assent to the purchase, which, by their laws or municipal regulations, was necessary to vest a title. Such a course was

never adopted by Great Britain in any of her colonies, nor by Spain, in Louisiana or Florida; of this fact there is abundant proof in the record, by public documents, and the testimony of the highest officers of the local government, the laws, usages and customs of which were well known to the United States, before the treaty. The report of the commissioners on Opelousas claims was submitted to the secretary of the treasury in 1815; acted on and approved by congress in 1816; in which report the commissioners state "that the right of the Indians to sell their land was always recognised by the Spanish government." The laws made it necessary when the Indians sold their lands, to have the deeds presented to the governor for confirmation. The sales by the Indians transferred the kind of right which they possessed; the ratification of the sale by the governor must be regarded as a relinquishment of the title of the crown to the purchaser, and no instance is known where permission to sell has been "refused, or the rejection of an Indian sale."

In the present case, the Indian sale has been confirmed with more than usual solemnity and publicity; it has been done at a public council and convention of the Indians, conformable to treaties, to which the king was a party, and which the United States adopted, and the grant was known to both parties to the treaty of cession. The United States were not deceived by the purchase, which they knew was subject to the claim of the petitioner, or those from whom he purchased, and made no stipulation which should put it to a severer test than *any other; and it was made to a house which, in consideration of its great and continued services to the king [*760 and his predecessor, had deservedly given them high claims as well on his justice as his faith.

But if there could be a doubt, that the evidence in the record did not establish the fact of a royal license or assent to this purchase, as a matter of specific and judicial belief, it would be presumed as a matter of law, arising from the facts and circumstances of the case, which are admitted or unquestioned. As heretofore decided by this court, the law presumes the existence in the provinces of an officer authorized to make valid grants (6 Pet. 728; 8 Ibid. 450); *à fortiori*, to give license to purchase and to confirm; and the treaty designates the governor of West Florida as the proper officer to make grants of Indian lands by confirmation, as plainly as it does the governor of East Florida to make original grants (8 Pet. 452), or the intendant of West Florida to grant royal lands. A direct grant from the crown of lands in a royal haven may be presumed, on an uninterrupted possession of sixty years (2 Anstr. 614; 1 Dow P. C. 322–3); or a prescriptive possession of crown lands for forty years. (3 Dow P. C. 112.) An encroachment on a royal forest, by a continued possession of twenty years, will be presumed to have been by the license of the crown or by a grant, if no act of parliament prohibits it. (11 East 57, 284, 488, 495.) On the same principle, after a long possession of Indian lands, the law would presume that it was founded on an Indian deed, duly confirmed, or any title consistent with the facts and circumstances in evidence. (1 Paine 469, 470.) Anything which would make the ancient appropriation good (Cowp. 110), if it could have had a lawful foundation, for whatever may commence by grant is good by prescription. (1 Roll. Abr. 512; 4 Mod. 55; 1 Saund. 345.) The length of time which brings a given case within the legal presumption of a grant, charter or license, to validate a right long enjoyed, is not definite, depend-

ing on its peculiar circumstances; in this case, we think it might be presumed in less time than when the party rested his claim on prescriptive possession alone. There is every evidence, short of the sign manual or order of the king, approving and confirming this grant, and if that were wanting to secure *a right of property to lands which have been held as these have been, the law would presume that it once existed, but was lost in the lapse of time and change of governments. The more especially, as by the laws of Spain, prescription for the period of ten years has the same effect as twenty by the principles of common law.

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For these reasons, we think the title of the petitioner is valid by all the rules prescribed by the acts of congress, which give us jurisdiction of the case.

This case came on to be heard, on the transcript of the record from the supreme court for the middle district of Florida, and was argued by counsel: On full consideration whereof, this court is unanimously of opinion, that the title of the petitioner to so much of the lands in controversy as is embraced within the lines and boundaries of the tract granted by the deeds, grants and acts of confirmation to Panton, Leslie & Co., in 1804 and 1806; also to the island in the river Appalachicola, ceded, granted and confirmed to John Forbes, in 1811; also to the lands and islands at and west of the mouth of said river, which were ceded, granted and confirmed to John Forbes & Co., in 1811, is valid by the law of nations; the treaty between the United States and Spain, by which the territory of the Floridas was ceded to the former; the laws and ordinances of Spain, under whose government the title originated; the proceedings under said treaty, and the acts of congress relating thereto: and do finally order, decree, determine and adjudge accordingly. And this court doth, in like manner, order, adjudge, determine and decree, that the title of the petitioner to so much of the tract of land which lies east of the first-mentioned tract, between the rivers Wakulla and St. Mark's, which was conveyed to John Forbes & Co., in 1811, as shall not be included in the exception hereinafter made, is valid by the laws, treaty and proceedings as aforesaid; with the exception of so much of the last-mentioned tract as includes the fortress of St. Mark's and the territory directly and immediately adjacent and appurtenant thereto, which are hereby reserved for the use of the United States. And it is further ordered and decreed, that the territory thus described shall be *that which was ceded by the Indian proprietors to the crown of Spain, for the purpose of erecting the said fort, provided the boundaries of the said cession can be ascertained. If the boundaries of the said cession cannot now be ascertained, then the adjacent lands which were considered and held by the Spanish government, or the commandant of the post, as annexed to the fortress for military purposes, shall be still considered as annexed to it, and reserved with it, for the use of the United States. If no evidence can now be obtained to designate the extent of the adjacent lands, which were considered as annexed to St. Mark's as aforesaid, then so much land shall be comprehended in this exception as, according to the military usage, was generally attached to forts in Florida or the adjacent colonies. If no such military usage can be proved, then it is ordered and decreed, that a line shall be extended from the point of junction between the rivers St. Mark's

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and Wakulla, to the middle of the river St. Mark's, below the junction, thence extending up the middle of each river, three miles in a direct line, without computing the courses thereof; and that the territory comprehended within a direct line, to be run so as to connect the points of termination on each river, at the end of the said three miles up each river, and the two lines to be run as aforesaid, shall be, and the same is hereby declared to be, the territory reserved as adjacent and appurtenant to the fortress of St. Mark's, and as such reserved for the use of the United States. To which the claim of the petitioner is rejected; and as to which this court decree that the same is a part of the public lands of the United States.

The decree of the court below is, therefore, reversed and annulled in all matters and things therein contained, with the exception aforesaid; and this court, proceeding to render such decree as the said court ought to have rendered, do order, adjudge and decree, that the claim of the petitioner is valid, and ought to be confirmed, and is and remains confirmed, by the treaty, laws and proceedings aforesaid, to all the lands embraced therein except such part as is hereinabove excepted. And this court does further order, adjudge and decree, that the clerk of this court certify the same to the surveyor-general of Florida, pursuant to law, with directions to survey and lay off the lands described in the petition of the claimant, according *to the lines, boundaries and descriptions thereof in the several deeds [*763
of cession, grant and confirmation by the Indians or governor of West Florida, filed as exhibits in this cause, or referred to in the record thereof, excepting, nevertheless, such part of the tract granted in 1811, lying east of the tract granted in 1804 and 1806, as is hereby declared to be the territory of the United States, pursuant to the exception hereinbefore mentioned, and to make return thereof, according to law, as to all the lands comprehended in the first three herein-mentioned tracts. And as to the tract last herein mentioned, to survey, and in like manner to lay off the same, so soon as the extent of the land herein excepted and reserved for the use of the United States shall be ascertained in the manner herein before directed.

And this court doth further order, adjudge and direct, that the extent, and boundaries of the land thus excepted and reserved, shall be ascertained and determined by the superior court of the middle district of Florida, in such manner and by such process as is prescribed by the acts of congress relating to the claims of lands in Florida, and to render thereupon such judgment or decree as to law shall appertain.

APPENDIX.

In the Matter of Poole and Wife, and Jones, Petitioners, *v.* Henry Nixon and John Aspden.

On a Motion for leave to file a Bill of Review.

Opinion of the Circuit Court of the United States for the Eastern District of Pennsylvania, delivered by Mr Justice Baldwin, at October Term 1834.(*a*)

To the April term of this court, in 1828, a suit in equity was brought by Samuel Packer against Henry Nixon, executor of the last will of Matthias Aspden, to recover the balance of the estate remaining in his hands unadministered; in the progress of the suit, other parties were added as complainants, among whom was John Aspden, of Lancashire, England. He claimed as heir-at-law to the testator, by descent from William Aspden, whom he alleged to be the eldest uncle of the testator. On a reference to the master, he reported the said John Aspden to be the heir-at-law; which report, on exceptions taken, was confirmed by this court, in May 1832. In December 1833, the cause come on to a final hearing, when a final decree was pronounced in favor of John Aspden, and the bill was dismissed as to all the other complainants; from this decree, an appeal was taken to the supreme court, at January term last, which is now depending. On the 17th June last, Jennet Jones, and Thomas Poole and Mary his wife, filed their petition, setting forth that the said Jennet and Mary are the heirs-at-law of the testator, by lineal descent from John Aspden, the eldest uncle of the testator, and as such pray to be made parties to the original suit. They also ask leave to file their supplemental bill, and bill of review, to reverse the decree so far as it declares John Aspden, of Lancashire, to be the heir-at-law of the testator; and directs the executor to pay him the balance of the estate.

This is an application to the discretion of the court, to allow an amendment, introducing new parties and new matter, into a suit closed by a final decree on its merits; and if the amendment is allowed, to revise and reconsider the decree, as it may be affected by evidence offered by the new parties. If the amendment is refused, the petitioners are precluded from the benefit of a bill of review, however much the decree may affect his rights; on the other hand, if it is once allowed, the respondents must plead, demur or answer to the new matter, as if it was set out in an original bill (5 Mason 309; 1 Vern. 418; Mitf. 236; 2 Madd. 543), or disprove it (Beames 314). The preliminary question, whether the bill shall be filed, is, therefore, an important one in all cases, and in some, the only one; for the new matter may be of the most conclusive effect, if once it is introduced into the cause, and its truth admitted or made out in proof. In this case, it is especially important, to examine it in all is bearings, as well from the novelty of such applications in the courts of the United States, as the peculiar situation of the parties, and the cause which it is sought, by the bill now offered, to review and re-examine on its merits; and as they involve principles highly interesting to suitors, the profession and the public, without taking into consideration the magnitude of the sum in controversy.

(*a*) See *ante*, page 492.

Poole v. Nixon.

Bills of review, in courts of equity, are an anomaly in the system of jurisprudence which prevails in England and this country; no principle is better settled, or of more universal application, than that no court can reverse or annul its own decrees or judgments, for errors in law or fact, after the term in which they are rendered, unless they have been entered by mistake of the clerk. 2 W. C. C. 433; 12 Wheat. 10; 3 Ibid. 591. The supreme court of the United States cannot reverse its own decisions (1 Wheat. 355); they are conclusive on the rights of the parties (Ibid. 387); and so are the judgments of inferior courts, while they remain unreversed. Courts of common law can reverse their judgments only in one case. A writ of error *coram vobis* lies on an error in fact; but for an error in law, they cannot reverse their own proceedings, nor can they grant a new trial on newly-discovered evidence, after final judgment. A court of equity cannot reverse its decree, nor rehear the cause, after a final decree enrolled; till then, it is open for both purposes; but after that is done, it is as a final judgment at law. Such was the rule in equity so late as the 15 Jac. I., when a bill of review for new matter was refused. Cary 20. The law considers the record of a cause to be in the breast of the judges, while the court is in session; they may alter or amend any entry of their proceedings, during the term; but when they have made a record of their acts, and the term is closed, they become adjudicated matters, which give to the parties rights that cannot be taken from them, otherwise than by the powers of an appellate court. Judgments at common law are reviewed on writ of error, as to matters of law, on matters of fact, they cannot be revised by the court of error; this is not only a rule of the common law, but an express provision of the 22d section of the judiciary act, and of the seventh amendment of the constitution. The question before the appellate court is, was the judgment correct; not the grounds on which the judgment professed to proceed. 6 Wheat. 603; 4 Dow P. C. 143. Final decrees in equity may be examined on appeal, both as to matters of law and fact; the appellate court gives such a decree as the circuit court ought to have given on the whole case. Jud. Act, § 24. But bills of review differ from writs of error and appeals, the former being by the court which renders the decree, the latter by a superior tribunal. Under an appellate authority, conferred by statute, or sanctioned by usage, defining the cases in which it can be exercised, if no power is given to any court to revise the proceedings of another, they become final and conclusive as to all matters adjudicated by them, whether in law, equity or admiralty.

No act of parliament has given to any court, the power of taking cognisance of appeals from courts of equity, and none had assumed it, before 1620–21. Up to the 13 Jac. I., there was no precedent of even a prohibition to a court of equity in a county palatine. Roll. 246, 331. The first that issued was during the protectorate, in 1651. Roll. Abr. 318. Nor to the stannary court in the Duchy of Cornwall; an appeal lay only to the prince of Wales, and if there was no prince, then to the king in council. 1 Roll. 246; 3 Bulst. 116. About this time, the court of king's bench claimed the power of issuing writs of prohibition to the chancellor; to prevent him from making a decree in matters cognisable at common law, or from interfering with the judgments of the courts of common law, for which Lord Coke gave this reason: "That the rules and judgments of courts of equity are as binding as the laws of the Medes and Persians, not to be altered, upon which no writ of error lies; they, therefore, ought to be prohibited, before judgment, or the party has no remedy" (2 Bulst. 197, 215; Cro. Jac. 335-6), except by petition to the king (3 Bulst. 118), who might refer the matter to the judges, to reverse the decree, if they should think it ought to be. 4 Inst. 85–6 (42–43 Eliz.); 3 Bulst. 118. The reason of applying to the king was, that the chancellor was his representative, sitting and judging in his name, and by his authority; his decrees were the decrees of the king, not to be altered without his leave. Gilb. For. Rom. 185, 183. The assertion by the king's bench, of the right to grant prohibitions to the chancellor, led to a controversy which brought Lord Coke to his knees, before the king in council; and it was determined, after a reference by the king to Lord Bacon and others, by a declaration of the king, that he had the sole power of deciding of the jurisdiction of the several courts, and ordered, that "the

report made to him, with his proceedings thereon, should be enrolled in chancery, there to remain of record, for the better extinguishing of the like differences and questions that may arise in future times." 1 Ch. Rep. app'x, 1–50; Cary 181–2 (A. D. 1616). From this time, there was no power in any court to revise the decrees of the chancellor (1 Chan. Cas. 44–5), until Lord BACON made an order on the subject of bill of review by the chancellor himself; but there was no appeal from his decision on a bill of review, nor any other subject, until the house of lords, in 1620–21, sustained an appeal from a decree of Lord BACON. 3 Journal of the House of Lords, 50, 61, 62, 63, 67, 76, 78. This was held by the commons to be a novelty, and was resisted from time to time up to 1704. 3 Bl. Com. 454; 1 vol. Deb. House of Commons 210, 240; 3 vol. 302, 308. Since which time, it has been at rest: "it has been submitted to, because it has been thought too much, that the chancellor should bind all the property in the kingdom without appeal" (Gilb. F. R. 190–91); and it is reasonable to have the examination of their sentences in the parliament, as well as of judgments at common law. Show. P. C. 81.

The cognisance of bills of review rests entirely on the order of Lord BACON; but as it has been acquiesced in, and acted on, from the time of its adoption, it forms a part of the law of equity which has been adopted by the constitution of the United States, as applicable to all cases in equity within the jurisdiction of the courts of the United States. 3 Pet. 446. This order is to be considered as an act of parliament, or of congress, conferring on courts of equity a new power, which must be exercised conformable to its provisions, and being in derogation of the principles of the common law, must be construed strictly, so as to confine its application to the specified cases. When such a case arises as is proper for a bill of review, the final decree of the court of equity becomes the subject of appeal to the supreme court, in the same manner as a decree on an original bill; but no appeal lies upon any order or interlocutory decree, it is confined to those decrees which decide finally on the rights of the parties before the court. Jud. Act, § 22.

The present application is for an order to amend the proceedings in the original suit, the refusal or making of which is a proper ground for appeal in England (3 Atk. 34; 4 Bro. P. C. 465, 486; Gilb. F. R. 188); but not here, because it is not a final decree, and because it is a matter purely in the discretion of the court, with which the supreme court do not interfere in ordinary cases on questions of amendment. 5 Cranch 15; 9 Wheat. 576; 11 Ibid. 302. The same rule applies to that part of the petition, which prays to have the decree opened for revision, on the new matter alleged, being in the nature of an application to a court of law for a new trial. 4 Wheat. 220; 3 Pet. 31–2. The supreme court never give directions respecting amendments, but leave that question to the court below. 6 Cranch 267. They will reverse a decree, for the want of proper parties; but in such case, "remand the cause for further proceedings, according to law and justice." 3 Pet. 204.

Bills of review are not favored in equity. If they are founded on the discovery of new matter, the petitioner must make a deposit to cover the costs of the application (2 Atk. 139), and the bill must be filed with the special leave of the court. 2 Atk. 139; Dick. 612, 614, 616; Mitf. 71; 2 Ves. 598; 1 Johns. 490–91. Though if the bill is filed without leave or deposit made, the court will give leave to make it, and have it considered as made before the bill filed. Dick. 223. The party praying for the bill of review must perform the decree; if for money, he must pay it; if to convey land, he must give up possession (Tothill, Pro. Ch. 42; 2 Eq. Cas. Abr. 175–6, pl. 13 n.); but if the act decreed to be done, will extinguish the party's right, its performance will be spared, till the bill of review is determined, but the sparing must be by the order of the court (Tot. 41–7; 2 Harr. Ch. 126; 1 Vern. 117, 264; Pr. Reg. 52; Bohun 382; Gilb. F. R. 185, 187; 2 Bro. P. C. 24 n.; 2 Freem. 88); or, if the party is unable to perform the decree, he must give good security or be committed (1 Chan. Cas. 42; Mitf. 70; 2 Johns. Ch. 491; 3 Ibid. 128); unless he is an executor, who may have a review without performance. 2 Eq. Cas. Abr. 175; 12 Mod. 343. The reason of imposing these conditions is obvious; "there is wisdom in the establishment of

such a provision, and it ought to be duly enforced; the object is, to prevent abuse in the administration of justice, by filing bills of review for delay and vexation, or otherwise protracting litigation to the discouragement and distress of the adverse party." 2 Johns. Ch. 491. These rules form a part of the law of equity on bills of review in England; subject to which, they have been introduced into the equity jurisprudence of the United States.

The party must make a strong affidavit (16 Ves. 349) that he had not any knowledge of the new matter set forth in his petition and bill of review, at the time of the hearing, or when the original decree was given; that it has since come to his knowledge, and that it could not have been produced or used then. Mitf. 66; 2 P. Wms. 284; Gilb. F. R. 187. The words of Lord Bacon's order are, "which could not possibly have been used at the time of the decree passed" (Tot. 41–2), which is adopted in the form of the affidavit (1 Harr. 64, 76); the most approved treatises (Pr. Reg. 51; 2 Harr. Ch. 123; 3 Bl. Com. 454); and in judicial decisions of the highest authority (3 Johns. Ch. 126; 2 Ibid. 492; 2 Bro. P. C. 108; Boh. C. C. 381; 1 Ves. 434; 3 Atk. 37). The affidavit must be by the party, and not the solicitor (4 Vin. 415; 2 Eq. Cas. Abr. 175–6, pl. 13), unless good reasons appear for the party not making it. The court may hear counter-affidavits, or other proof in opposition (5 Mason 308) to the affidavit of the party, to show that he had knowledge of the alleged new matter before the decree, or that he has been negligent in searching. 1 Ves. 435; Mitf. 70; 3 Johns. Ch. 125; 2 Bro. P. C. 25. They require to be satisfied, that the new matter was not in the knowledge of the party, his solicitor or agent (2 Atk. 534; Dick. 612, &c.), or country attorney (3 Atk. 35); the knowledge of either being the knowledge of the party. 4 Bro. P. C. 465, 486. The party must have used active diligence (16 Ves. 351), or a reasonable diligence to procure the evidence before the decree (2 Atk. 40; 2 Johns. Ch. 491. If negligence is imputable to him, leave will not be granted. 1 Chan. Cas. 43; 4 Vin. 409, pl. 18; Boh. C. C. 384; 2 Eq. Cas. Abr. 176; 2 Bro. P. C. 109, 110; Gilb. F. R. 187; 1 H. & M. 15. Inattention or misjudgment is no excuse (Pet. C. C. 379); as if the party had the paper in a trunk, in his own possession, but did not know of it in time (Ibid.); unless they had been in a distant place, or the party had no reason to believe that they were in the trunk, &c., in which they were found. Gilb. F. R. 187, 189; 1 Ves. 435; 16 Ibid. 354; 3 Johns. Ch. 127; 5 Mason 312. So, if there was enough in tne knowledge of a party or his solicitor, to put them on an inquiry; if, by what was before him, he was sufficiently apprised to enable him to acquire complete knowledge, or enough appeared in the bill, to call upon a party using reasonable diligence to bring forward the whole case; he is not allowed to file his bill. 16 Ves. 350, 354. So, if the paper discovered has been found in the appropriate office, without any previous search, as in the case of a vicar's bill for tithes, it is deemed negligence not to have searched in the augmentation office. 4 Cond. Ch. 114–15; Jacob 243. It will not avail a party, that he was prevented from offering the evidence, by the advice of one of his counsel in the absence of the other. 3 Munf. 112, 115.

These rules show the caution with which the courts of equity act in the first attempt to disturb an enrolled decree; they are much more rigid than in any other case, showing that a bill of review, for newly-discovered matter, is considered as an extreme remedy for extreme cases, which public policy and peace alike require to be administered with extreme care, lest the sanctity of final decrees may become of too easy or common violation. These, too, are cases in which the greatest danger exists, if not of perjury, at least, of the most latitudinous oaths, in the affidavits of interested parties; the court must hear them, in all cases, they must act in conformity to them, if they are full, clear and not contradicted; and when they have given leave to file the bill, the new matter becomes incorporated into the proceedings in the original cause, as it is stated in the petition and bill of review.

Then, the usual course is, for the defendant in the bill of review to plead and set forth the original decree, and then demur to the new matter set up for opening the enrolment; the court then judge, from the face of the decree, whether the new matter

as admitted by the demurrer, is sufficient for its reversal. Finch 36, 209; 2 Atk. 535; 3 Ibid. 627; 1 Vern. 392; 4 H. & M. 24, 34. Or the defendant may take issue on the truth of the new matter set up, when the court will open the publication, to receive and decide on the evidence offered; if the facts, as alleged, are then established, the court review and revise the decree upon those facts. 5 Mason 308–9.

These reasons induce a court to examine particularly into all these preliminary questions; not only to avoid interminable litigation; but doing injustice to a party in whose favor their deliberate decree has been made, by suffering it to be questioned on a suspicious application, founded on alleged new matter, or when that matter, as set forth, is not clearly relevant and material, and would or might have led to a different result, if it had been known and used at the hearing. Mitf. 66, 67; 1 Ves. 434; 2 Ibid. 600; 3 Atk. 35-6; 3 Johns. Ch. 127; 1 H. & M. 15; 5 Mason 312.

Few cases can arise in an any court, which call for more circumspection and deliberation in their every step than this; the final decree complained of was not rendered till the suit had been depending for more than five years, during which every preliminary question was contested before the master and the court, whether it was of law or fact. The case turned on two questions: 1. The construction of the will of Matthias Aspden, the younger; and next, on who was his heir-at-law. There were competent parties before the court, who were entitled to the fund, on any construction which the court might put on the devise—an heir-at-law on the father's side, an heir-at-law on the mother's side, and the next of kin to the testator in all the ramifications of genealogy; all claiming from the executor, who was before the court, with the fund in his hand, subject to their order. The heir-at-law on the father's side was identified in the person of John Aspden, of Lancashire, England; he appeared, was made a party, and no one contested that character with him; the only controversy was, as to his descent from the common ancestor, Thomas Aspden, of Simonstone, by legitimate succession. That fact was contested by the other parties, before the master, on the evidence before him, on an exception to his report, founded on the insufficiency of the evidence before him to prove the fact. The court deemed the evidence legally sufficient, and confirmed the report, in May 1832, from which time, the question was no longer agitated, the decree assumed the fact of heirship in the person of the said John, and was founded upon it, as one not then in controversy; the only question open, after the confirmation of the master's report, being the construction of the will. It was not suggested to the court, that there were parties in interest not before them; it was evident, that the fund was fully represented by some one of the parties, for there was no character in which any one person could take under the will, which was not completely filled by some of the claimants. It was not, therefore, a case in which the court could suspend their decree, for the want of parties, or one which an appellate court could, on appeal, reverse, on that ground, a decree in favor of either description of claimants. 7 Cranch 87, 98.

As the counsel of the petitioners have alluded to an expression of the court, in giving their opinion on the master's report, and rendering the final decree, we think it proper to observe, that on the question of heirship the evidence was not so full or clear as it might have been; we gave our opinion upon it, with some misgivings as to the fact of William Aspden being the oldest brother of the testator's father. But then we had only to judge of its legal sufficiency, of which we had not then, and have not now, a doubt, that from the facts before the master, the legal conclusion was inevitable. What we said in reference to a future examination of that question, was not intended, and could not be understood, as referring to any other revision than was usual in courts of equity, and consistent with its rules, that is, before a final decree was pronounced. When, in delivering the opinion, we assumed "for the present," that John Aspden, of Lancashire, was the heir-at-law, it could not be intended, that we would allow a revision of that fact, after our power over the decree had terminated by an adjournment. The obvious as well as intended meaning was, that up to the time of a decree for final distribution, the question might be opened; and in the act of rendering that decree, we did not consider it as finally closed, so long as by the rules of law it could

be kept open, that is during the term. On a proper case being presented, new parties might have been introduced, the publication opened, new evidence received, and the cause reheard, on the question of heirship, or any other matter proper for a rehearing; but when the term had closed upon a final decree, on the merits, between competent parties, ordering the payment of the fund to a claimant, and dismissing the bill as to all others, it was too late for a rehearing. There was no suit depending, no cause to rehear, no fact to decide, no question of law to examine; everything which had accrued in the cause had become a *res adjudicata;* and unless for the purpose of appeal, there were no parties in court, except the plaintiff, John Aspden, and the executor, between whom all past questions were finally adjudicated, and no new ones could arise, otherwise than on the execution of the decree.

It is then no case for rehearing, however clear may be the justice or abstract right of the petitioners, had they asserted their claim, within that time during which the court had power to decide upon it. In the intermediate time between the pronouncing and enrolling the decree, in England, or between the decree and the rising of the court at the end of the term, in this country, a supplemental bill in the nature of a bill of review may be filed, making new parties, and introducing new matter as the ground of a prayer for a rehearing. Mitf. 71; 2 Ves. 598; 2 Johns. Ch. 490; 2 Atk. 534; Dick. 612, 616; 17 Ves. 177–8; 2 Atk. 40. After the decree is enrolled, or the term elapsed in which it is given, new parties or new matter can be introduced by a bill of review, as a ground for a prayer for revision and reversal of the decree. 17 Ves. 177; 5 Mason 310.

The supplemental bill in the nature of a bill of review, and the bill of review, depend on the same rules as to granting or refusing them. 17 Ves. 176; 2 Johns. Ch. 490. Their prayer must be certain and specific as to the relief prayed (2 Anstr. 551), and not in the alternative. 17 Ves. 177–8; 5 Mason 317–18. When the petition is presented in time, it rests in the discretion of the court to allow it to be filed, in the exercise of which they will determine whether a proper case is made out (5 Mason 315); but if the term elapses, they cannot act upon the petition, without an abuse as well as excess of jurisdiction; the court has no power to receive a supplemental bill, after a final decree enrolled, nor to revise the decree, in any other manner than by a bill of review, nor allow either to be filed, unless in the cases and for the causes specified in the rules which form the law of equity; discretion can be exercised only on the existence of the required case and cause, but on no other subject; the authority to open the decree is special, and must be pursued strictly. The chancellor must decide whether the given state of facts brings the case within the rules; but if he thinks they do not, he cannot permit the petitioner to proceed further.

This is the interesting question in the present case; have the petitioners made out a case for a bill of review, under any circumstances; if so, are those presented a sufficient cause for opening the decree: if they have done these, there is abundant reason for believing, that their rights have been overlooked, and that the abstract justice and equity of their claim would have prevailed, had it been asserted in time. The evidence which is before us judicially, with that which has been known otherwise, makes out a case (till explained) of an imposing character, as to original right, long neglected and now for the first time asserted in this court; on the other hand, the case of the defendant is one, not without its strong appeals, on account of the persevering efforts of years to disincumber his claim of the adversary pretensions of a host of claimants. He has hitherto been successful in establishing his right, according to all the forms and rules of law, so that it has become as perfect as the decree of this court could make it. If it shall remain unreversed, a princely fortune awaits him, as the heir-at-law; it has been recovered by the exertions and active vigilance of the defendant, while its pursuit in this country was abandoned, for two years after the death of the former owner, by the new petitioners; who first assert their claim, after the defendant has removed all difficulties interposed by his former adversaries. If the prize is awarded to the petitioners, they are bound to pay no salvage; if retained by defendant, the actual owner is entitled to no compensation for his lost right;

in either event, there must be abstract injustice; which, as individuals, it might appear to us, to be the case of greater hardship, is not easy to say; as judges, our course is plain. With the relative claims of the parties, as they stood at the death of Matthias Aspden, we have now nothing to do; but must examine them as they were when this petition was filed; one comes before us, on his original right, the other has, in addition, our final decree in favor of his; whether we have acted erroneously is not for us to say; the cause is now out of our jurisdiction, unless it can be again brought within it, by the matters set up now. Whether it can or cannot, it is not for us to look to consequences, we must follow the course prescribed by law; to ascertain, first, our power according to the rules of equity, to open this decree, on the case presented; next, the sufficiency of the causes alleged for its exercise. The importance of the case, in all respects, induces us to take a view of all the points it involves, as it is desirable that the general principles which govern cases of this description, should be so explained, as to leave, for the future, less doubt on their application than has attended this.

As the authority of a court of chancery to review its decrees rests on the order of Lord Bacon, we must consider it as a test to which all applications are to be applied. "No decree shall be reversed, altered or explained, being once enrolled, but upon bill of review; and no bill of review shall be admitted, except it be upon error in law, appearing in the body of the decree, without further examination of matters in fact; or he shall show some new matter which hath risen in time, after the decree, and not any new proof which might have been used when the decree was made. Nevertheless, upon new proof which hath come to light since, and after the decree made, and could not possibly have been used at the time when the decree passed, a bill of review may be granted, by the special license of the court, but not otherwise." Tot. Pro. Ch. 41; Bac. L. T. 279–80. Miscasting, by an error in auditing or numbering, may be explained and reconciled by an order, without bill of review. Tot. 41–2. The terms imposed on the party are specified as before referred to. Ibid. 42–7. These orders have continued to be respected as the basis of equity jurisprudence, till the present day (3 Atk. 35; 3 Johns. Ch. 126; 16 Ves. 350), both in England and the equity courts of the different states and of the United States. 5 Mass. 310.

The first question in order is, whether a bill of review can be filed in this court, during the pendency of the cause in the supreme court by appeal. The question has never been decided in the courts of equity in England. 16 Ves. 89. In a late case, on an appeal from the rolls, the chancellor decided on a petition presented for leave to file a bill of review, without adverting to its being on an appeal (Jacob 203); so that we are without any direct decision on the point, whether one could be filed with the master of the rolls, after an appeal to the chancellor, or before him, after an appeal to the lords. Their appellate power, as we have seen, is an assumed one, from the necessity of the case; being neither conferred nor regulated by statute, it may, and has been, exercised, according to the exigency of the case and the time, as either may call for the adoption of new rules or orders, which partake more of the character of legislation, than the mere regulation of the forms and modes of proceeding in the practice of the courts. 4 Bridg. Eq. Dig. 50, pl. 49. Not restrained by any act of parliament, they permit or prohibit the action of courts of equity on cases appealed from, according to their discretion. By their ancient practice, an appeal stayed all proceedings in the cause, and it continued, till the frequency of appeals and their abuse, for the purposes of delay, induced the house of lords to alter it and permit the chancellor to proceed after appeal; this was deemed indispensable, as an appeal might be taken on every order on a petition, motion or interlocutory decree in the progress of a suit in equity (15 Ves. 184; 16 Ibid. 213, 218; 18 Ibid. 453; 1 Johns. Ch. 327; 3 Ibid. 66, 68, 123, 162); this alteration of the practice took place, as Chancellor Kent says, in 1798. 1 Johns. Ch. 80. It is not followed in New York, where an appeal suspends proceedings on the point appealed from, but the chancellor may, in his discretion, proceed, if the court of errors is not in session, or in possession of the case. 1 Johns. Ch. 81, 327; 3 Ibid. 66, 68. In that state, too, that court has power to render its practice conformable to that of the house of lords, to prevent the abuse

of appeals on orders and interlocutory decrees (1 Johns. Ch. 127, 128; 3 Ibid. 69, 123), and the court of chancery acts on the same principle in proceeding after appeal (Ibid. 162, 166), not because the nature and effect of an appeal is not to suspend proceedings below in equity, as a writ of error does in law, but because the exception is made from necessity. Lord ELDON says, that in doing so, "he acts by the authority of the lords—such is their clear understanding—as they permit the practice, it amounts to their authority." 9 Ves. 316. Chancellor KENT adopts this reason. 1 Johns. Ch. 80. It may, therefore, be taken as the settled practice in England and New York, that an appeal does not stay proceedings, unless an order to that effect is made by the chancellor, or the special order of the house of lords or court of errors, which either is competent to make; if not made, then the chancellor may proceed in the cause to its termination, when an appeal may be taken on the whole proceedings in the cause. 9 Ves. 319; 14 Ibid. 184; 15 Ibid. 585. "It is more expedient" (as Lord ELDON says), "to make the application to the house of lords, than to the court below, as the order made upon that occasion may be the subject of appeal, and it is difficult to determine how far appeals may go" (15 Ves. 182), and if the court could not proceed after an appeal, it "would make a chancery suit the greatest nuisance." 9 Ibid. 318.

It cannot be denied, that these are powerful reasons for the prevailing practice, when the inferior and appellate courts have power to adopt it; they cannot, however, be applied to cases of appeal from the decrees of this court, which must be final ones on all the matters in controversy between the parties, leaving nothing on which there is a power to act, except in their execution. The appeal is by a right given by a statute, of the benefits of which the party cannot be deprived, if he gives the security required by law. 3 Dall. 78. It is in the nature of an appeal or writ of error, to operate as a supersedeas (3 Dall. 87, 118; 5 Cranch 532) to the execution of the decree or judgment appealed from; the record is removed from the inferior to the superior court, leaving the former nothing to act upon. 15 Ves. 182. When the appeal or writ of error is matter of right, no terms can be imposed; if it is matter of favor or indulgence, they may be; as, in appeals from the rolls to the chancellor, or rehearings, these are matters of indulgence known to no other than courts of equity; the proceedings at the rolls are not suspended, except by special order, but that originates in a special order of Lord CLARENDON, and is not founded on any general principal of the law of equity. 9 Ves. 317–18.

When final judgments or decrees are removed, there is no proceeding to suspend, except execution, the benefit of the appeal would, therefore, be lost, if the court below could enforce it; hence has resulted the rule, which makes them operate as a supersedeas. An appeal to the house of lords brings the cause and record before them (Gilb. F. R. 190–91), and by the ancient practice, prior to 1798, stayed all proceedings in chancery (15 Ves. 184), and yet does, in Scotch appeals. 15 Ibid. 182. When the cause is once before the house of lords, it was necessary to obtain a special order, that the respondents be at liberty to go on with the account before the matter, notwithstanding the appeal. 2 Bro. P. C. 108; Ludlow *v.* McCartney, 21 Journal House of Lords 82. In the case of Popham *v.* Bampfield, the court of chancery proceeded in the account, after an appeal, when the house was prorogued (1 Vern. 344); this, however, was a special case, the appeal was made in June 1685 and no parliament sat till 1689. This circumstance made an exception to the rule, which seems not to have been departed from in any other case, till the late practice was introduced. 8 Bro. P. C. 2, 6. In 1686, during that long intermission of parliaments, the chancellor, in the case of Barbon *v.* Searle, permitted a bill of review to be filed, after a decree of dismissal had been affirmed in the house of lords, on the ground, that the lords were not then in session to give directions; and if they were, yet as answers to petitions to them were not on oath, and the house had referred the cause back, to be reheard as to one of the parties, the chancellor conceived, that the defendant ought to answer, so as to enable the plaintiff to make application to the lords; the demurrer was overruled, defendant ordered to answer, but the plaintiff was not to proceed any further, without the special order of the court. The plaintiff's counsel did not pretend, that the court could alter

or reverse the order of the house, but put the case on the same ground as the chancellor, alleging as their reasons, that as the house could not act in the interval, there was a necessity for the action of the chancellor, or the party, by death or otherwise, might lose the benefit of the bill. 1 Vern. 416, 418. See 1 Johns. Ch. 196. In a prior case, the defendant was decreed to answer a bill of review, or demur on the errors assigned, after the dismissal of an appeal to the house of lords; but it was on an allegation, that the cause was carried by collusion, without defence, and the benefit of the order of dismissal was saved to the defendant. Finch 468–9.

This seems to be the utmost extent to which any court of equity have gone, after an appeal; when they have gone further and attempted to review or reverse what had been done in the house of lords, the latter have asserted their powers as an appellate court. In the case before referred to, of Bampfield *v.* Popham, a bill of review had been filed in chancery, after a decision on appeal on a petition to the lords, suggesting that that court had proceeded to examine into an order made by them for the purpose of reversing it, the party and his solicitors were ordered to attend the house (15 Journal House of Lords 328); a committee was appointed to report what ought to be done (Ibid. 330), who reported, that as the chancellor had not proceeded on the bill of review, nothing need be done by the house. Ibid. 332; 8 Bro. P. C. 3. After this, a petition was presented to the lords, praying directions by them to the court of chancery, to proceed on the bill of review. The petition was dismissed, "in regard, it appeared, that the motion therein complained of had been already settled by the house." Ibid. 8; 16 Journal House of Lords 197. These cases show that, by the ancient practice, the court of chancery, in cases of necessity, might proceed, after an appeal from an interlocutory order, to settle an account before a master; that they might receive a bill of review, after a decree of dismissal in the house of lords, and act upon it, by their special order; but that they viewed it as a contempt in the party and his counsel, to examine their decree, for the purpose of reversal, by a bill of review in the court of chancery. This course seems to accord with the rules of equity, and to be particularly applicable to the judicial system of the United States. The equity powers of the supreme court, in ordinary cases, are exclusively appellate, by the constitution; they cannot take cognisance of an original bill in equity, for the want of jurisdiction; and as an appellate court, cannot sustain an application for a bill of review (4 Desauss. 13–14), nor an appeal from an order of the circuit court refusing it, as it is not a final decree, and no act of congress has extended their appellate power to such a case (1 Hen. & Munf. 557, 559; s. p. 6 Cranch 51; 6 Wheat. 448), and as it is a matter of discretion.

A bill of revivor, a supplemental bill, or bill of review, is an original bill, so far as it relates to the court in which it is filed, and any action upon it is by the original power of the court which gave the decree, over its own proceedings; appellate power is exercised only over the proceedings of inferior courts, not on those of the appellate court. So, on the other hand, the inferior court, after the action of the appellate court, is bound by its decree as the law of the case, and must carry it into execution according to their mandate; they cannot vary it or examine it for any other purpose, or give any other or further relief. 1 Johns. Ch. 194, 196. They cannot sustain a bill of review, on any matter finally decided on appeal (1 Hen. & Munf. 557–8), or for error apparent in the decree of the appellate court (3 Munf. 228; Mitf. 69), or intermeddle with it further than to settle so much as had been remanded. 1 Johns. Ch. 196. The court of appeal decides on the whole case, and gives such decree as the court below ought to have made. Such is the acknowledged doctrine of courts of review (1 Johns. Ch. 194), and the express direction of the 24th section of the judiciary act (1 U. S. Stat. 61); and the supreme court remands the cause to the circuit, with a mandate to execute their decree. When this is done, they will not grant a rehearing, and, on a subsequent appeal, nothing is brought up but the proceeding subsequent to the mandate. 7 Wheat. 58; 5 Cranch 313; 10 Wheat. 442. Whatever was before the court, and disposed of by its decree, is considered as finally disposed of. The house os lords never grant a rehearing. 3 Dow P. C. 157. The supreme court have no power

to review their decisions, whether in a case at law or in equity; a final decree in chancery is as conclusive as a judgment at law. 1 Wheat. 355 ; 6 Ibid. 113, 116. Both are final as to the rights adjudicated upon.

It is clear, therefore, that a circuit court cannot, on a bill of review, reverse a decree of the supreme court, in a cause remanded to them for execution, for error apparent; nor reverse their own decree, during the pendency of an appeal, as that would be a direct interference with the power of the supreme court over a cause before them. If they should affirm the original decree, and remand the cause for execution, this court would be bound to obey the mandate; or on a simple affirmance, would be equally obliged to execute it, notwithstanding their reversal on a bill of review. But can they do this, give leave to file the bill as an amendment, by adding new matter and parties to the original record? After a writ of error is brought, the court below may amend the record, by adding the charge of the court, which had been excepted to (12 Serg. & Rawle 13–14), and many other cases, where the justice of the case requires it. A court of equity is not less liberal in allowing amendments than courts of law; and we can see no reason why they should not be made, during the pendency of an appeal, as before; especially, when we consider that the benefit of the new matter may be lost by time or accident, or the party may lose the bill of review by the equitable limitation as to time. 10 Wheat. 149.

What will be done with it, after the court have given leave to file it, is another question. Should the supreme court award an order or *certiorari* to return it to them, the circuit court must obey the order, and then it will be for the supreme court to act upon the new matter or not, as they shall think belongs to them as an appellate court; if not, then it remains in the circuit court, as a subject not acted upon in either court. In an admiralty case, the supreme court have decided, that after their mandate has been before the circuit court, on a proceeding to carry it into effect, the original proceedings are always before the court, so far as they are necessary to determine any new points or rights in controversy between the parties, which were not terminated by the original decree. They may inspect them, to ascertain the merits or demerits of the parties, so far as they bear on the new claim, and must decide upon the whole examination what their duty requires. 10 Wheat. 442. Where an application was made to the circuit court, to open a decree in an admiralty case, after an appeal to the supreme court, the learned judge of the first circuit refused it; but considered it competent to allow the new evidence to be placed upon the record, with a memorandum, that it was brought in, after the appeal, and it was transmitted together with the record. 1 Mason 23–4. In these cases the application of new parties to be permitted to make claim, after an appeal must be made in the circuit court (9 Cranch 214), and all amendments must be made there (11 Wheat. 38), though that court may make amendments in cases before them on appeal from the district court.

In a common-law case, it has been decided, that after an affirmance of a judgment of the supreme court of New York, by the court of errors, and their judgment affirmed in the supreme court of the United States, a writ of error *coram vobis* will lie, to reverse the original judgment for an error in fact. Davis *v.* Packard, 8 Pet. 324. There is a strong analogy between proceedings in admiralty and chancery, but still stronger between a writ of error *coram vobis*, and a bill of review on matters of fact not in the record; both proceedings are in the same court, and if there is a reversal, it is for error in fact. In the case of Davis *v.* Packard, the fact of alleged error was, that Davis was a consul, not suable in a state court, which did not appear in the record, but he was allowed to state it in his writ of error *coram vobis*, for the purpose of reversing the judgment. So, here, the error in fact alleged is, that the court decreed John Aspden, of Lancashire, to have been the heir-at-law of the testator, whereas, the petitioners allege, that John Aspden, of London, was the heir-at-law; and they ask for leave to file their bill of review, to enable them to prove this fact, and on that ground, to reverse the decree.

We have, therefore, no doubt, that we have cognisance of a bill of review, after an appeal, if it is brought on newly-discovered evidence of facts; but not, if it is for

error apparent in the body of the decree. The whole case is now in the supreme court, on the law and the facts; they may affirm, or reverse in whole or in part, and after rendering such decree as we ought to have done, will direct their mandate to us for its execution, which we must obey; we cannot alter, review, revise, reverse or explain it, for any errors, however apparent, except miscasting or clerical mistakes. It will be time enough to decide, whether we can reverse it for error in fact, on the bill now offered, when it shall be necessary; in the meantime, we feel at perfect liberty to allow it to be filed, if in other respects a proper case is made out.

The next subject of inquiry is, whether the petitioners are entitled to a bill to review the decree rendered in the case of Packer *v.* Nixon. The rule is well settled, that it lies only in favor of a party or privy to the original suit, as in a writ of error (Pr. Reg. 50; Boh. C. C. 383; 1 Harr. Ch. 290; 6 Wheat. 263; 2 Hen. & Munf. 244; 4 Vin. 410; Mitf. 72), or those who are aggrieved by the decree. As the petitioners were not parties to the original suit, the only question is, whether there was a privity between them and any of the parties, or whether they come within the discription of persons aggrieved by the decree, who may have a bill of review to revise and reverse it. Privity is fourfold : 1. Of estate, as donor and donee, lessor or lessee. 2. In blood, as heir to the ancestor, or between coparcenors. 3. In representation, as executors, &c., to the testator. 4. In tenure, as the lord and tenant. Which may be reduced to two general heads, privies in deed and privies in law. Co. Litt. 271 *a;* 3 Mason 510. Privity of title is, where a party dies, whose interest is transmitted to some other person who succeeds by law to the title of the deceased; if he claims by purchase or devise, he introduces a new title, not before in the case, the privity must be by representation, as heir in relation to the real estate, and executors and administrators to the personal. 3 Mason 511; Gilb. F. R. 172, 186; 2 Harr. Ch. 123. A devisee is not in privity with the testator, nor is an assignee or vendee in by privity (1 Chan. Cas. 123; 1 Eq. Cas. Abr. 146, pl. 3; Pr. Reg. 50; Boh. C. C. 383; 1 Ch. C. 174; Coop. 43–4; Tot. 173; 1 Vin. 426; 3 Mason 509) with the assignor. So, in cases of bankruptcy, the assignor cannot revive a decree in favor of the bankrupt, and in this respect the rule is the same in bills of revivor as of review (1 Atk. 88–9; Com. 590), for privity of title is not enough, it must be privity of title derived by the act of the law. 3 Mason 512.

As to parties, the rule is so strict, that a bill of review lies not in favor of one in whose favor a decree is rendered for less than he claims (2 Freem. 182–3; 4 Chan. Rep. 99, 100; Boh. 387; 2 Harr. 127 1 Chan. Cas. 53, *contrà*, but by mistake in *overruled* instead of *allowed* in s. c.), it lies only in favor of him against whom the decree is rendered, or whose bill is dismissed (2 Freem. 183; 2 Eq. Cas. Abr. 174); and when the heir of the mortgagee brought a bill against the mortgagor for foreclosure, and obtained a decree, on a will being discovered, which gave the mortgage-money to the executor, the mortgagor exhibited his bill of review to be relieved against the decree, and praying the court to direct to whom the money should be paid, the court would not make the executor a party, but left him at liberty to sue the mortgagor on the mortgage covenant. 4 Chan. Rep. 52, 54; 2 Freem. 148–9; 3 Chan. Rep. 94; 2 Eq. Cas. Abr. 173–4.

In the present case, the petitioners, as devisees, are in privity neither with the parties nor the testator; they do not claim by representation, succession or act of law; but as purchasers under the will, in which capacity they must take, if at all, as we decided in the original case. Had they been purchasers from any of the parties, they would not have been their privies in deed or in law. Their claim is adverse to all the parties in the cause, and not coming in by any privity, cannot sustain a bill of review. It is unnecessary to examine the cases in which remainder-men, or others whose interest is affected by a decree to which they are not parties, may have a remedy in a court of equity; it is enough for this case, that none but parties or privies are entitled to a bill of review, and that the petitioners appear before us in neither character. If they do not come within that class of persons who are aggrieved by the decree, their petition cannot be received. There is but one case of this description to be found in the books.

A vicar sued the parish for tithes; four of the parishioners were appointed to defend the suit; a decree passed against the four, and all the miners in the parish (see 2 Vern. 184; 1 Eq. Cas. Abr. 163); the court said, that one of the miners, not one of the four, though not party or privy, might have a bill of review, because he is grieved by the decree. 1 Chan. Cas. 272; Pr. Reg. 50. It is obvious, that this case cannot aid the petitioners; it was a peculiar one, which requires no further elucidation than to state it. Were we to consider this general expression, "persons grieved," as applying to all persons whose interest may be affected by a decree, we must extend it to devisees, purchasers and assignees, in opposition to a weight of authority which judicial power is incompetent to remove or shake.

On this ground, then, there is an insuperable objection to granting leave to file the bill now offered; we might stop here, but as other important questions necessarily arise on the case, it is proper to decide them, as the merits depend as much on one view as on another. The objection taken to the affidavit is, we think, unanswerable. The one annexed to the petition by one of the solicitors, and to the bill by the agent of the petitioners, in in the common form of affidavits to original bills, which require the verification of the complainant; they want both form and substance, as neither of them contains the necessary averment which a party is bound to make. Neither does the supplemental affidavit of the two solicitors remove the difficulty. It presents this case: that about the 3d of June last, they were retained in this cause, and in a few days afterwards, discovered the new matter now set up for a bill of review; the petition was presented immediately, containing an averment, that neither the petitioners nor their agent, at the date of the decree, knew of the existence of the matter thus discovered, "and that it could not have been made use of by them in any way, at the said hearing or before said decree." Now, there is no direct affidavit to this averment, even by reference, to the petition or bill; the forms require it to be in the body of the affidavit; admitting that under the circumstances of this case, petitioners residing in London, and their agent here being a merchant, the affidavit of the solicitor might be taken as to the fact of discovery; it cannot be as to the all-important fact, "that the matter could not have been used before the decree." It matters not, that it was not known; if it could have been known and used, by the exercise of a reasonable degree of active diligence, at any time before the decree, it is a conclusive answer to the petition. How stands the case in this respect? the petitioners retained no solicitor till near six months after the decree; by the affidavit of Mr. Broom, it appears, that in March 1831, he communicated to Mr. Brown, the pendency of the suit of Packer *v.* Nixon, its subject-matter, nature and the parties respectively who claimed the estate of Mr. Aspden. The bill of review shows, that from 1825 till 1830, a suit was depending in the court of chancery in England, against the same defendant, for the same subject-matter, to which thepetitioners were parties by a bill of revivor, which was dismissed, as they are informed and believe, upon an opinion, that the personal property was distributable according to the laws of the United States; after which, they brought another suit on the equity side of the court of exchequer, which was dismissed in 1831. After this active pursuit of the fund and the executor, in the courts in England, for six years, and with the knowledge that it was here in his hands for distribution, they make no claim, employ no counsel, nor make any movement in the assertion of their rights, till the summer of 1833, when they, as the bill alleges, gave some instructions to Mr. Brown, which are not produced. When petitioners, thus circumstanced, appear in a court of equity, and ask for leave to file a bill of review, on new matter discovered in the possession of the executor, on the first search they had ever made, or authorized to be made, and that, ten years after the death of the testator; it presents a case of the most gross and palpable negligence, while it remains unaccounted for. In such a case, we should require not only the strong affidavit which is necessary in all cases, but the strongest one which would be necessary from any petitioners, their solicitors, attorneys and agents employed to conduct the suit in England, as well as their agent here. There must be a direct appeal to the conscience of all, by a searching drastic affidavit, which should purge them all of such negligence.

Yet, from England, we have not one word, from party, solicitor, country attorney or law-agent, though an affidavit on another matter has been taken in London, since the pendency and knowledge of this petition. No person employed in the suits from 1825 to 1831 has given us his oath on any subject. A witness has been called from Lancashire to London, to verify the parish registers, for the purpose of showing the pedigree of the petitioners. His affidavit shows very active diligence in searching the registers, as early as 24th July last, but it also shows, that they were found where they ought to be, and where they were known to be, that is, in the places where the persons lived and died; as that of the solicitors does, that the papers of the testator were found in his trunk, in the hands of his executor, and both, so far from removing the imputation of negligence, confirm it most conclusively, in the absence of any affidavit by other persons.

Being satisfied that the evidence now discovered could, by the exercise of ordinary diligence, have been procured and used before the decree, we must refuse leave to file the bill, on this ground, if it was the only one, and we must not be understood as deciding this point on the particular circumstances of this case alone. The common affidavits to original bills, cannot be received on petitions for bills of review; they must be in the usual form, and contain the averment not only of the party, but of all other persons whose negligence may be imputable to the petitioners, that they could not possibly have used the evidence at the hearing, or before the decree. This is not merely form, but the very essence and substance of the application for review; no decree can be opened, upon the mere fact of discovery, if there has been negligence in making the proper search; when a party has it in his power to remove the imputation, and does not do it, especially, in a case like this, every presumption is against him.

It must, therefore, be understood as our decided opinion, that to all petitions for bills of review, the affidavit must be made by the party making the application, unless it shall appear, from special circumstances, that the whole subject is so fully in the knowledge of some other person, and that he can satisfy the court on all matters upon which they are to act.

The most responsible and solemn act of civil justice which any court can perform is the reversing their own deliberate judgment; it is the most dangerous too, when it is done on the affidavit of a party on whose oath a fortune depends, and especially, when the decree points him exactly to the proof he is to make or procure: yet, if, by such oath, he makes out a case, we are bound to open a decree, if there is nothing to throw suspicion over the application. The rules of equity have wisely provided, not only that the party shall make an oath, but that the court shall be satisfied, as well of the fact that new matter has been discovered, as that it could not have been known and used before. Their first step is the all-important one, and as it necessarily leads to a second, it then becomes irrevocable, the decree becomes open for examination in a new course of litigation, it will be interminable; our most solemn proceedings will be but shadows, if, before we revise them, on the oath of a litigant party, he is not required on his part, to comply with every condition imposed on him, as indispensable to any movement of the court. If he does not do his duty, we directly violate ours, in granting him a dispensation not warranted by the law or usages of a court of equity. In this case, we are not satisfied with the case presented by the affidavits; on the other hand, we think, that it would be difficult to support it by any affidavit, however strong.

This leads to a consideration of the application, as it would stand on satisfactory affidavits. Among the exhibits in the case of Packer *v.* Nixon, is a copy of the bill filed in chancery by John Aspden, of London, the father of the petitioners, against Mr. Nixon, the executor. This bill is referred to in the bill of review, now offered for our allowance, and is, therefore, judicially before us. This bill was filed in 1825, praying that the complainant might be declared the heir-at-law to the testator, and as such, entitled to his whole personal estate, and praying for an injunction to the transmission of the estate to the executor. The will and accompanying codicils or memoranda were set out at length, with an averment that Mr. Nixon had proved it here and in England, had taken on himself its execution, and possessed himself of all the per-

sonal property of the testator. He then avers himself to be the heir-at-law; and as evidence thereof, shows, that Thomas Aspden, of Simonstone, in Lancashire, was the common ancestor of the testator and himself, who had issue twelve children, the eldest of whom was John Aspden, who died and was buried at Deptford, in Kent, in 1754, leaving issue only one son, Andrew Aspden, who died and was buried in the same place, in 1771, leaving issue, the complainant, his only child and heir-at-law. That testator was the only son of Matthias Aspden, the son of Thomas, of Simonstone, the common ancestor; he also stated, that at the time of filing the bill, he was eighty-five years of age. After their father's death, the petitioners became parties to the suit, by bill of revivor, in 1828, and its averments thus became theirs; they also filed a bill as heirs-at-law of the testator, in the exchequer, in 1831. Such was the case of the father from 1825 to 1828, and of the petitioners from 1828 till 1831, in the courts of England. This is precisely their case, as first presented in this court in 1834; there is no new matter now introduced as evidence of their title—not one fact alleged which was not before substantially averred. From the first to the present movement, the whole case rests on pedigree; it was necessary to trace it to a time beyond the memory of living witnesses; there could be no evidence to prove it but the registers of births, marriages, deaths and burials, traditions, hearsay, or the written recognition of relationship by the testator or other members of the family. Let it come from whatever source, it tended to but one point—the common ancestry of the complainant and the testator, and a lawful succession from the elder brother, all of which was as fully known in 1825 as now. John Aspden was then eighty-five years old; born in 1740, he was fourteen years of age when his grandfather died, and thirty-one at the death of his father; he must have been familiar with the family pedigree for more than half a century, after he came to man's estate, and when he was seeking a large fortune by an adversary suit, must have been aware of the necessity of proving his case; on what subject did he want knowledge—pedigree? it was easily attainable at the places where he was bound first to look—the registers, and the testator's papers would show it; if he did not examine them, there is gross negligence, in which case he is presumed to know all that he might have known with reasonable diligence. 16 Ves. 353. But it is needless to resort to presumption in such a case as this; it is neither possible or credible, that the counsel or solicitors in England, would prosecute a suit by an heir-at-law whose succession was to be traced back one hundred and thirty-six years, without examining the registers; or that if the search had been made without effect, they would not have advised the present petitioners to give some account of it. The disposition of Mr. Neville, with the accompanying copies of the registers, shows the facility with which they were obtained; those from Padeham and Whatley are dated on the 24th July, the same day on which Mr. Neville states he went there for the purpose; the others were obtained between the 4th and 8th of August, and the affidavit taken on the 9th, being only 53 days from filing the present petition. There is no averment in the bill, petition or in any other way, that all this evidence was not in possession of the parties from 1825; the counsel in their arguments have not pretended it, they surely cannot expect the court to presume it. The facts attested by the registers, therefore, cannot be deemed new matter.

This brings us to the consideration of the testator's memoranda on the two separate papers found in his trunk, with the entries in his bible; and as we should probably have permitted the petition to be amended, so as to introduce the cancelled wills of the testator, it may not be improper to refer to them, to avoid a future application. These memoranda are good evidence of pedigree, as the deliberate declarations of the testator, and tend strongly to prove the fact that his grandfather, Thomas, had twelve children, of whom John was the eldest; this is the very fact stated in the bill of 1825, and, of course, has not been newly discovered. These memoranda also note the baptism of several of the children, with their places of burial, but none of them take notice of the descendants of any, except Matthias, the father of the testator; so far as they relate to the baptism and burial, they correspond with the registers proved by Mr. Neville's affidavit, and thus far disclose no matter which the registers do not

contain. They are not new in fact, or to the knowledge of the petitioners, or their father, if they or either of them knew of the registers before; they cannot be deemed by the court to be new, if the registers were known to their counsel, solicitors, attorneys or agent, for knowledge by either of them is knowledge by the parties; nor is the matter deemed new in law, if by reasonable diligence either might have known of it in time to use it before the decree. 3 Atk. 36; 4 Bro. P. C. 483–4; 5 Mason 312–3. As facts, therefore, we cannot consider them as new matter, they can only be considered as new evidence of facts known since 1825. There are some other facts referred to in these memoranda, but it is necessary to inquire only into their materiality hereafter. The cancelled wills are evidence not only of the intention of the testator at the time of making them (8 S. & R. 589, Seaton *v.* Kuhn, C. C.) but as the recognition of a kinsman or relation, and that there was a person in the family of the name of T. I., an elder brother of the William from whom the lessor claimed. 11 East 504, 506.

In the will of 1776, a legacy of 100 pounds is given "to my cousin, John Aspden, of London;" in that of March 1791, he gives "to my second cousin, John Aspden, living in Old street, London, 10 pounds, and to his two daughters the sum of two pounds each;" this recognition of the testator is good evidence of the relationship of both the father and the present petitioners, but it is no newly-discovered fact. In 1825, John Aspden knew that the testator was the grandson of Thomas, of Simonstone, and that he was his great-grandson; of necessity, then, they were cousins in fact and so deemed in law; and nothing more is now discovered, except the fact that the petitioners are the daughters of John.

The new discovery being then exclusively of the evidence of well-known facts, we proceed to inquire, whether it is of that nature as suffices to open a decree, as also whether it is so relevant and material as, if used before the decree, would probably have produced a different result. The order of Lord Bacon, allowing bills of review, is, in its terms and its uniform construction, applicable only to two cases, error in law in the body of the decree, without further examination of fact; the error must be apparent in the decree itself (Tot. 41; 2 Chan. Cas. 153; Prec. Ch. 260; 1 Eq. Cas. Abr. 81; 4 Vin. 414, p. 12); it is in the nature of a writ of error (4 Vin. 407); and lies for want or excess of jurisdiction (1 Vin. 292; 2 Harr. Ch. 123, 127); or an error in conscience on a matter proved (4 Vin. 408; 1 Roll. Abr. 382); the error must appear on the case, as stated in the decree, and every fact must be admitted as stated (2 Harr. Ch. 124; Boh. C. C. 381, 386; 2 Eq. Cas. Abr. 174; 2 Freem. 182; 4 Vin. 407–8; 1 Chan. Cas. 54, 55, 105; Hardr. 174); the decree is matter of record, and can be tried only by the record (Pr. Reg. 51); if there is a mistake of fact, it must be corrected on an appeal (2 Freem. 182; 1 Eq. Cas. Abr. 164; Lane 68–9), or the decree is final (4 Vin. 407; 1 Chan. Cas. 231, 233; Boh. C. C. 385–6), and it is no error; that the matter decreed is contrary to the proof (1 Vern. 166), for after a decree it is presumed the court judged on the whole proof, according to its purpose (Hardr. 174); witnesses cannot be re-examined anew (4 Vin. 407; 2 Freem. 181; 1 Eq. Cas. Abr. 81; Dick. 614; 2 Madd. Ch. 536, &c.; 5 Mass. 311, full on these points).

These bills are not favored, and a second one will not be allowed, however manifest the error (2 Chan. Cas. 133; 2 Madd. Ch. 541); and if a fact is omitted to be stated, that is matter of appeal. 4 Vin. 408; 2 Keb. 276, pl. 46; 5 Mass. 311. After a decree, the proofs are no more to be questioned, than the verdict of a jury on a writ of of error (Hardr. 51, 127), nor is a master's report, confirmed on exceptions, it is as conclusive as a verdict. 6 Wheat. 113, 116.

Error apparent does not apply to an erroneous judgment merely, and the question is not, whether the cause is well decided, but whether the decree is right or wrong on the face of it, as an infant not having a day allowed him, &c. (17 Ves. 178); a decree taken *pro confesso*, where the party was not brought in contempt (4 Chan. Rep. 64, 66); or the decree is contrary to a statute (4 Vin. 406; 1 Roll. Abr. 382), or for decreeing a sale under the authority of a law without complying with its provisions (8 Pet. 145); not for any errors in the progress of a cause, or a master's report excepted to,

because not in the body of the decree (2 Eq. Cas. Abr. 175, pl. 12; 4 Vin. 414, pl. 6; 8 Bro. P. C. 391, 392); but if part is repugnant to another (Bohun C. C. 381), or the decree impossible (1 Chan. Cas. 86), it lies; so, if the decree is founded on a record made in a case depending in chancery, which was referred by the solicitor in the cause, without the consent of the party (1 Chan. Cas. 85–6); but to make a decree conclusive as to the facts, it must appear, that the court rendered their judgment upon them, as "on reading the proofs it appeared;" if it is on reading the proofs, it is decreed, that is no decree on the evidence. 2 Chan. Cas. 161–2; Boh. C. C. 388.

The new matter to sustain a bill of review must have risen in time since the decree (3 Atk. 627); and not any new proof which might have been used when the decree was made, unless it has come to light since, and could not possibly have been used at the time of the decree. Ord. Tot. 41. New matter means, a fact *in esse* at the time of the decree, not then in the knowledge of the party, his solicitor or agent (2 Atk. 534; Dick. 612, 614; 2 Atk. 178); not where a matter of fact was in issue at the hearing; though new proof of it discovered since, it will not be admitted. 2 Freem. 31; 4 Chan. Rep. 196; 3 P. Wms. 371; 4 Vin. 414; 2 Eq. Cas. Abr. 175, 176; 2 Chan. Rep. 45; 5 Mason 312. If the bill contain matter, part of which was in a former bill and decree, and part new or by a supplemental bill, the court will, on a demurrer to so much as was contained in the former bill, direct the master to see what was in the former bill, and allow the demurrer accordingly (Gilb. Eq. R. 183–4), to what was in the former bill.

No witnesses who were or might have been examined on the former bill, shall be examined to any matter on a bill of review (Boh. C. C. 381; 2 Madd. Ch. 518; Pr. Reg. 53); as, where "plaintiff would examine as to a matter of tender and refusal, which he could not prove before the hearing, but could now prove it, no precedents could be produced and the bill was dismissed. 2 Chan. Rep. 66. Nothing is a ground to direct a new trial at law, that would not be a ground for a bill of review to reverse a decree (1 Chan. Cas. 43; 2 Harr. Ch. 125); nor is the want of any evidence or matter which might have been used in the first cause, of which the party then had knowledge and there is no proof, but the plaintiff might have had the witnesses that were examined here at the trial; though the proof on the bill of review was such that the plaintiff in the original cause could not have recovered; it being his own confession, the court would not enjoin the judgment at law, and declared, that a confession after a decree, was no ground for a bill of review (1 Chan. Cas. 43–4); or where the new evidence is not applicable to the original issue, nor where the original bill contained information on which he was required, with reasonable diligence, to try the case at first, on his whole evidence, and where the relief might have been effectually asked. 16 Ves. 350, 354; 5 Mass. 312–13. New evidence cannot be received on a bill of review, in support of a case not in the record (16 Ves. 354; Ambl. 293; 5 Mass. 313–14); or to draw in question matters which have been settled on an account before the master or put to an issue. 2 Bro. P. C. 109; 2 Atk. 534.

If a paper is produced by an adversary, it is the same as if produced by the party, and is not deemed new matter on a bill of review. 3 Atk. 37. The new matter set up must not be merely accumulation (3 Atk. 37; 3 Johns Ch. 127); it must not be the same or similar evidence or corroboration. 1 Hen. & Munf. 15. If the party had knowledge of the matter, but offered no proof of it at the hearing, it is not the subject of a bill of review. 2 Freem. 178; 3 Chan. Rep. 76–7. The new matter must show the right of the party, at the time of the decree, which was not then known to him (2 Ves. 576); not additional circumstances, merely confirming facts before proved (1 Hen. & Munf. 179, 200), or proof on the same points which were in issue, or any evidence in the knowledge of the party before the decree (Gilb. F. R. 186; 5 Mason 313–14); the course of the court on bills of review is conclusive to show the kind of evidence on which alone they can be sustained.

The first object is a reversal of the decree, while it remains closed there can be no revision or explanation of it, except misstating. Gilb. F. R. 184. On the plea by the defendant, of the decree, and a demurrer to the new matter set up for opening it, as

insufficient in law, the court decide whether there is a case for review. Gilb. F. R. 189. In this stage of the cause, nothing is read but what appears on the face of the decree, but after the demurrer is overruled, the plaintiff is at liberty to read the bill and answer, or any other evidence, as at a rehearing, the cause being now equally open. 1 Atk. 290; 5 Mason 309. Defendant may, on a plea, disprove the new matter (2 Madd. 543; Mitf. 236); but if he demurs, it is then too late to show that there is no new matter discovered, as it cannot be insisted on at the hearing. 2 Atk. 40; 3 Id. 217. The court will not reverse a decree for any error not specially assigned in the bill or petition. Mitf. 70, 72; 5 Mason 317. If the decree is reversed, on a rehearing, the cause is entirely open to the party in whose favor the decree is; as to the other, it is only open as to the facts complained of, if it is on new proof, no other can be heard (2 Madd. Ch. 483); there can be no new evidence on the merits (6 Johns. Ch. 256; 1 P. Wms. 300; 2 Vern. 463; 2 Harr. Ch. 85), without special leave of the court, which is seldom granted (Gilb. F. R. 183); these cases are, evidence duly taken and omitted to be read; evidence of new matter not before ready; papers since found and allowed to be proved *vivâ voce*, or to impeach a witness before examined. 6 Johns. Ch. 256; Prec. Ch. 64; 10 Ves. 236; 13 Id. 458; 1 Ves. & B. 153, 154. New evidence is not heard in the house of lords on appeal (2 Bl. Com. 455; Gilb. Eq. Rep. 156; Amb. 90, 91); though it may be, by the chancellor, on appeal from the rolls (Prec. Ch. 496; 2 Atk. 408; 2 Vern. 463; Gilb. Eq. R. 151), it being in the nature of a rehearing. But the relation between these officers is peculiar, aud the practice on such appeals is no guide to the course of equity, in cases where the rehearing is by the same court which gave the original decree, or to the proceedings in the courts of the United States on appeal. On a rehearing of a decree, after the reversal on bill of review, the party must rely on the new matter in his bill, or the evidence already in the cause; he can introduce nothing which he had not assigned as a ground for opening the decree.

The court will not reverse a decree for extraneous matter arising in the progress of a cause not in the decree (Finch 36, 209; 2 Atk. 534; 3 Ibid. 627; 1 Vern. 392; 4 Hen. & Munf. 243–4); the new matter must be such as will bear on the body of the body of the decree, not on interlocutory orders. As the verdict of a jury cannot be revised on a writ of error, neither can the report of a master to which exceptions have been filed, after confirmation, as it has all the legal effect of a verdict of the judgment. The error assigned in this case is an error in fact, in declaring John Aspden, of Lancashire, to be the heir-at-law of the testator; if the decree is reversed, it must be on this ground alone; the other grounds taken in the petition are merely introductory to this. The only ground assumed by the petitioners is, that they are the heirs-at-law, in which character they claim the fund in the hands of the executor, and this is the only fact on which they rest their case.

They are not parties to the original suit, their title is nowhere set up, nor appears in any part of the proceedings; it was not in the case, or at issue in any way. John Aspden, of Lancashire, claimed in his own right, by descent from William, the alleged eldest uncle of the testator on the father's side; he established his claim by competent evidence, without the least reference to there having been an uncle older than William. We have then to decide upon a new case, by a new party, on a new title, no fact of which appeared before the final decree.

The first question is, whether an entire new title, in a new party, who is a stranger to the suit, claiming adversely to all the original parties, can be considered newly-discovered matter, for the opening of a decree. On this subject, we have no doubt. There is not only no precedent of a new trial at law, or review in equity, in such a case, but it is opposed to the whole course of adjudication, in all courts, from the date of Lord Bacon's ordinances.

If we take a narrower view of the case, the matter set up is only corroborative and confirmatory of the registers. The petitioners do not pretend, that the fact of their heirship is matter come to light, since the decree passed; or that the evidence of it by the registers has been newly discovered, or could not have been used at the hearing.

They rest their their bill of review solely on the memoranda and other papers of the testator, discovered in June last. Copies of these registers, duly attested or certified, are good evidence of all matters of pedigree. 1 Dall. 2 ; 10 Serg. & Rawle 389; 1 Yeates 17, 15. They are the records of facts, beyond the memory of man, entitled to great weight; they are alone sufficient to establish pedigree of a much higher character than hearsay, which is also admissible. As to distant facts, they are the primary and principle evidence, not to be lightly questioned. The contemporaneous memoranda of a member of the family, made from his own knowledge, may, in some cases, be as good or better evidence, as family records or muniments of title. But that is not this case; these memoranda refer to events before the testator was born; the last one was more than a century after the birth of his uncle John; his knowledge must, therefore, have been derived from hearsay, family papers and entries, or from the registers. In this case, the registers must be considered as the primary and most authentic evidence, and the memoranda, secondary or auxiliary: but view them in either way, they are only additional to the registers, if they had been produced before the decree, tending to prove the same fact.

Now, as it was clear, that the family pedigree was known from 1825, and that the evidence of it by the registers could have been used at the hearing, the petitioners cannot be now put in a better situation than if they had been parties and had produced the registers; in which case, the memoranda and cancelled wills would have been confessedly mere accumulation. The delay of their application to become parties, certainly gives them no better claims to the interference of a court of equity, than if they had made it, after they knew of the dismissal of their bill, and that the injunction which prevented the transmission of the fund here to be distributed according to the law of this country, had been dissolved.

There is no principle or rule of equity, in relation to this subject, that we should not violate, by now permitting the registers to be used as a ground for opening the decree; they cannot be used in an appellate court, nor could they be used at a rehearing, if the decree was opened. It would be giving to the memoranda the effect of an *ac ætiam*, or *quo minus* clause in a writ, mere inducement to introduce inadmissible, yet indispensable, evidence, that would make bills of review matters of course; for the party would only be obliged to show some item of evidence connected with, or forming a part of, his title, which was newly discovered; then he could, by its potency, introduce an entire new case and title, and all other evidence, however long he had known of it, and however convenient it might have been to produce it before. The effect of the registers may be very powerful, to show how good a case the petitioners had, and how easy it was to have established it by the most ordinary attention; but they also show that a good cause may be lost by negligence, and when that negligence has been palpable and continued, any hardship that awaits them is not the fault of the law. If they had a title or right to this estate, they had a remedy which they could lose only by their negligence; they knew the fund was here, and a small portion of the time and money expended in England in litigation, would have sufficed long since to establish it here. No principle is more approved, both in courts of law and equity, than that the best right may be lost by negligence; it is necessary to the peace of society, and the security of titles.

It remains to take a still closer view of these memoranda and cancelled wills, their relevancy and materiality, in producing a different result in the original cause. The entry in the bible, and on the two papers produced, are evidence of one fact, that John Aspden was the eldest son of Thomas, of Simonstone, and as such, the stock from which the petitioners must trace their descent; the memoranda as to the other children of Thomas, have no bearing on the case, as they relate only to the place or time of their burial; the succession from John is not brought down, his death, burial, and place and time only is noted; this leaves a long chasm between him and the petitioners, as to which the memoranda or entry in the bible give no information. It shows that William, the ancestor of John, of Lancashire, was not the eldest son of Thomas; but not that John, of London was the grandson of John, of Kent, the son of Thomas.

of Simonstone. The cancelled wills show that John, of London, was the cousin or second cousin of Matthias, the testator, and that the petitioners are the daughters of this John, but not that John was a cousin by descent from John, the eldest son of Thomas; he is equally a cousin by descent from any of his children. The indispensable link to complete the chain is wanting; there is no evidence to prove the descent from John: the law cannot presume that John, of London, was his descendant, rather than of any other son, the fact must be made out in some other way than by the entry, memoranda or cancelled wills. Had they all been produced, previous to the decree, they would not have authorized the court to declare that John, of London, was the heir. In our opinion, on the exceptions to the master's report, we pointed out the course we should have pursued, but no notice was given that there was or would be any contest between two adversary claimants to the heirship on the father's side. Now, the newly-found evidence leaves a fatal chasm in the title of the petitioners; if we reverse the decree, we cannot declare the petitioners heirs-at-law, on the new matter set up; it may induce us to doubt, whether John, of Lancashire, is the heir-at-law, or to believe that he is not; but, then, for what shall we reverse the decree, or permit it to be opened, to receive evidence that does not make out the petitioners' case? If we do, then we must admit the registers, or proof by tradition, hearsay, or some other source not now pointed out. We cannot act upon the registers, without making law to suit the case, and overturning every rule and principle which has been consecrated by courts of equity for two hundred years; we can act on no other evidence than that now set up, without a second bill of review to let in new evidence from other sources than the register, or the papers now produced. If we could receive a second bill, we could act on nothing now before us; the consequence is, that the petitioners have neither made out a case where they can be relieved by bill of review, nor assigned any cause for review in the new matter set up.

The defendants have objected to the allowance of this bill, on the ground, that the proceedings in the court of chancery and exchequer in England, before referred to, are final and conclusive between the parties to those suits, and orperate as a bar to any resort to the estate of the testator by the petitioners. If it were necessary to decide this question, we might not find it one of much difficulty; but it arises only collaterally on a preliminary proceeding, resting in the discretion of the court, on which there can be no appeal, and as we cannot grant leave to file the bill of review, it is unnecessary to decide it. Had the bill been filed, it would have been a proper matter to plead in bar, or to have set out as a ground of demurrer, or it may be pleaded to an original bill; in either case, the decision of this court would be subject to an appeal, we, therefore, decline giving any opinion on this point.

There is another circumstance in this case, which has not been noticed by the counsel on either side, and to which we advert, only for the purpose of not being misunderstood, in passing it without observation. The petitioners are certainly in time, in making their application for the bill of review, in less than six months from the final decree. But the effect of time is important in other respects, than as a mere legal limitation to the assertion of a claim in a court of equity; it has been before us on more than one occasion, we have expressed ourselves plainly and at length on the subject, and must not be understood as entertaining any doubts of the correctness of former opinions; whether they would apply to this case, is another matter.

We have felt it our duty to give this case our fullest consideration, it has enabled us to come to a conclusion perfectly satisfactory to our own minds; we should have been better pleased, if a case had been presented to us, which would have authorized the opening of our former decree. It is highly desirable, that justice should be so administered, that no right should be without a remedy, especially in a court of equity. Yet no administration of justice can be so dangerous, as affording remedies in violation of the settled law of the land; the peace of society and the security of the rights of property are better preserved by leaving parties to suits to the effects of their own negligence, than disturbing the sanctity of judicial proceedings for light causes. It is for the interest of the public, that there should be some end of suits, and the law aids the vigilant, not the negligent. The petition is dismissed.

INDEX

TO THE

PRINCIPAL MATTERS CONTAINED IN THIS VOLUME.

The References in this Index are to the STAR *pages.

AFFIDAVITS.

1. Affidavits sworn to before a state magistrate, are lawfully taken in cases in which, by the regulations of the treasury department, they were received as evidence of claims on the United States. *United States* v. *Bailey*. *238
2. If, in making such an affidavit, the affiant swears falsely, he is liable to be punished in a prosecution instituted by the United States, under the third section of the act of congress of March 1st, 1823, relative to false swearing, touching the expenditure of public money, or in support of any claim on the United States..... *Id.*

AGENT AND ATTORNEY.

1. Every authority given to an agent or attorney to transact business for his principal, must, in the absence of any counter-proof, be construed to be to transact it according to the laws of the place where it is to be done. A sale of slaves, authorized to be made, in Louisiana, by an executrix, must be presumed to be intended to be done in the manner required by the laws of that state to give it validity; and the purchaser, equally with the seller, is bound, under these circumstances, to know what the laws are, and to be governed thereby; the law will never presume that parties intended to violate its precepts. *Owings* v. *Hull*..... *Id.*
2. A ratification of the unauthorized acts of an attorney in fact, without a full knowledge of all the facts connected with those acts, is not binding on the principals. No doctrine is better settled, on principle and authority, than this, that the ratification of the act of an agent, previously unauthorized, must, in order to bind the principal, be with a full knowledge of all the material facts; if the material facts be either suppressed or unknown, the ratification is invalid, because founded on mistake or fraud..... *Id.*

ANNUITIES.

1. The ingenuity of lenders has devised many contrivances by which, under forms sanctioned by law, the statute of usury may be evaded; among the earliest and most common of these, is the purchase of annuities secured upon real estate, or otherwise. The statute does not reach these, not only because the principal may be put in hazard; but because it was not the intention of the legislature to interfere with individuals in their ordinary transactions of buying and selling, or other arrangements made with a view to convenience or profit; the purchase of an annuity or rent-charge, if a *bonâ fide* sale, has never been considered as usurious, though more than six per cent. profit be secured. Yet, it is apparent, that if giving this form to the contract will afford a cover which conceals it from judicial investigation, the the statute would become a dead letter; courts, therefore, preceived the necessity of disregarding the form, and examining into the real nature of the transaction; if that be, in fact, a loan, no shift or device will protect it. Though this principle may be extacted from all the cases, yet, as each depends

on its own circumstances, and those circumstances are almost infinitely varied; it ought not to surprise, if there should be some seeming conflict in the application of the rule by different judges; different minds allow a different degree of weight to the same circumstances. *Scott* v. *Lloyd*.....*418

2. The covenants in a deed from S., granting the annuity to M., secure the payment of ten per cent. for ever on the sum advanced; there is no hazard whatever in the contract; M. must, in something more than twenty years, receive the money he has advanced, with the legal interest on it, unless the principal sum should be returned after five years; in which event, he would receive the principal with ten per cent. interest. The deed is equivalent to a bond for 5000*l.*, amply secured by a mortgage on real estate, with interest at ten per cent. thereon; with liberty to repay the same in five years. If the real contract was for a loan of money, without any view to a purchase, it is plainly within the statute.....*Id.*

APPEAL.

1. A decree of a circuit court, perpetuating an injunction, in a case on which some matters of account were left open for further consideration, is not a final decree; and an appeal will not lie in such a case. *Brown* v. *Swann* *1
2. An appeal does not lie from the decree of the district court in the United States for the district of Louisiana, dissolving an injunction. *Hriart* v. *Ballon*.....*156
3. No persons but those appearing to be parties to the record, can be permitted to be heard on an appeal or writ of error. *Harrison* v. *Nixon* *483
4. After a case had been fully heard in the superior court of Middle Florida, the judge of that court, in examining the evidence in the case, with a view to its decision, considered, that he had discovered in the date of the water-mark in the paper on which one of the original Spanish documents had been written, a circumstance which brought into doubt the genuineness of the instrument; no objection of this kind had been made during the argument of the cause; and after the supposed discovery, no opportunity was permitted, by the court of Florida, to the claimants, to explain or account for the same; after the appeal had been docketed in this court, the appellants asked permission to send a commission to procure testimony, which it was alleged, would fully explain the circumstance, and offered to read *ex parte* depositions to the same purpose. This is refused, because, in an appellate court, no new evidence can be taken or received, without violating the best-established rules of evidence; under such circumstances, it would be dealing to the petitioner a measure of justice incompatible with every principle of equity, to visit upon his title an objection which the claimant was not bound to anticipate in the court below, which he could not meet there, and which this court were compelled to refuse him the means of removing by evidence. We will not say, what course would have been taken, if his title had depended on the date of the paper alluded to; as the case is, it is only one of numerous undisputed documents, tending to establish the grant, the validity of which is but little, if it could be in any degree, affected by the date of the permission. *Mitchel* v. *United States*..... .....*711

ASSETS.

1. During the pendency of a suit to rescind a contract for the purchase of a tract of land, on an allegation that there had been a fraudulent misrepresentation by the vendor, it was agreed, that the rents and profits of the land should be received by an agent, to abide the event of the suit; the supreme court affirmed the decree of the circuit court, rescinding the contract, and ordering the part of the purchase-money paid by the purchaser, repaid to him. The vendor of the land died, and the rents and profits which had been received by the agent, were adjudged to be assets in the hands of his executor, who had been the receiver. *Boyce's Executors* v. *Grundy*..*275

ASSUMPSIT.

1. The ancient doctrine that a corporation can act, in matters of contract, under its seal only, has been departed from by modern decisions; and it is now considered, that the agents of a corporation may, in many cases, bind it, and subject it to an action of *assumpsit*. *Chesapeake and Ohio Canal Co.* v. *Knapp*... .....*541
2. When a special contract remains open, the plaintiff's remedy is on the contract; and he must set it forth specially in his declaration; but if the contract has been put an end to, the action for money had and received lies, to recover any payment that has been made under it.....*Id.*
3. It is a well-settled principle, that where a special contract has been performed, a plaintiff may recover on the general counts...*Id.*

BAIL.

1. The recognisance of special bail being a part of the proceedings on a suit, and subject to the regulation of the court, the nature, extent and limitations of the responsibility created thereby, are to be decided, not by a mere examination of the terms of the instrument, but by a reference to the known rules of the court, and the principles of law applicable thereto; whatever, in the sense of these rules and principles, will constitute a discharge of the liability of the special bail, must be deemed included within the purview of the instrument, as much as if it were expressly stated. *Beers* v. *Haughton*..*329
2. By the rules of the circuit court of Ohio, adopted as early as January 1808, the liability of special bail was provided for and limited; and it was declared, that special bail may surrender their principal, at any time, before or after judgment against the principal, provided such surrender shall be before a return of a *scire facias* executed, or a second *scire facias* returned "*nihil*" against the bail; and this, in fact, constituted a part of the law of Ohio, at the time the present recognisance was given; the same having been so enacted by the legislature. This act of the legislature of Ohio was in force at the time of the passage of the act of congress of the 19th of May 1828, regulating the process of the courts of the United States, in the new states, and must, therefore, be deemed as a part of the "modes of proceeding in suits," and to have been adopted by it; so that the surrender of the principal, within the time thus prescribed, is not a mere matter of favor of the court, but is strictly a matter of legal right.....*Id.*
3. It is not strictly true, that on the return of *non est inventus* to a *capias ad satisfaciendum* against the principal, the bail is fixed, in courts acting professedly under the common law, and independently of statute; so much are the proceedings against bail deemed a matter subject to the regulation and practice of the court, that the court will not hesitate to relieve them, in a summary manner, and direct an *exoneretur* to be entered, in cases, by the indulgence of the court, by giving them time to render the principal, until the appearance day of the last *scire facias* against them, as in cases of strict right.....*Id.*
4. When bail is entitled to be discharged, *ex debito justitiæ*, they may not only apply for an *exoneretur* by way of summary proceeding, but they may plead the matter as a bar to a suit, in their defence; but when the discharge is matter of indulgence only, the application is to the discretion of the court; and an *exoneretur* cannot be insisted on, except by way of motion.....*Id.*
5. When the party is, by the practice of the court, entitled to an *exoneretur*, without a positive surrender of the principal, according to the terms of the recognisance; he is, *à fortiori*, entitled to insist on it by way of defence, when he is entitled, *ex debito justitiæ*, to surrender the principal ..... *Id.*
6. The doctrine is fully established, that where the principal would be clearly entitled to an immediate and unconditional discharge, if he had been surrendered, there the bail are entitled to relief by entering an *exoneretur*, without any surrender; and, *à fortiori*, this doctrine will apply, when the law prohibits the party from being imprisoned at all, or when, by the positive operation of law, a surrender is prevented.....*Id.*

BANK OF THE UNITED STATES.

1. The office of the Bank of the United States, at Lexington, Kentucky, in February 1822, held a large amount of notes of the Bank of Kentucky, which had been received in the usual course of business, at the full value expressed on the face of them, as equivalent to gold and silver, and were so considered by the bank; on the amount of these notes so held, the Bank of Kentucky had agreed to pay interest, at the rate of six per centum, until the same should be redeemed; all the notes of the Bank of Kentucky, held by the Bank of the United States, were finally paid with the interest. In February 1822, when the notes of the Bank of Kentucky were at a depreciation of between thirty-three and forty per cent., Owens applied to the office of the Bank of the United States, for a loan of $5000 of the said notes, saying, they would answer his purpose as well as gold or silver; after repeated refusals and re-applications, with the consent of the board of directors of the Bank of the United States, at Philadelphia, the sum of $5000, in the notes of the Bank of Kentucky, was loaned to him, on a promissory note, signed by him, and by Waggener, Miller and Wagley, payable in three years, with interest, at the rate of six per cent. per annum; the money so loaned was paid to the borrower in the notes of the Bank of Kentucky, and in a check on that bank; and the interest on that amount of the notes, being so much of the sum due by the Bank of Kentucky to the Bank of the United States, ceased from the date of the loan. In an action on the note given by Owens and others, the defence set up was, that the transaction was usurious, contrary to the charter

of the Bank of the United States, and void: *Held*, that there was no usury in the transaction. *Bank of United States* v. *Waggener* *378

2. The statute of usury of Kentucky, of 1798, declares that all bonds, notes, &c., taken for the loan of money, where "is reserved or taken" a greater rate of interest than six per cent., shall be void. In this case, no interest at all was taken, the interest being payable at the termination of the three years mentioned in the note; and if the case can be brought within the statute, it must be, not as a taking, but a reservation of more than legal interest.....*Id.*
3. The ninth article of the fundamental articles of the charter of the Bank of the United States, declares, among other things, "that the bank shall not be at liberty to purchase any public debt whatsoever, nor shall it take more than at the rate of six per centum per annum, for on its loans or discounts." It is clear, that the present transaction does not fall within the prohibition of dealing or trading, in the preceding part of the same article; according to the interpretation thereof given by this court in the case of Fleckner *v.* Bank of United States, 8 Wheat. 338, 351, to which the court deliberately adhere...*Id.*
4. The words of the article are, that the bank shall not take (not, shall not "reserve" or "take") more than at the rate of six per cent. In the construction of statutes of usury, this distinction between the reservation and the taking of usurious interest has been deemed very material; for the reservation of usurious interest makes the contract utterly void; but if usurious interest be not stipulated for, but only taken afterwards, then the contract is not void, and the party is only liable for the excess.....*Id.*
5. In the case of the Bank of United States *v.* Owens, 2 Pet. 527, 538, it was said, that in the charter, the word "reserving" must be implied in the word "taking." This expression of opinion was not called for by the certified question which arose out of the plea; for it was expressly averred in the plea, that in pursuance of the corrupt and unlawful agreement therein stated, the bank advanced and loaned the whole consideration of the note, after deducting a large sum for discount, in the notes of the Bank of Kentucky, at their nominal value .....*Id.*
6. The case of the Bank of the United States *v.* Owens, 2 Pet. 527, turned upon considerations essentially different from those presented in the present record; the question certified in that case, arose upon a demurrer to a plea of usury; and the demurrer, in terms, admitted, that the agreement was unlawfully, usuriously, and corruptly entered into; so that no question as to the intention of the parties, or the nature of the transaction, was put; the transaction was usurious and the agreement corrupt; and the question there was, whether, if so, it was contrary to the prohibitions of the charter, and the contract void. In the present case, the questions are very different; whether the agreement was corrupt or usurious, or *bonâ fide*, and without any intent to commit usury, or to violate the charter, are the very points which the jury were called upon, and under the instructions were asked, to decide; the decision in 2 Pet. 527, cannot, therefore, be admitted to govern this; for the *quo animo* of the act, as well as the act itself, constitute the gist of the controversy.....*Id.*
7. In construing the usury laws, the uniform construction in England has been, and it is equally applicable here, that to constitute usury, within the prohibitions of the law, there must be an intention knowingly to contract for and to take usurious interest; for if neither party intend it, and act *bonâ fide* and innocently, the law will not infer a corrupt agreement. This principle would seem to apply to the charter of the bank; there must be an intent to take illegal interest; or, in the language of the law, a corrupt agreement to take it, in violation of the charter; the *quo animo* is, therefore, an essential ingredient, in all cases of this sort. *Id.*
8. There has been no taking of usury, and no reservation of usury on the face of this transaction; the case, then, resolves itself into this inquiry, whether, upon the evidence, there was any such corrupt agreement, or device, or shift to reserve or take usury; and none of these appear in the case... *Id.*
9. Because an article is depreciated in the market, it does not follow, that the owner is not entitled to demand a higher price for it, before he consents to part with it; he may possess bank-notes which, to him, are of par value in payment of his own debts, or in payment of public taxes; and yet their marketable value may be far less. If he uses no disguise, if he seeks not to cover a loan of money, under the pretence of a sale or exchange of them, but the transaction is *bonâ fide* what it purports to be; the law will not set aside the contract, for it is no violation of any public policy against usury...*Id.*

BILL OF EXCEPTIONS.

1. A bill of exceptions to evidence cannot be taken in the district court of the United states in Louisiana, when the case was not tried by a jury. *Field* v. *United States*.....*182

2. In the course of the trial of the cause in the circuit court, the counsel for the plaintiff objected to a question put by the defendant's counsel to a witness, as being a leading one. Although the plaintiff's counsel objected to this question and said, that he excepted to the opinion of the court, no exception is actually prayed by the party and signed by the judge; this court cannot consider the exception as actually taken, and must suppose it was abandoned. *Scott* v. *Lloyd*.....*428

BILL OF PARTICULARS.

1. A bill of particulars should be so specific as to inform the defendant, substantially, on what the plaintiff's action is founded; this is the object of the bill, and if it fall short of this, its tendency must be to mislead the defendant, rather than to enlighten him. *Chesapeake and Ohio Canal* v. *Knapp*..*541
2. As the bill of particulars is filed before the trial, it is always in the power of the defendant to object to its want of precision, and the court will require it to be amended, before the commencement of the trial; and if this be not the only mode of taking advantage of any defect in the bill, it is certainly the most covenient for the parties.....*Id.*

CASES CITED.

1. Barr *v.* Gratz, 4 Wheat. 213. An ancient deed, accompanied with possession, admitted as evidence, without proof of its execution. *Coulson* v. *Walton*.....*62
2. Fleckner *v.* Bank of United States, 8 Wheat. 338, 351. Charter of the Bank of the United States. *Bank of United States* v. *Waggener*.....*378
3. Lenox *v.* Roberts, 2 Wheat. 373. Demand of payment of a promissory note. *Bank of Alexandria* v. *Swann*.....*33
4. Mills *v.* Bank of United States, 11 Wheat. 431. Notice of dishonor of promissory note.....*Id.*
5. Patterson *v.* Jenks, 2 Pet. 216. Grants. *Winn* v. *Patterson*.....*663
6. Patterson *v.* Winn, 5 Pet. 233. Evidence: Grants of land.....*Id.*
7. Sturges *v.* Crowninshield, 4 Wheat. 200; Mason *v.* Haile, 12 Ibid. 370; Wayman *v.* Southard, 10 Ibid. 1; United States Bank *v.* Halstead, 10 Ibid. 51. *Beers* v. *Haughton*.....*329
8. United States *v.* Arredondo, 6 Pet. 691. Florida land-claims. *Delassus* v. *United States*.....*117
9. United States *v.* Arredondo, 6 Pet. 733. *New Orleans* v. *De Armas*.....*224
10. United States *v.* Clarke, 8 Pet. 436. Florida land-claims. *Delassus* v. *United States*..*117
11. United States *v.* Percheman, 7 Pet. 51. Florida land-claims.....*Id.*

CERTIFICATE OF DIVISION.

1. The language of the sixth section of the act to amend the judicial system of the United States, which provides for the removal of cases from the circuit court to the supreme court, when the judges of the circuit court are opposed in opinion, shows conclusively, that congress intended to provide for a division of opinion on single points, which frequently occur in the trial of a cause; not to enable a circuit court to transfer an entire cause into the supreme court, before a final judgment. A construction which would authorize such transfer, would counteract the policy which forbids writs of error or appeals, until the judgment or decree be final; it has been repeatedly decided, that the whole cause cannot be adjourned on a division of the judges; and this is a case of that description. *United States* v. *Bailey*.*267

CHANCERY AND CHANCERY PRACTICE.

1. G. K., the father of the wife of the complainant, T., a few days after the marriage of his daughter, proposed to his son-in-law, that he should repair a house and lot in Georgetown, saying he intended it for his daughter; at this time, G. K. was in good circumstances; T. laid out a considerable sum in the repairs, afterwards occupied the property, removed from it, and received the rents, and afterwards left Georgetown to reside elsewhere, the rents of the property being collected and paid to him by G. K.; some time after the repairs of the property were finished, a correspondence took place as to the terms on which G. K. was to convey the property to T. and wife, in which G. K. acknowledged the right of T. to have the amount paid for the repairs secured or repaid to him, and stated, that he would convey part of the property to T., and part to his daughter, so that the property should be possessed and enjoyed by them both; no specific agreement was made on the subject, and G. K. afterwards died insolvent; T. and wife filed a bill against the heirs of G. K., and the trustee of the creditors of G. K., claiming a conveyance of the property, and for general relief. In no point of view, could such a contract as that in this case be considered voluntary; there was not only a good con-

sideration, that of natural affection, but a valuable one; to constitute a valuable consideration, it is not necessary, that money should be paid; but if, as in this case, it be expended on the faith of the contract, it constitutes a valuable consideration. *King's Heirs* v. *Thompson*.....*204

2. In testing the validity of the transaction of 1812, the subsequent fall of property in Georgetown, or the failure of K., cannot be taken into view; the inquiry must be limited to his circumstances at that time. It is not shown, that the persons for whom he was bound, as indorser, were then unable to pay the respective sums for which he was responsible; and it would be improper to consider those sums as debts due by K.; he was responsible for their payment on certain contingencies; but the fact that his credit remained unimpaired for several years after the contract, shows, that neither his credit nor the credit of those for whom he was indorser, was considered doubtful. In this state of facts, K. was in a condition to dispose of the house and lot, not worth more than $2500, on the terms stated.....*Id.*
3. The terms of the contract not being sufficiently established by the evidence, the court decreed that the property should be sold, and the proceeds of the sale first applied to the payment of the money expended by T. in making improvements on the property; and the balance, if any, paid over for the benefit of the creditors of G. K.—T. not to be charged with rent of the premises while he occupied them, nor with the rent collected and paid to him after he removed.....*Id.*
4. Statutes of limitations are applied by courts of equity, in all cases where, at law, they might be pleaded. *Coulson* v. *Walton*...*63
5. A bill was filed in the circuit court of Ohio, for a conveyance of the legal title to certain real estate in the city of Cincinnati, and the statute of limitations of Ohio was relied on by the defendants; the complainant claimed the benefit of an exception in the statute, of non-residence and absence from the state; and evidence was given, tending to show that the person under whom he made his claim in equity, was within the exception; the non-residence and absence were not charged in the bill, and of course, were not denied or put in issue in the answer: *Held*, that the court could take no notice of the proofs; for the proofs, to be admissible, must be founded upon some allegations in the bill and answer. If the merits of the case were not otherwise clear, the court might remand the cause for the purpose of amending the pleadings. *Piatt* v. *Vattier*.....*405
6. A bill was filed in the circuit court of the United States for the eastern district of Pennsylvania, to recover the estate of the testator, bequeathed to "his heir-at-law;" The court considered, on an examination of the bill and proceedings, that there was not a sufficient averment of the testator's actual domicil, at the time of making the will, at the time of his death, or at any intermediate period; and remanded the cases to the circuit court, to have sufficient averments inserted. *Harrison* v. *Nixon*.....*483
7. Every bill must contain, in itself, sufficient matter of fact, *per se*, to maintain the case of the plaintiff; the proofs must be according to the allegations of the parties, and if the proofs go to matters not within the allegations, the court cannot judicially act upon them, as a ground for decision, for the pleadings do not put them in contestation....*Id.*
8. Upon motions made to the court, and from proceedings in the circuit court, laid before the court, it appeared, that there were certain claimants of the bequest, asserting themselves to be "heirs-at-law," whose claims were not adjudicated upon in that court, on account of their having been presented at too late a period. As the cause is to go back again, for further proceedings, and must be opened there, for new allegations and proofs, the claimants will have a full opportunity of presenting and proving their claims; and they ought to be let into the cause for that purpose.....*Id.*
9. The district court of the United States in Louisiana, has jurisdiction in all cases which are cognisable in courts of equity, as contra-distinguished from courts of common law; and the modes of proceeding in that court must be according to the usages, principles and rules which belong to courts of equity. *Livingston* v. *Story*.....*632
10. If there are no equitable claims or rights, cognisable in the courts of the state of Louisiana, nor any courts of equity, and no state laws regulating the practice in equity causes, the law of 1824 does not apply to a case of chancery jurisdiction, and the district court of Louisiana is bound to adopt the antecedent modes of proceeding, authorized under the former acts of congress.....*Id.*
11. If any part of a bill in chancery is good, and entitles the complainant to relief or discovery, a demurrer to the whole bill cannot be sustained.....*Id.*
12. It is an established and universal rule of pleading in chancery, that a defendant may meet a complainant's bill by several modes of defence; he may demur, answer and plead to different parts of the bill; so that, if a bill for a discovery contain proper matter for the one, and not for the other, the defendant

should answer the proper, and demur to the improper matter; and if he demurs to the whole bill, the demurrer must be overruled.....*Id.*

13. Congress has the power to establish circuit and district courts in any, and all the states of the Union, and to confer on them equitable jurisdiction, in cases coming within the constitution; it falls within the express words of the constitution.....*Id.*

CONSTITUTIONAL CASES.

1. The court refused to take up cases involving constitutional questions, when the court was not full. *New York* v. *Miln*, *85; *Briscoe* v. *Commonwealth Bank*.....*85

CONSTRUCTION OF STATUTES OF THE UNITED STATES.

1. The relief which is given by the act of congress, passed 15th of May 1820, entitled "an act providing for the better organizing the treasury department," on which a warrant of distress may be issued, by application to any district judge of the United States, for an injunction to stay proceedings on such warrant, is not confined to an officer employed in the civil, military or naval departments of the government, to disburse the public money appropriated for the service of those departments, respectively, who shall fail to render his accounts, or pay over, in the manner required by law, any sum of money remaining in the hands of such officer. *United States* v. *Nourse*.....*8
2. Opinions of Chief Justice MARSHALL and of Judge BARBOUR, delivered in the circuit court of the United States for the eastern district of Virginia, in the case of the United States *v.* Randolph, upon the construction of the act of congress of 15th May 1820, authorizing the issuing of a warrant of distress in certain cases.....*12
3. Construction of the act of congress of 25th May 1824, "enabling the claimants to land within the limits of the state of Missouri and territory of Arkansas, to institute proceedings to try the validity of their claims." *Delassus* v. *United States*.....*117
4. Construction of the 3d section of the act of congress of March 1st, 1823, relating to false swearing touching expenditures of public money. *United States* v. *Bailey*.....*238

CONSTRUCTION OF STATE STATUTES.

1. Construction of the statutes of limitations of North Carolina of 1815 and 1819. *Coulson* v. *Walton*.....*62
2. Construction of the act of the legislature of Kentucky, authorizing aliens to hold lands. *Beard* v. *Rowan*.....*301
3. Construction of the statute of Maryland of 1796, ch. 67, § 13, relative to the manumission of slaves. *Fenwick* v. *Chapman*..*461

CONTINUANCE OF CAUSES.

See *Mitchel* v. *United States*, *711.

CONTRACT.

1. Where the parties in their contract fix on a certain mode by which the amount to be paid shall be ascertained, the party that seeks an enforcement of the agreement, must show that he has done everything on his part, which could be done, to carry it into effect; he cannot compel the payment of the amount claimed, unless he procure the kind of evidence required by the contract; or show that, by time or accident, he is unable to do so. *United States* v. *Robeson*.....*319

CRIMES.

See PERJURY.

DAMAGES.

1. The allowance of damages in cases of affirmance of judgments or decrees of the circuit court, when brought up by writ of error or appeal, is solely for the decision of the supreme court. *Boyce's Executors* v. *Grundy*.....*275

DOMICIL.

See CHANCERY AND CHANCERY PRACTICE: WILLS AND PROBATE OF WILLS.

ERROR.

1. Where there is no evidence tending to prove a particular fact, the court are bound so to instruct the jury, when requested; but they cannot legally give any instruction which will take from the jury the right of weighing what effect the evidence shall have; an instruction to the jury, founded on part of the evidence only, is error. *Greenleaf* v. *Birth*.....*292

EVIDENCE.

1. The bill of exceptions stated, that during the trial of the cause in the district court, the counsel for the marshal stated, that he had made a seizure, or given notice that he seized, in the hands of the defendants, as syndics, any funds in their hands to a suffi-

cient amount to satisfy a judgment obtained in the case of the United States *v.* John Brown, sen., and Lewis E. Brown; this testimony was objected to, as being contrary to the statement of facts in the case, in which it was stated, that a return of *nulla bona* had been made by the marshal; and because the act was done in a case to which the defendants were not parties, and because the best evidence was the notice or true and proved copies of it; the return of the marshal in the case of the United States *v.* John Brown, sen., and Lewis E. Brown was also offered, and was objected to. The evidence was properly admitted, as notice to the syndics of the debts due to the United States. *Field* v. *United States*.....*182

2. S. obtained a sum of money of M., securing him by an annuity equal to ten per cent. per annum for ten years; he afterwards resisted the payment of the annuity, on the ground, that the contract was usurious, and having sold the estate to L., on which the annuity was secured, he, in writing, promised to indemnify and save him harmless for prosecuting a writ of replevin, should a distress be made for the annuity. On the trial of the action of replevin, S. was not a competent witness to show the original contract between him and M. was usurious. *Scott* v. *Lloyd*.....*418
3. The attorney in fact, residing in New Orleans, of certain executrices, residing in Baltimore, of the will of a person who left certain slaves in New Orleans, sold the slaves, without conforming to the provisions of the law of Louisiana; and received a part of the proceeds of the sale, but having failed, did not pay over the same to his constituents; the heirs of the testatrix instituted a suit for the recovery of the slaves, in a court of Louisiana; and by a decree of the court, they were adjudged to them; the purchaser instituted a suit in the circuit court of the district of Maryland, against the executrices, to recover the amount paid for the slaves, and his expenses, and offered the record of the proceedings in the suit in Louisiana in evidence, which was objected by the defendants. The suit and the proceedings was *res inter alios acta*, and were no further evidence than to show a recovery by a paramount title. *Owings* v. *Hull*.....*607
4. By the laws of Louisiana, copies from the notarial register of deeds and bills of sale, certified under the notarial seal of the notary, are evidence—the original register always remaining in the office of the notary. The circuit court was bound to take notice of the laws of Louisiana, and the copy being evidence by these laws, was legal evidence in a suit instituted before the circuit court in another state.....*Id.*
5. A copy of the letters testamentary granted by the parish court of New Orleans, was proved by the oath of the clerk and register of the court of probates, to be a true copy of the original, and that he could not send the original, which was on file in the court of probates. This is the best evidence which the nature in the case admits of.....*Id.*
6. The letters and accounts of J. K. West, the attorney in fact of the executrices, transmitted by him to Mr. Winchester, their attorney in fact, were legal evidence in the circuit court.....*Id.*
7. What evidence is sufficient to introduce secondary proof of the contents of lost deeds, powers of attorney, &c. *Winn* v. *Patterson*.....*663
8. The deputy-clerk of the Richmond county court, who, as such, had recorded an original power of attorney, swore 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.....*Id.*
9. 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 it 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....*Id.*
10. 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 can

pable 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 laws as high evidence as the original, for then it is also a second remove from the original. But it is quite a 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, 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.....*Id.*

11. 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.....*Id.*

12. 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 substitued for the principal in every respect; and his statements, which form a part of the *res gestæ* may be proved. *United States* v. *The Brig Burdett*.....*682

13. The plaintiffs instituted a suit in the circuit court of the United States for the district of Maryland, stating themselves to be citizens of the state of Maryland, and that the defendant was an alien, and a subject of the king of Spain; the defendant pleaded in abatement, that one of the plaintiffs, Domingo De Arbel, was not a citizen of Maryland, nor of any of the United States, but was an alien, and a subject of the king of Spain; upon the trial of the issue joined on this plea, the plaintiffs produced and gave in evidence, under the decision of the circuit court, a passport granted by the secretary of state of the United States, stating De Arbel to be a citizen of the United States: *Held*, that the passport was not legal evidence to establish the fact of the citizenship of the person in whose favor it was given. *Urtetiqui* v. *De Arbel*.....*692

14. The defendant in the circuit court offered in evidence the record, duly certified, of the district court of the United States for the district of Louisiana, containing the proceedings in a suit which had been originally instituted against De Arbel, in a state court of Louisiana, and on his affidavit that he was an alien, and a subject of the king of Spain, had been removed for trial to the district court, under the authority of the act of congress authorizing such a removal of a suit against an alien into a court of the United States; the record was introduced, as containing a copy of the affidavit of De Arbel in the state court, upon which the case was removed: *Held*, that this was legal evidence.....*Id.*

See CONTRACT.

EXECUTION.

1. An execution is the end of the law; it gives the successful party the fruits of his judgment, and the distress-warrant is a most effective execution; it may act on the body and estate of the individual against whom it is directed. *United States* v. *Nourse*...*8

EXECUTORY DEVISE.

1. The clauses in the will of John Campbell, under which the land in controversy was claimed, were as follows: "And if, within that time, my said half-brother, Allen Campbell, shall become a citizen of the United States, or be otherwise qualified by law to take and hold real estate within the same, I then direct, that my said trustees, or the survivor or survivors of them, shall convey to my said half-brother, Allen Campbell, his heirs or assigns, in fee-simple, all the land herein-before described in this devise; but if my said half-brother shall not, within the time aforesaid, become a citizen as aforesaid, I then direct, that my said trustees, or the survivor or survivors of them, shall sell and dispose of the said land, hereby directed to be conveyed to him, on two years' credit, with interest from the date, to be paid annually, and the money and interest arising from such sale to be transmitted to my said half-brother, to whom I give and bequeath the same; but should my said half-brother become a citizen of the United States, or be otherwise qualified to hold real estate within the same, before his death, it is then my will and desire, that he shall have the sole and absolute disposal of all the estate herein-before devised or bequeathed to him, notwithstanding he may not have obtained deeds therefor from my said trustees." The testator died in October 1799; Allen Campbell, a native of Ireland, came to the state of Kentucky, in December 1799, and continued to reside therein until September 1804, when he died; on the 18th of December 1800, the legislature of Kentucky passed a law, under which Allen Campbell was authorized to hold

the land devised to him. The devise to Allen Campbell was a good executory devise, depending on the contingency of his becoming a citizen of the United States, or being otherwise qualified to hold real estate; this contingency was not too remote; it must, necessarily, not only from the nature of the contingency, but by express limitation in the devise, happen in the lifetime of the devisee, if ever; and upon the happening of this contingency, there can be no doubt, but the devisee took an estate in fee. *Beard* v. *Rowan*.....*301

FINAL DECREES AND JUDGMENTS.

1. A decree perpetuating an injunction, leaving some matters of account open for further consideration, is not a final decree. *Brown* v. *Swann*.....*1
2. A judgment awarding a writ of restitution in an action of ejectment, where in the execution of a writ of *habere facias possessionem*, the sheriff had improperly turned a person out of possession, is not a final judgment in a civil action; it is no more than the action of a court on its own process, which is submitted to its own discretion. *Smith* v. *Trabue's Heirs*.....*4

FLORIDA LAND-CLAIMS AND FLORIDA TREATY.

1. The decree of the supreme court of East Florida, confirming a concession of land to the appellee, granted to him by Governor Coppinger, in December 1817, confirmed. *United States* v. *Clarke*.....*168
2. A concession on condition becomes absolute, when the condition is performed.....*Id.*
3. The original concession by Governor Coppinger, on the petition of George J. F. Clarke, was made on the 17th of December 1817, of 26,000 acres of land, in the places he solicited in his petition, and a complete title was made of 22,000 acres, part of the same, in December 1817; 20,000 acres, part of the whole concession, were sold by the appellee; the other 4000 were surveyed in conformity with the decree of 17th of December 1817, and a complete title to the same was made by Governor Coppinger, on the 4th of May 1818. The claimant cannot avail himself of the grant of the 4th of May 1818, made after the 24th of January 1818, the time limited by the Florida treaty; he must rest his claim on the concession made on the 17th of December 1817.....*Id.*
4. The validity of concessions of land, by the authorities of Spain in East Florida, is expressly recognised in the Florida treaty, and in the several acts of congress.....*Id.*
5. The eighth article allows the owners of land the same time for fulfilling the conditions of their grants, from the date of the treaty, as is allowed in a grant from the date of the instrument; and the act of the 8th of May 1822, requires every person claiming title to lands, under any patent, grant, concession or order of survey, dated previous to the 24th of January 1818, to file his claim before the commissioners, appointed in pursuance of that act; all the subsequent acts on the subject observe the same language; and the titles under these concessions have been uniformly confirmed, when the tract did not exceed a league square.....*Id.*
6. A claim to lands in East Florida, the title to which was derived from grants by the Creek and Seminole Indians, ratified by the local authorities of Spain, before the cession of Florida by Spain to the United States, confirmed. *Mitchel* v. *United States*.....*711
7. It was objected to the title claimed in this case, which had been presented to the superior court of Middle Florida, under the provisions of the acts of congress for the settlement of land claims in Florida, that the grantees did not acquire, under the Indian grants, a legal title to the land: *Held*, that the acts of congress submit these claims to the adjudication of this court, as a court of equity; and those acts, as often and uniformly construed in its repeated decisions, confer the same jurisdiction over imperfect, inchoate and inceptive titles, as legal and perfect ones, and require the court to decide by the same rules on all claims submitted to it, whether legal or equitable.....*Id.*
8. By the law of nations, the inhabitants, citizens or subjects of a conquered or ceded country, territory or province, retain all the rights of property which have not been taken from them by the orders of the conqueror; and this is the rule by which we must test its efficacy, according to the act of congress which we must consider as of binding authority. *Id.*
9. A treaty of cession is a deed or grant by one sovereign to another, which transfers nothing to which he had no right of property; and only such right as he owned, and could convey to the grantee. By the treaty with Spain, the United States acquired no lands in Florida to which any person had lawfully obtained such a right, by a perfect or inchoate title, that this court could consider it as property, under the second article, or which had, according to the stipulations of the eighth article of the treaty, been granted by the lawful authorities of the king; which words, "grants" or "concessions," were to be con-

strued in their broadest sense, so as to comprehend all lawful acts which operated to transfer a right of property, perfect or imperfect.....*Id.*

10. The effect of the clauses of the confirmation of grants made was, that they confirmed them presently, on the ratification of the treaty, to those in possession of the lands; which was declared to be, that legal seisin and possession which follows title, is co-extensive with the right, and continues till it is ousted by an actual adverse possession, as contradistinguished from residence and occupation. *Id.*

11. The United States, by accepting the cession under the terms of the eighth article, and the ratification by the king, with an exception of three annulled grants to Allagon, Punon Rostro and Vargas, can make no other exceptions to grants made by the lawful authorities of the king.....*Id.*

12. The meaning of the words "lawful authorities," in the eighth article, or "competent authorities," in the ratification, must be taken to be, "by those persons who exercised the granting power by the authority of the crown;" the eighth article expressly recognises the existence of these lawful authorities in the ceded territories, designating the governor or intendant, as the case might be, as invested with such authority; which is to be deemed competent, till the contrary is made to appear..... .....*Id.*

13. By "the laws of Spain," is to be understood the will of the king, expressed in his orders, or by his authority, evidenced by the acts themselves; or by such usage and customs in the province as may be presumed to have emanated from the king, or to have been sanctioned by him, as existing authorized local laws.....*Id.*

14. In addition to the established principles heretofore laid down by this court as the legal effect of a usage or custom, there is one which is peculiarly appropriate to this case; the act of congress giving jurisdiction to this court to adjudicate on these causes, contains this clause in reference to grants, &c., "which was protected and secured by the treaty, and which might have been perfected into a complete title, under and in conformity to the laws, usages, and customs of the government under which the same originated;" this is an express recognition of any known and established usage or custom in the Spanish provinces, in relation to the grants of land, and the title thereto, which brings them within a well-established rule of law—that a custom or usage saved and preserved by a statute, has the force of an express statute, and shall control all affirmative statutes in opposition, though it must yield to the authority of negative ones, which forbid an act authorized by a custom or usage thus saved and protected; and this is the rule by which its efficacy must be tested, according to the act of congress, which must be considered of binding authority.....*Id.*

15. In the case of the United States *v.* Arredondo, 6 Pet. 691, the lands granted had been in the possession and occupation of the Allachua Indians, and the centre of the tract was an Indian town of that name; but the land had been abandoned, and before any grant was made by the intendant, a report was made by the attorney and surveyor-general, on a reference to them, finding the fact of abandonment; on which it was decreed, that the lands had reverted to and become annexed to the royal domain.....*Id.*

16. By the common law, the king has no right of entry on lands which is not common to his subjects; the king is put to his inquest of office, or information of intrusion, in all cases where a subject is put to his action; their right is the same, though the king has more convenient remedies in enforcing his. If the king has no original right of possession to lands; he cannot acquire it, without office found, so as to annex it to his domain.....*Id.*

17. The United States have acted on the same principle, in the various laws which congress have passed in relation to private claims to lands in Florida; they have not undertaken to decide for themselves, on the validity of such claims, without the previous action of some tribunal, special or judicial; they have not authorized an entry to be made on the possession of any person in possession, by color of a Spanish grant or title, nor the sale of any lands, as part of the national domain, with any intention to impair private rights. The laws which give jurisdiction to the district courts of the territories, to decide in the first instance, and to this, on appeal, prescribe the mode by which lands which have been possessed or claimed to have been granted pursuant to the laws of Spain, shall become a part of the national domain; which, as declared in the 7th section of the act of 1824, is a "final decision against any claimant, pursuant to any of the provisions of the law."*Id.*

18. One uniform rule seems to have prevailed in the British provinces in America, by which Indian lands were held and sold, from their first settlement, as appears by their laws—that friendly Indians were protected in the possession of the lands they occupied, and were considered as owning them, by a perpetual right of possession in the tribe or nations inhabiting them, as their common property, from generation to generation, not as

the right of individuals located on particular spots; subject to this right of possession, the ultimate fee was in the crown and its grantees; which could be granted by the crown or colonial legislatures, while the lands remained in possession of the Indians, though possession could not be taken without their consent.....*Id.*

19. Individuals could not purchase Indian lands, without permission or license from the crown, colonial governors, or according to the rules prescribed by colonial laws; but such purchases were valid, with such license, or in conformity with the local laws; and by this union of the perpetual right of occupancy with the ultimate fee, which passed from the crown by the license, the title of the purchaser became complete.....*Id.*

20. Indian possession or occupation was considered with reference to their habits and modes of life; their hunting-grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its exclusive enjoyment in their own way and for their own purposes, were as much respected, until they abandoned them, made a cession to the government, or an authorized sale to individuals. In either case, their rights became extinct, the lands could be granted disincumbered of the right of occupancy, or enjoyed in full dominion by the purchasers from the Indians. Such was the tenure of Indian lands, by the laws of Massachusetts, Connecticut, Rhode Island, New Hamsphire, New York, New Jersey, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina and Georgia.....*Id.*

21. Grants made by the Indians, at public councils, since the treaty at Fort Stanwix, have been made directly to the purchasers, or to the state in which the land lies, in trust for them, or with directions to convey to them; of which there are many instances of large tracts so sold and held, especially in New York.....*Id.*

22. It was a universal rule, that purchases made at Indian treaties, in the presence, and with the approbation of the officer under whose direction they were held by the authority of the crown, gave a valid title to the lands; it prevailed under the laws of the states, after the revolution, and yet continues in those where the right to the ultimate fee is owned by the states or their grantees; it has been adopted by the United States, and purchases made at treaties held by their authority have been always held good, by the ratification of the treaty, without any patent to the purchasers, from the United States. This rule in the colonies was founded on a settled rule of the law of England, that, by his prerogative, the king was the universal occupant of all vacant lands in his dominions, and had the right to grant them at his pleasure, or by his authorized officers.....*Id.*

23. When the United States acquired and took possession of the Floridas, the treaties which had been made with the Indian tribes, before the acquisition of the territory by Spain and Great Britain, remained in force over all the ceded territory, as the laws which regulated the relations with all the Indians who were parties to them, and were binding on the United States, by the obligation they had assumed by the Louisiana treaty, as a supreme law of the land, which was inviolable by the power of congress. They were also binding as the fundamental law of Indian rights, acknowledged by royal orders, and municipal regulations of the province, as the laws and ordinances of Spain in the ceded provinces, which were declared to continue in force, by the proclamation of the governor, in taking possession of the provinces; and by the acts of congress, which assured all the inhabitants of protection in their property. It would be an unwarranted construction of these treaties, laws, ordinances and municipal regulations, to decide, that the Indians were not to be maintained in the enjoyment of all the rights which they could have enjoyed under either, had the provinces remained under the dominion of Spain; it would be rather a perversion of their spirit, meaning and terms, contrary to the injunction of the law under which the court acts, which makes the stipulations of any treaty, the laws and ordinances of Spain, and these acts of congress, so far as either apply to this case, the standard rules for its decision.....*Id.*

24. The treaties with Spain and England, before the acquisition of Florida by the United States, which guarantied to the Seminole Indians their lands, according to the right of property with which they possessed them, were adopted by the United States; who thus became the protectors of all the rights they had previously enjoyed, or could of right enjoy, under Great Britain or Spain, as individuals or nations, by any treaty, to which the United States thus became parties in 1803.....*Id.*

25. The Indian right to the lands as property, was not merely of possession, that of alienation was concomitant; both were equally secured, protected and guarantied by Great Britain and Spain, subject only to ratification and confirmation by the license, charter or deed from the governor, representing the king; such purchases enabled the Indians to pay their debts, compensate for their depredations on the traders resident among them to

provide for their wants; while they were available to the purchasers, as payment of the considerations, which, at their expense, had been received by the Indians. It would have been a violation of the faith of the government to both, to encourage traders to settle in the province, to put themselves and property in the power of the Indians, to suffer the latter to contract debts, and when willing to pay them by the only means in their power, a cession of their lands, withhold an assent to the purchase, which by their laws or municipal regulations was necessary to vest a title; such a course was never adopted by Great Britain, in any of her colonies, nor by Spain, in Louisiana or Florida.....*Id.*

26 The laws made it necessary, when the Indians sold their lands, to have the deeds presented to the governor for confirmation; the sales by the Indians transferred the kind of right which they possessed; the ratification of the sale by the governor must be regarded as a relinquishment of the title of the crown to the purchaser, and no instance is known where permission to sell has been "refused, or the rejection of an Indian sale."..... *Id.*

27. In the present case, the Indian sale has been confirmed with more than usual solemnity and publicity; it has been done at a public council and convention of the Indians, conformable to treaties, to which the king was a party, and which the United States adopted; and the grant was known to both parties to the treaty of cession. The United States were not deceived by the purchase, which they knew was subject to the claim of the petitioner, or those from whom he purchased; and they made no stipulation which should put it to a severer test than any other; and it was made to a house which, in consideration of its great and continued services to the king and his predecessor, had deservedly given them high claims as well on his justice as his faith. But if there could be a doubt, that the evidence in the record did not establish the fact of a royal license or assent to this purchase, as a matter of specific and judicial belief, it would be presumed as a matter of law, arising from the facts and circumstances of the case, which are admitted or unquestioned.....*Id.*

28. As heretofore decided by this court, the law presumes the existence in the provinces of an officer authorized to make valid grants; *à fortiori*, to give license to purchase and to confirm; and the treaty designates the governor of West Florida as the proper officer to make grants of Indian lands by confirmation, as plainly as it does the governor of East Florida to make original grants, or the intendant of West Florida to grant royal lands. A direct grant from the crown of lands in a royal haven, may be presumed, on an uninterrupted possession of sixty years; or a prescriptive possession of crown lands for forty years.....*Id.*

29. The length of time which brings a given case within the legal presumption of a grant, charter or license, to validate a right long enjoyed, is not definite, depending on its peculiar circumstances.....*Id.*

FORFEITURE.

1. An information was filed in the district court of the United States, on the 1st of October 1822, 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 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 commander 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. *United States* v. *The Brig Burdett*.....*682

2. 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 infractions of the law were established beyond reasonable doubt.....*Id.*

3. That frauds are often practised under the revenue laws, 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.....*Id.*

4. 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 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.....*Id.*

FRAUD AND STATUTE OF FRAUDS.

1. G., the executor of his father, who had devised his estate to G. and his other children, sold the estate, and became himself the purchaser of it; and in order to secure the portions of the other devisees, who were minors, confessed a judgment, June 1st, 1819, on a promissory note, in favor of two persons, without their knowledge, in a sum supposed to be sufficient to be a full security for the amount of the portions of the minors; the judgment was kept in full operation, by executions regularly issued upon it, so as, under the laws of South Carolina, to bind the property of G. He was then engaged in mercantile pursuits, and had other property than that so purchased by him; G. afterwards became insolvent, and the claims of the devisees of his father, under the judgment, were contested by his creditors as fraudulent —the plaintiffs in the judgment, having no knowledge of it, when it was confessed, the amount of the sum due to the co-devisees not having been ascertained when it was confessed, no declaration of trust having been executed by the plaintiffs, and false representations of his situation having been made by G., after the judgment, whereby his creditors were induced to give him time on a judgment confessed to them subsequently. The judgment of June 1st, 1819, was held to be valid, and the plaintiffs in that judgment entitled to the proceeds of the sales of the estate of G., for the satisfaction of the amount actually due to the co-devisees by G. *Bank of Georgia* v. *Higginbottom*.....*48
2. A bill was filed in the circuit court of the United States for the district of Kentucky, claiming certain lands in Kentucky, under an agreement by parol, by Carrington with Williams, for an exchange of lands, and in which exchange C., the husband and devisor of the claimant, agreed to give certain lands then owned by him in Virginia, to W., and of which W. took possession, and part of which he sold, and for which W. was to convey certain military lands in Kentucky to C.; the bill prayed that the heir of W. should be decreed to convey the lands; and that certain persons who, knowing of the agreement between C. and W., had purchased from the heir of W., and who had obtained from the heir of W. the legal title to a part of the same lands, should be decreed to convey the same to the complainant. The court held, that although the statute of frauds avoids parol contracts for lands, yet the complete execution of the contract in this case by Carrington, by conveying to Williams the land he agreed to give to Williams in exchange, prevented the operation of the statute in this case; this was undoubtedly supposed in Virginia to be the sound construction of the statute, when this contract was made; and as the lands then lay in Virginia, Kentucky being then a part of that state, this construction forms the law of contract. *Caldwell* v. *Carrington*.....*86

See *King's Heirs* v. *Thompson*, *204.

GRANTS OF LANDS.

1. No grant of land can affect pre-existing titles. *New Orleans* v. *De Armas*.....*224
2. There are cases when 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 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. *Winn* v. *Patterson*.....*664
3. A grant may be good for part of the land granted, and bad as to other parts of the same.....*Id.*

HABEAS CORPUS.

1. As the jurisdiction of the supreme court is appellate, it must be shown to the court, that the court has the power to award a *habeas corpus*, before one will be granted. *Ex parte Milburn*.....*704

2. George Milburn was imprisoned in the jail of the county of Washington, upon a bench-warrant issued by the circuit court of the United States for the district of Columbia, to answer an indictment pending against him, for keeping a faro bank, an offence which, by an act of congress, is punishable by imprisonment at hard labor in the penitentiary of the district; he had been arrested on a former *capias*, issued on the same indictment, upon which he gave a recognisance of bail, with sureties, in the sum of one hundred pounds, Maryland currency, according to the statute of Maryland, conditioned to appear in court at the return-day of the process, &c.; he did not appear, and the recognisance was forfeited, and a *scire facias* was issued against him and his sureties, returnable to December term 1833; at the same term, another writ of *capias* was issued against him, returnable immediately, and returned *non est inventus;* at June vacation 1834, another writ of *capias* was issued against him, returnable to November term 1834, on which he was arrested, and from which arrest he was discharged on a *habeas corpus*, by the chief justice of the circuit court, on the ground, that the writ of *capias* improperly issued. On a return of this discharge by the marshal, a bench-warrant was issued, by order of a majority of the judges of the circuit court, and on which he was in custody; he applied for a writ of *habeas corpus* to this court, to obtain his discharge: *Held*, that he was properly in custody; the rule for the habeas corpus was refused..... *Id.*

INDIANS AND INDIAN GRANTS OF LAND.

See FLORIDA LAND-CLAIMS AND FLORIDA TREATY.

INSOLVENT LAWS.

1. Constitutionality of the insolvent laws of the state of Ohio. *Beers* v. *Haughton*....*329
2. The legislature of Ohio possessed full constitutional authority to pass laws whereby insolvent debtors should be released or protected from arrest or imprisonment of their persons, on any action for any debt or demand due by them; the right to imprison constitutes no part of the contract; and a discharge of the person of the party from imprisonment, does not impair the obligation of the contract, but leaves it in full force against his property and effects..... *Id.*

INSTRUCTIONS TO THE JURY.

See TRIAL BY JURY.

INTEREST.

1. No interest can be allowed on the execution of the mandate of the supreme court, issued on the affirmance of a decree of a circuit court, for a stated amount of money; unless the supreme court has, in their decree, ordered the same to be allowed. *Boyce's Executors* v. *Grundy*.....*275

JUDGMENTS.

1. A judgment of a court of competent jurisdiction, while unreversed, concludes the subject-matter of it, as between the same parties. *United States* v. *Nourse*.....*8
2. Where the United States had proceeded on a treasury transcript, by a warrant of distress against a public officer, for a balance alleged to be due to the government, and after an injunction issued by the chief justice of the circuit court of the district of Columbia, an examination of the accounts between the United States and the defendant in the warrant of distress took place, under the order of the chief justice of the circuit court, by which it was found, that the United States were largely indebted to the defendant, and the injunction was perpetuated: it was *held*, that this was a final judgment in the case; and no suit could afterwards be instituted by the United States, on the said treasury transcript, so long as the decree of the chief justice of the circuit court remained unreversed; the accounts between the United States and defendant in the warrant of distress, cannot again be brought into litigation..... *Id.*

JUDGMENTS OF STATE COURTS.

1. A decree of a county court of Virginia, which would be enforced in Kentucky, will be enforced in the circuit court of the United States for the district of Kentucky. *Caldwell* v. *Carrington*.....*86

JURISDICTION.

1. A lot of ground, situate in the city of New Orleans, which was occupied, under an incomplete title, for some time, by permission of the Spanish government, granted before the acquisition of Louisiana by the United States, was confirmed to the claimants, under

the laws of the United States, and a patent was issued for the same, on the 17th of February 1821; the city of New Orleans, claiming this lot as being part of a quay dedicated to the use of the city, in the original plan of the town, and therefore, not grantable by the king of Spain, enlarged the levee in front of New Orleans, so as to include it; the patentees from the United States brought a suit in the district court of the state of Louisiana, for the lot, which pronounced judgment in their favor, and that judgment was affirmed by the supreme court of the state; the judgment was removed to this court, under the 25th section of the judiciary act; a motion was made to dismiss the writ of error for want of jurisdiction. The merits of this controversy cannot be revised in this tribunal; the only inquiry here is, whether the record shows that the constitution, or a treaty, or a law of the United States has been violated by the decision of that court. *New Orleans* v. *De Armas*.....*224

2. The 25th section of the judiciary act is limited by the constitution, and must be construed so as to be confined within these limits; but to construe this section so that a case can arise under the constitution or a treaty, only when the right is created by the constitution or treaty, would defeat the obvious purpose of the constitution, as well as the act of congress; the language of both instruments extends the jurisdiction of this court to rights protected by the constitution, treaties or laws of the United States, from whatever source these rights may spring.....*Id.*
3. To sustain the jurisdiction of the court in this case, it must be shown, that the title set up by the city of New Orleans, is protected by the treaty ceding Louisiana to the United States, or by some act of congress applicable to that title.....*Id.*
4. The third article of the treaty of Louisiana stipulates for the admission of Louisiana into the Union, and it obviously contemplates two objects: the one, that stated; and the other, that, until that admission, the inhabitants of the ceded territory shall be protected in the enjoyment of their liberty, property and religion. Had any of these rights been violated, while the stipulation continued in force the individual supposing himself to be injured might have brought his case into this court, under the 25th section of the judiciary act.....*Id.*
5. But the stipulation ceased to operate, when Louisiana became a member of the Union, and its inhabitants were "admitted to the enjoyment of all the rights, advantages and immunities of citizens of the United States;" the right to bring questions of title decided in a state court before this tribunal, is not classed among those immunities; the inhabitants of Louisiana enjoy all the advantages of American citizens, in common with their brethren in their sister states, when their titles are decided by the tribunals of the state.....*Id.*
6. The act of congress admitting Louisiana into the Union, carries into execution the third article of the treaty of cession; and cannot be construed to give appellate jurisdiction to the court, over all questions of title between the citizens of Louisiana.....*Id.*
7. The patent granted to the claimants of the land did not profess to destroy any previous existing title, nor could it so operate; the patent was issued under the act of May 1820, entitled "an act supplementary to the several acts for the adjustment of land titles in the state of Louisiana;" that act confirms the titles to which it applies, "against any claim on the part of the United States;" the title of the city of New Orleans could not be affected by this confirmation.....*Id.*
8. Jurisdiction of the supreme court, in cases certified from circuit courts, on a division of opinion between the judges of these courts. *United States* v. *Bailey*.....*672

LIEN.

1. A contract was made for the sale of a tract of land in Mississippi, and a bill was filed in the circuit court of Tennessee to rescind it, and direct the repayment of the part of the purchase-money paid to the vendor, on the ground of misrepresentation of the quality of the land; the court gave a decree in favor of the complainant, by which he became entitled to recover from the defendant the sum of $2065.21: *Held*, that there was no lien on the land in Mississippi, under the decree, for the sum to which the complainant was entitled; and that the land in Mississippi could not be sold by an order of the circuit court of Tennessee. *Boyce's Executors* v. *Grundy*.....*275

LIMITATION OF ACTIONS.

1. Statutes of limitation are applied by courts of equity, in all cases where at law they might be pleaded; at law, to make the statute a bar, there must be an adverse possession; and by analogy, a court of equity, in a similar case, will hold the statute to be a good bar; but the statute insisted on as a bar in this case, does not depend upon possession; it bars the creditor who does not sue the heir within seven years; there can be no doubt, that the statute applies, where

a creditor seeks to make the heir liable for the debt of his ancestor, on the ground, that either personal or real property descended to him. And this appears to be the decision of the supreme court of Tennessee on the statute; there is nothing in their decisions referred to, which show that they have given effect to the statute beyond this. By the statute of 1819, which is wholly different in its language from the act of 1815, a bar is created, indiscriminately, to suits in equity, as well as at law; the statutes do not apply to this case. *Coulson* v. *Walton*.....*62

2. In a case in which there was a clear adverse possession of the real estate in controversy, without any acknowledgment of a trust in any one, and no circumstances shown to overcome the decisive influence of this adverse possession, the court *held*, that according to the established doctrine in courts of equity, independent of any legislative limitations, it would not entertain so stale a demand. *Piatt* v. *Vattier*.....*405

See CHANCERY AND CHANCERY PRACTICE.

LOUISIANA.

1. Provisions of the laws of the United States, establishing the courts of the United States in the district of Louisiana, and regulating the practice in those courts. *Livingston* v. *Story*.....*632

2. By the provisions of the act of congress, Louisiana, when she came into the Union, had organized therein a district court of the United States, having the same jurisdiction, except as to appeals and writs of error, as the circuit courts of the United States in other states; and the modes of proceeding in that court, were required to be according to the principles, rules and usages which belong to courts of equity, as contradistinguished from courts of common law; and whether there were or not, in the several states, courts of equity proceeding according to such principles and usages, made no difference, according to the construction uniformly given by this court..... .....*Id.*

3. The provisions of the act of congress of 1824, relative to the practice of the courts of the United States in Louisiana, contain the descriptive term, civil actions, which embrace cases at law and in equity, and may be fairly construed as used in contradistinction to criminal causes; they apply equally to cases in equity, and if there are any laws in Louisiana directing the mode of proceeding in equity causes, they are adopted by that act, and will govern the practice in the courts of the United States.....*Id.*

LOUISIANA TREATY.

1. The stipulations of the treaty ceding Louisiana to the United States, affording that protection or security to claims under the French or Spanish government to which the act of congress refers, are in the first, second and third articles; they extended to all property, until Louisiana became a member of the Union, into which the inhabitants were to be incorporated as soon as possible, "and admitted to all the rights, advantages, and immunities of citizens of the United States;" the perfect inviolability and security of property is among these rights. *Delassus* v. *United States*.....*117

2. The right of property is protected and secured by the treaty, and no principle is better settled in this country, than that an inchoate title to lands is property. This right would have been sacred, independent of the treaty; the sovereign who acquires an inhabited country, acquires full dominion over it; but this dominion is never supposed to divest the vested rights of individuals to property; the language of the treaty ceding Louisiana, excludes any idea of interfering with private property..... ..*Id.*

MANDAMUS.

1. In the district court of the United States for the district of Louisiana, the district judge refused to extend a judgment previously entered in the district court, so as to cover other instalments due to the plaintiffs which became due after it was entered; and to enter a judgment in favor of the plaintiffs mortgagees, upon a transaction which had been entered into with the mortgagor, in relation to the debt due to the mortgagees, in which it was stipulated, that judgment should be entered for certain instalments to be paid to the plaintiffs, on the non-payment of the same—the district judge not considering the plaintiffs entitled to have the judgment entered according to the terms of the transaction, without notice to the debtor and his syndics, into whose hands his property had passed, under the insolvent law of Louisiana, after the execution of the transaction, and after a judgment for part of the debt had been entered, which was the judgment asked to be extended. The district judge was also required to receive a confession of judgment against the mortgagor and the insolvent, by an agent of the plaintiffs, and whose powers to confess the judgment, the district judge did not consider adequate and legal for the purpose. An execution had been issued for a part of the

debt, upon the previous judgment in the district court, and the execution was put into the hands of the marshal of the United States; who, finding the property of the insolvent defendant, the property mortgaged to the plaintiffs, in the hands of the syndics of the creditors of the mortgagor, according to the insolvent laws of Louisiana; refused to proceed and sell the same, and returned the execution unexecuted. An application was made to the supreme court for a *mandamus*, to command the district judge to enter the judgment required of him, and to receive the confession of the judgment by the agent of the plaintiffs, and award execution therein; and also to compel him to oblige the marshal to execute the execution in his hands, on the property of the defendant, wherever found. The court refused to award a *mandamus* on any of the grounds, or for any of the purposes stated in the application. *New York Life and Fire Insurance Co.* v. *Adams* *573

2. To extend a judgment to subjects not comprehended in it, is to make a new judgment; this court is requested to issue a *mandamus* to the court for the eastern district of Louisiana, to enter a judgment in a cause supposed to be depending in that court; not according to the opinion which it may have formed on the matter in controversy, but according to the opinion which may be formed in this court on the suggestions of one of the parties; the court is asked to decide that the merits of the cause are with the plaintiff; and to command the district judge to render judgment in his favor; it is an attempt to introduce the supervisory power of this court into a cause, while depending in an inferior court, and prematurely to decide it. In addition to the obvious unfitness of such a procedure, its direct repugnance to the spirit and letter of our whole judicial system cannot escape notice .....*Id.*

3. The supreme court, in the exercise of its ordinary appellate jurisdiction, can take cognisance of no case, until a final judgment or decree shall have been made in the inferior court; though the merits of the cause, may have been substantially decided; while anything, though merely formal, remains to be done, this court cannot pass upon the subject. If, from any intermediate stage in the proceedings, an appeal might be taken to the supreme court, the appeal might be repeated, to the great oppression of parties; so, if this court might interpose by way of *mandamus*, in the progress of a cause, and order a judgment or decree; a writ of error might be brought to the judgment, or an appeal prayed from the decree, and a judgment or decree entered in pursuance of the *mandamus* might be afterwards reversed; such a proceeding would subvert our whole system of jurisprudence.....*Id.*

4. The *mandamus* ordered by this court, 8 Pet. 306, directed the performance of a mere ministerial act .....*Id.*

5. In the particular case in which the creditor asks for a *mandamus* to the district judge to compel the marshal to seize and sell the property mentioned in the writ, that property is no longer in the possession of the debtor against whom the process is directed; but has been transferred, by law, to other persons, who are directed by the same law in what manner they are to dispose of it. To construe the law, or to declare the extent of its obligation, the questions must be brought before this court in proper form, and in a case in which it can take jurisdiction; this case, so far as it is before any judicial tribunal, is depending in the district court of the United States, and perhaps, in a state court in Louisiana; the supreme court of the United States has no original jurisdiction over it; and cannot exercise appellate jurisdiction, previous to a final judgment or decree, further than to order acts, purely ministerial, which the duty of the district court requires it to perform; this court cannot, in such a condition of a case, construe judicially the laws which govern it, nor decide in whom the property is vested; in so doing, it would intrude itself into the management of a case requiring all the discretion of the district judge, and usurp his powers.....*Id.*

6. Though the supreme court will not order an inferior tribunal to render judgment for or against either party, it will, in a proper case, order such court to proceed to judgment; should it be possible, that in a case ripe for judgment, the court before whom it was depending could perseveringly refuse to terminate the cause; this court, without indicating the character of the judgment, would be required by its duty to order the rendition of some judgment; but, to justify this mandate, a plain case of refusing to proceed in the inferior court, ought to be made out.....*Id.*

MANDATE.

See *Boyce's Executors* v. *Grundy*, *275.

MANUMISSION.

1. A testatrix, by her will, directed that certain slaves should be manumitted at her death, and charged a portion of her real estate, specifically devised, with the payment of annui-

ties to some of those slaves; she left a considerable real estate, and some personal estate, but not sufficient to pay her debts; the executor suffered the manumitted persons to go at large, as free, for some years; but afterwards, on finding that the personal estate would not pay the debts of the testator, he obtained an order for the sale of all the personal estate, having included the slaves manumitted in the inventory, and sold those persons as slaves: *Held*, that the persons who had been manumitted by the will were free; and that under the laws of Maryland authorizing manumissions of slaves by will, provided it was not done to the injury of creditors, the manumission was valid; and the executor must resort to the real estate for the funds to pay off the debts of the testator. *Fenwick* v. *Chapman*...*461

2. By this statute of Maryland, of 1796, ch. 67, § 13, manumissions of slaves, by will and testament, may be made to take effect at the death of the testator; the testator may devise or charge his real estate with the payment of debts, to make the manumission effective, and not in prejudice of creditors.....*Id.*
3. The right to freedom may be tried at law, in a suit against the executors, at the instance of the manumitted slaves; and the executor may, in such suit, admit the existence of a sufficiency of real assets or real estate to pay the debts of his testator.....*Id.*
4. A judgment at law, in favor of manumitted slaves, in a suit against an executor, obtained on the admission by the executor of a sufficiency of assets, may be set aside in equity, if such admission was made without foundation in fact, or in fraud or mistake. In such a proceeding in equity, to which the executor, the manumitted slaves, and all persons interested, have been made parties, there may be an entire review of the administration of the estate, of the conduct of the executor, and that of the creditors, in regard to the estate, and in respect to the vigilance of the executor in paying, and of the creditors in the pursuit of their debts.....*Id.*
5. The words in a will, "after my debts and funeral charges are paid, I devise and bequeath as follows," amount to a charge upon the real estate for the payment of debts..*Id.*
6. When a testator manumits his slaves by will and testament, and it clearly appears to have been his intention, that the manumission shall take place at all events; the manifest intention, without express words to charge the real estate, will charge the real estate for the payment of debts, if there be not personal assets enough, without the manumitted slaves, to pay the debts of the testator.....*Id.*
7. In such a case, the creditors of the testator must look to the real estate for the payment of debts which remain unpaid, after the personal estate, exclusive of the manumitted slaves, has been exhausted; and they may pursue their claims in equity, or according to the statutes of Maryland subjecting real estate to the payment of debts.....*Id.*
8. When an executor permits manumitted slaves to go at large and free, under a manumission to take effect at the death of the testator, he cannot recall such assent; nor can it be revoked, under an order of the orphans' court of Maryland, for the sale of all the personal estate of the testator; that court not having jurisdiction of the question of manumission.....*Id.*
9. It being admitted, that a testator left real estate to an amount in value more than sufficient to pay his debts, without the sale of slaves manumitted by his will, those persons are free, notwithstanding a deficiency of personal assets.....*Id.*

MARSHAL.

1. It is the duty of a marshal of a court of the United States, to execute all process which may be placed in his hands; but he performs this duty at his peril, and under the guidance of law; he must, of course, exercise some judgment in the performance; should he fail to obey the *exigit* of the writ, without a legal excuse, or should he, in its letter, violate the rights of others, he is liable to the action of the injured party. *New York Life and Fire Insurance Co.* v. *Adams*.....*573

MINORS.

1. It is the duty of the court, to protect the interests of minors. *Coulson* v. *Walton*..*62

MISSOURI LAND-CLAIMS.

1. Confirmation of a Spanish grant of a tract of land in Missouri. *Delassus* v. *United States*.....*117
2. A grant or concession made by an officer who is by law authorized to make it, carries with it *primâ facie* evidence that it is within his powers; no excess of them, or departure from them, is to be presumed; he violates his duty by such excess, and is responsible for it; he who alleges that an officer intrusted with an important duty has violated his instructions, must show it.....*Id.*
3. The instructions of Governor O'Reilly, relative to granting lands in Louisiana, were considered by the court, in 8 Pet. 455; these regulations were intended for the gen-

eral government of subordinate officers, and not to control and limit the power of the person from whose will they emanated; the Baron De Carondelet must be supposed to have had all the powers which had been vested in Don O'Reilly, and a concession ordered by him is as valid as a similar concession directed by Governor O'Reilly would have been.....*Id.*

4. A concession of land was made by the lieutenant-governor of Upper Louisiana, at the time when the power of granting lands was vested in the governors of provinces; this power was, in 1799, after the concession, transferred to the intendant-general; and after this transfer, in January 1800, the order of survey of the land was made by the lieutenant-governor. The validity of the order of survey depends on the authority of the lieutenant-governor to make it; the lieutenant-governor was also a sub-delegate, and as such was empowered to make inchoate grants. The grant was confirmed. *Chouteau's Heirs* v. *United States*.....*137
5. The transfer of the power to make concessions of lands belonging to the royal domain of Spain, from the governor-general to the intendant-general, did not affect the power of the sub-delegate, who made this concession. The order in this case is the foundation of title, and is, according to the act of congress on the subject of confirming titles to lands in Missouri, &c., and the general understanding and usage of Louisiana and Missouri, capable of being perfected into a complete title; it is property, capable of being alienated, of being subjected to debts; and is, as such, to be held as sacred and inviolate as other property.....*Id.*
6. A concession of one league square of land, in Upper Lousiana, was made by Don Zenon Trudeau, the lieutenant-governor of that province, to Auguste Chouteau, and a decree made by him, directing the surveyor-general of the province to put him in possession of the land, and to survey the same, in order to enable Chouteau to solicit a complete title thereof from the governor-general, who, by the said decree, was informed, that the circumstances of Chouteau were such as entitled him to a grant of the land; the land was surveyed, and the grantee put in full possession of it, on the 20th of December 1803; he retained possession of it, until his death. The objection to the validity of the concession was, that the petitioner had not as many tame cattle as the eighth regulation of Governor O'Reilly, governor-general of Louisiana, required; that regulation required that the applicant for a grant of a league square of land should make it appear that he is possessed of one hundred head of tame cattle, some horses and sheep, and two slaves to look after them; a proportion which shall always be observed for the grants, &c. In the spirit of the decisions which have been heretofore made by this court, and of the acts of confirmation passed by congress, the fact that the applicant possessed the requisite amount of property to entitle him to the land he solicited, was submitted to the officer who decided on the application, and he is not bound to prove it to the court, which passes on the validity of the grant; these incomplete titles were transferrible, and the assignee might not possess the means of proving the exact number of cattle in possession of the petitioner when the concession was made. The grant was confirmed. *Chouteau's Heirs* v. *United States*.....*47
7. If the court can trust the information received on this subject, neither the governor nor the intendant-general has ever refused to perfect an incomplete title granted by a deputy-governor or sub-delegate.....*Id.*
8. The regulation made by Don O'Reilly, as to the quantity of land to be granted to an individual, is not that no individual shall receive grants for more than one league square, but that no grant shall exceed a league square; the words of the regulation do not forbid different grants to the same person; and, so far as the court are informed, it has never been so construed.....*Id.*

OPINIONS.

1. Opinions of Mr. Chief Justice Marshall and Judge Barbour, in the case of Ex parte Robert B. Randolph, in the circuit court of the United States, in the eastern district of Virginia, delivered December 21st, 1833. *United States* v. *Nourse*.....*12

PASSPORT.

1. A passport granted and certified by the secretary of state, under the impression of the seal of the United States, stating the person named therein to be a citizen of the United States, is not, *per se*, legal evidence of the facts stated therein. *Urtetiqui* v. *D'Arbel*.....*692

PERJURY.

1. Indictment for false swearing, under the third section of the act of congress, of March 1st, 1823, which declares, that "any person who shall swear or affirm falsely, touching the expenditure of public money, or

in support of any claim against the United States, shall suffer as for wilful and corrupt perjury." *United States* v. *Bailey*.....*238

2. The indictment charged the false swearing to be an affidavit made before a justice of the peace of Kentucky, in support of a claim against the United States, under the act of congress of July 1832, to provide for liquidating and paying certain claims of the state of Virginia.....*Id.*
3. There is no statute of the United States which expressly authorizes any justice of the peace of a state, or any officer of the national government, judicial or otherwise, to administer an oath in support of any claim against the United States, under the act of 1823.....*Id.*
4. The secretary of the treasury, in order to carry into effect the authority given to him to liquidate and pay the claims referred to in the act of 1832, had established a regulation, authorizing affidavits made before any justice of the peace of a state, to be received and considered in proof of claims under the act. By implication, he possessed the power to make such a regulation; and to allow such affidavits in proof of claims under the act of 1832; it was incident to his duty and authority in settling claims under the act. When the oath is taken before a state or national magistrate, authorized to administer oaths, in pursuance of any regulations prescribed by the treasury department, or in conformity with the practice and usage of the treasury department, so that the affidavit would be admissible evidence at the department, in support of any claim against the United States, and the party swears falsely, the case is within the provision of the act of 1823, ch. 165.....*Id.*
5. If a state magistrate shall administer an oath, under an act of congress expressly giving him the power to do so, it would be a lawful oath, by one having competent authority; and as much so as if he had been specially appointed a commissioner, under a law of the United States for that purpose; and such an oath, administered under such circumstances, would be within the purview of the act of 1823.....*Id.*
6. The act of 1823 does not create or punish the crime of perjury, technically considered; but it creates a new and substantial offence of false swearing, and punishes it in the same manner as perjury. The oath, therefore, need not be administered in a judicial proceeding, or in a case of which the state magistrate, under the state laws, had jurisdiction, so as to make the false swearing perjury; it would be sufficient, that it might be lawfully administered by the magistrate, and was not in violation of his official duty..*Id.*
7. The language of the act of 1823 should be construed with reference to the usages of the treasury department; the false swearing and false affirmation referred to in the act, ought to be construed to include all cases of swearing and affirmation required by the practice of the department in regard to the expenditure of public money, or in support of any claims against the United States; the language of the act is sufficiently broad to include all such cases; and there is no reason for excepting them from the words, as they are within the policy of the act, and the mischief to be remedied.....*Id.*
8. The act does no more than change a common-law offence into the statutory offence.....*Id.*

PRACTICE.

1. The original writ was issued out of the circuit court of the district of Columbia, dated 2d of December 1831, and was returned "executed," on the first Monday of the same December, the return-day of the succeeding term; the defendant appeared by his attorney, on the return-day, and obtained a rule on the plaintiffs to declare against him; the circuit court, on the trial of the cause, directed the jury to find damages against the defendant, for the hire of a steamboat, for which the action was brought, from the 20th of November 1831, to the 6th of February 1832, whereas, the suit was instituted on the 2d of December 1831. These instructions were erroneous, as damages were to be given to a time long posterior to the institution of the action. *Bradley* v. *Steam-Packet Company*.....*107
2. The district court of the United States for the eastern district of Louisiana, adopted a rule which was analogous to the law of Louisiana, by which the surety, in an appeal bond, shall have a summary judgment entered against him on motion; the appeal having failed, the judgment was entered, he not having appeared, after notice, and the defendant came in subsequently and prayed a trial by jury, which was refused by the court. There was no error in this decision. *Hiriart* v. *Ballon*.....*156

PRIORITY OF THE UNITED STATES.

1. The United States obtained judgment, in suits instituted on bonds for duties, in the district court of the United States of Louisiana; before the judgments, the debtor to

the United States had become insolvent, and his property, under the insolvent laws of Louisiana, had passed into the hands of syndics, for distribution among his creditors, according to their respective priorities, and the syndics sold the property, part for cash and part on credits of one, two and three years. The whole proceeds of the estate exceeded $40,000; the mortgages were about $27,000; and when all the notes taken by the syndics were paid, there would be sufficient to discharge these mortgages, and all the debts due to the United States. A large amount of the proceeds was not to be received, until after the judgments in a suit against the syndics were obtained in favor of the United States; one moiety of the amount of sales being payable after the suit against the syndics was commenced, and the other, after the judgment against them was rendered: *Held*, that the syndics were not liable to the United States for the debts due to them, unless funds had actually come into their hands; as one moiety of the notes was not paid at the time of the judgment of the United States against them, it does not judicially appear, that they had funds on which the United States were entitled to judgment; if the remaining moiety of the notes has since been paid, the United States will then have a legal claim thereon for their debts. *Field* v. *United States*.*182

2. The United States were not parties to the proceedings in the parish court, nor were they bound to appear and become parties therein; the local laws of the state could and did not bind them in their rights; they could not create a priority in favor of other creditors, in cases of insolvency, which should supersede that of the United States..... *Id.*

3. The priority of the United States attached, by the laws of the United States, in virtue of the assignment and notice to the syndics; and it was the duty of the syndics to have made known these debts in their tableau of distribution, as having had priority. The mortgages upon particular estates sold, must be first paid ont of the sales of those estates; but if there be any deficiency in the proceeds of any particular estate, to pay the mortgages thereon, the mortgagees thereof cannot come in upon the funds and proceeds of the sales of the other estates, except as general creditors..... *Id.*

PROCESS.

1. The process act of 1798, expressly adopts the mesne process, and modes of proceeding in suits at common law, then existing in the highest state court, under the state laws: which, of course, included all the regulations of the state laws as to bail and exemptions of the party from arrest and imprisonment; in regard, also, to writs of execution, and other final process, and "the proceedings thereupon," it adopts an equally comprehensive language, and declares they shall be the same as were then used in the courts of the state. *Beers* v. *Haughton*.....*329

PROMISSORY NOTES.

1. The general rule, as laid down by this court, in Lenox *v.* Roberts, 2 Wheat. 273, is, that the demand of payment of a promissory note should be made on the last day of grace; and notice of the default of the maker be put into the post-office, early enough to be sent by the mail of the succeeding day. *Bank of Alexandria* v. *Swann*.....*33

2. The law, generally speaking, does not regard fractions of a day; and although the demand of payment of a promissory note at the bank is required to be made during banking-hours, it would be unreasonable, and against what the special verdict finds to have been the usage of the bank at that time, to require notice of non-payment to be sent to the indorser on the same day. This usage of the bank corresponds with the rule of law on the subject..... *Id.*

3. If the time of sending notice is limited to fractions of a day, it will always come in question how swiftly notice could be conveyed; the notice sent by the mail, the next day after the dishonor of the note, was in due time..... *Id.*

4. The law has prescribed no particular form for such notice; the object of it is merely to inform the indorser of the non-payment by the maker, and that he is held liable for the payment thereof..... *Id.*

5. The note on which the suit was brought was for $1400, made by H. P., in favor of the defendant in error, and the notice described it as for the sum of $1457; in the margin of the note was set down in figures $1457, and the special verdict found that the note was discounted at the bank, as for a note of $1457. The defendant in error was not an indorser on any other note made by H. P., and discounted at the bank, or placed there for collection. This case falls within the rule laid down by this court in the case of Mills *v.* Bank of United States, 11 Wheat. 431, that every variance, however immaterial, is not fatal to the notice..... *Id.*

RULES OF COURT.

1. General rules of court of the district cour

of the United States for the eastern district of Louisiana.....*157

2. The circuit court of Ohio established a rule of court, conforming to the laws of Ohio, by which a person who had been discharged by the insolvent law of the state, was not to be imprisoned for his debts. An *exoneretur* was entered, so as to discharge the bail of the insolvent, in conformity with the law of Ohio, and the rules of the courts of Ohio; the circuit court acting under the provisions of the act of the 19th of May 1828, regulating process and proceedings in the courts of the United States. Under the authority conferred on the courts of the United States by the acts of 1789 and 1792, there would be no solid objection to the decision of the circuit court of Ohio, in this case; but it is directly within, and governed by, the process act of the 19th of May 1828, ch. 63. *Beers* v. *Haughton*.....*330

SET-OFF.

1. The rule as to set-off, in questions arising exclusively under the laws of the United States, cannot be influenced by any local law or usage; the rule must be uniform in the different states; for it constitutes the law of the courts of the United States, in a matter which relates to the federal government. *United States* v. *Robeson*.....*319

2. When a defendant has, in his own right, an equitable claim against the government, for services rendered or otherwise, and has presented it to the proper accounting officer of the government, who has refused to allow it; he may set up the claim as a credit, in a suit brought against him, for any balance of money claimed to be due by the government; and when the vouchers are not in the power of the defendant, before the trial, or, from the peculiar circumstances of the case, a presentation of the claim to the treasury could not be required, the off-set may be submitted to the action of the jury. But a claim for unliquidated damages cannot be pleaded by way of set-off, in an action between individuals; and the same rule governs in an action brought by the government.....*Id.*

SPECIFIC PERFORMANCE.

1. A bond was executed in 1787, by which the obligor bound himself to pay 100*l.* for a horse, or to make over to the obligee his interest in a certain entry and warrant of land; and if the deed or grant for the land should issue to him, to transfer the land by deed, and to warrant and defend the said deed; the obligor elected to pay the bond by giving the land for the same; he made no valid conveyance of the land in his lifetime; but it was taken possession of by the obligee, and had ever since been occupied, under the title so acquired, by the latter. After the son and sole heir of the obligor came of age he commenced an action of ejectment for the land; and those who claimed title under the obligee filed a bill for an injunction, and that the defendant, the plaintiff in the ejectment, be decreed to convey the land, according to the stipulations in the bond; this bill was filed in 1822. The court said, in considering the question as to the genuineness of the bond on which this controversy is founded, the first important fact that occurs to the mind is, the remoteness of the transaction; nearly half a century has elapsed, since this instrument purports to have been executed; the obligor and the obligee, and both the witnesses, are dead; the contract belongs to the past age; it was executed, if at all, when the country was new and unsettled, and the parties to it seem to have been illiterate men, and unacquainted with business transactions; these circumstances are referred to, not to show that this bond should be received without proof, but to show that as strict proof should not be required of its execution, as if it were of recent date; the law makes some allowance for the frailties of memory, and where a great length of time has elapsed, since the signing of an instrument attempted to be proved, circumstances are viewed as having an important bearing upon the question. *Coulson* v. *Walton*.....*62

See *King's Heirs* v. *Thompson*, *204.

STATE LAWS.

1. State laws cannot control the exercise of the powers of the national government, nor in any manner limit or affect the operation of the process or proceedings in the federal courts; the whole efficacy of such laws in the courts of the United States, depends upon the enactments of congress; so far as they are adopted by congress, they are obligatory; beyond this, they have no controlling influence. Congress may adopt such state laws, directly, by substantive enactments; or, they may confide the authority to adopt them, to the courts of the United States. *Beers* v. *Haughton*.....*329

2. The circuit courts of the United States are created by congress, not for the purpose of administering the local law of a single state alone, but to administer the laws of all the

states in the Union, in cases to which they respectively apply; the judicial power conferred on the general government by the constitution, extends to many cases arising under the laws of the different states; and this court is called upon, in the exercise of its appellate jurisdiction, constantly to take notice of, and administer, the jurisprudence of all the states; that jurisprudence is, then, in no just sense, a foreign one, to be proved in the courts of the United States, by the ordinary modes of proof by which the laws of a foreign country are to be established; but it is to be judicially taken notice of in the same, as the laws of the United States are taken notice of in those courts. *Owings* v. *Hull*.....*607

STATE MAGISTRATES.

See AFFIDAVITS: PERJURY.

TRIAL BY JURY.

1. When there is no evidence tending to prove a particular fact, the court are bound so to instruct the jury, when requested; but they cannot legally give any instructions, which will take from the jury the right of weighing what effect the evidence shall have. An instruction founded on part of the evidence, is erroneous. *Greenleaf* v. *Birth*.....*292
2. The court was requested to say to the jury, that the facts given in evidence on the trial of the case, did not import such a lending as would support the defence of usury. The court was asked to usurp the province of the jury, and to decide on the sufficiency of the testimony, in violation of the well-established principle, that the law is referred to the court, the fact to the jury. *Scott* v. *Lloyd*.....*418
3. An instruction to the jury which would separate the circumstances of the case from each other, and the object of which is, to induce the court, after directing the jury that they ought to be considered together, to instruct them that, separately, no one in itself amounted to usury, ought not to be given. *Id.*
4. The court ought not to instruct, and, indeed, cannot instruct, on the sufficiency of evidence; but no instruction to the jury should be given, except upon evidence in the case; where there is evidence on a point, the court may be called upon to instruct the jury on the law, but it is for them to determine on the effect of evidence. *Chesapeake and Ohio Canal Co.* v. *Knapp*.....*541

USURY.

1. The branch Bank of the United States, at Lexington, Kentucky, having in its possession a large amount of the notes of the Bank of Kentucky, on which the latter had agreed to pay interest yearly, until they should redeem the said notes in specie, at the earnest solicitation of the borrower, loaned, on a promissory note, payable, with interest, in three years, the sum of $5000 in those notes and in a check on the Bank of Kentucky, by which the debt due to the Bank of the United States from the Bank of Kentucky was diminished to the amount of the loan; the borrower, at the time of the loan, declared the notes of the Bank of Kentucky equivalent, for his purposes, to gold or silver. The Bank of Kentucky, long before the note given for the loan became due, redeemed their notes held by the Bank of the United States, and paid all the debt due to that bank, with the interest due thereon: *Held*, that there was no usury in this transaction. *Bank of United States* v. *Waggener*.....*378
2. In constructing the usury laws, the uniform construction, in England, has been, and it is equally applicable here, that to constitute usury, within the prohibitions of the law, there must be an intention knowingly to contract for, and to take, usurious interest; for if neither party intend it, and act *bonâ fide* and innocently, the law will not infer a corrupt agreement.....*Id.*
3. There was no taking of usury, and no reservation of usury, on the face of this transaction; the case, then, resolves into this inquiry, whether, upon the evidence, there was any such corrupt agreement, or device, or shift, to reserve or take usury.....*Id.*
4. Because an article is depreciated in the market, it does not follow, that the owner is not entitled to demand or require a higher price for it, before he consents to part with it; he may possess bank-notes which to him are of par value, in payment of his own debts, or in payment of public taxes; and yet their marketable value may be far less; if he uses no disguise, if he seeks not to cover a loan of money, under the pretence of a sale or exchange of them, but the transaction is *bonâ fide* what it purports to be, the law will not set aside the contract; for it is no violation of any public policy against usury.....*Id.*
5. The statute against usury not only forbids the direct taking more than six per centum per annum for the loan or forbearance of any sum of money; but it forbids any shift or device by which this prohibition may be evaded, and a greater interest be in fact secured; if a larger sum than six per cent. be not expressly reserved, the instrument will not of itself expose the usury, but the

real corruptness of the contract must be shown by extrinsic circumstances, which prove its character. *Scott* v. *Lloyd*....*418

6. The statute declares, "that no person shall, on any contract, take, directly or indirectly, for loan of any money, &c., above the value of six dollars, for the forbearance of one hundred dollars, for a year." It has been settled, that to constitute the offence, there must be a loan, upon which more than six per cent. interest is to be received, and it has been also settled, that where the contract is, in truth, for the borrowing and lending of money, no form which can be given to it will free it from the taint of usury, if more than legal interest be secured.....*Id.*

See ANNUITIES.

VENDOR AND PURCHASER.

1. Under a power of attorney granted to him to sell personal property in New Orleans, given by constituents residing in Baltimore, the attorney sold certain slaves, without conforming to the provisions of the laws of Louisiana regulating such sales; the property sold was recovered from the purchaser by a paramount title; and he instituted a suit against the grantors of the power of attorney, to recover the money paid to the attorney, but which had not been paid over to his principal, he having become insolvent: *Held*, that the plaintiff, in order to recover in the suit, should have proved that the sale of the slaves was in conformity with the laws of the state of Louisiana. *Owings* v. *Hull*.....*607

2. The purchaser was bound to see whether the agent acted within the scope of his powers; and at all events, he was bound to know, that the agent could not, in virtue of any general power, do any act which was not in conformity with the laws of Louisiana; the principals could never be presumed to authorize him to violate those laws; and the purchaser, purchasing a title invalid by those laws, must have purchased it with full knowledge.....*Id.*

WARRANT OF DISTRESS.

See CONSTRUCTION OF STATUTES OF THE UNITED STATES: JUDGMENT.

WILLS AND PROBATE OF WILLS.

1. The testator made his will, stating that "being about to take a long journey, and knowing the uncertainty of life, he deemed it advisable to make a will;" he returned from the journey, and died many years afterwards. This is not a conditional will; the instrument taking effect as a will, is not made to depend upon the event of the return or not of the testator from his journey; there is, therefore, no color for annulling the will, that it was conditional. *Tarver* v. *Tarver*.....*174

2. In the case of Armstrong *v.* Lear, 12 Wheat. 175, it was said by this court, that no other evidence of there being a will can be received by the court, than such as would be sufficient, in all other cases where titles are derived under a will; and nothing but the probate, or letters of administration with the will annexed, are legal evidence in all questions respecting personalty. But the rule there laid down does not apply to this case; here, the complainant set up the will as a source of his title, and was bound to prove it; this must be done by the probate, which must be set forth in the bill; in this case, the complainant had set forth a copy of the instrument in his bill, alleging it was conditional, and therefore, not valid; the defendant was under no obligation to produce any probate; everything, by the complainant's own showing, was before the court.....*Id.*

3. An original bill will not be sustained, on the allegation that the probate of the will is void; if any error was committed by the court of Dallas county, in admitting the will to probate, it should have been corrected by an appeal to the next term of the supreme court in chancery, or in the district of Washington, to the superior court of that district, according to the law of Alabama.....*Id.*

4. The words of a will, "after my debts and funeral charges are paid, I devise and bequeath as follows," amount to a charge upon the real as well as the personal estate for the payment of debts. *Fenwick* v. *Chapman*.....*461

5. The language of wills is not of universal interpretation, having the same import, in all countries, and under all circumstances; they are supposed to speak the sense of the testator, according to the received laws and usages of the country where he is domiciled, by a sort of tacit reference to them; unless there is something in the language which compels or controls such a conclusion. In regard to personalty, in an especial manner, the law of the place of the testator's domicil governs the distribution thereof, unless it is manifest, that the testator had the laws of some other country in view. *Harrison* v. *Nixon*.....*483

6. No one can doubt, if a testator, born and domiciled in England, during his life, by his

will, gives his personal estate to his heir-at-law, that the *descriptio personæ* would have reference to, and be governed by, the import of the terms, in the sense of the laws of England; the import of them might be very different, if the testator were born and domiciled in France, in Louisiana, Pennsylvania or Massachusetts..... ..... *Id.*

7. A will of personalty speaks according to the testator's domicil, when there are no other circumstances to contract the application. To raise the question what the testator meant, it must first be ascertained, where was his domicil, and whether he had reference to the laws of that place, or to the laws of a foreign country..... *Id.*

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WRIT OF ERROR.

1. A writ of error will not lie, in a case in which a circuit court had awarded a writ of restitution, in an action of ejectment, the marshal having erroneously executed a writ of *habere facias possessionem*, which had been previously issued in the case. *Smith* v. *Trabue's Heirs*..... *4