Upon the whole, our judgment is, that the district court had no jurisdiction of the libel or its incidents; and therefore, that the decree of the district court must, upon this ground, be reversed, and a mandate awarded to the district court to dismiss the suit, for want of jurisdiction.

Decree reversed.

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*Bergess Poole and others, Plaintiffs in error, *v.* The Lessee of John Fleeger and others. [*185

Compacts between states.—State boundaries.—Exceptions.— Will of lands. Ejectment.—Joint demise.

The plaintiffs, in the circuit court of West Tennessee, instituted an ejectment for a tract of land held under a Virginia military land-warrant, situate north of a line called Mathews's line, and south of Walker's line, the latter being the established boundary between the states of Kentucky and Tennessee, as fixed by a compact between these states, made in 1820; by which compact, although the jurisdiction over the territory to the south of Walker's line was acknowledged to belong to Tennessee, the titles to lands held under Virginia military land-warrants &c., and grants from Kentucky, as far south as "Mathews's line," were declared to be confirmed; the state of Kentucky having, before the compact, claimed the right to the soil as well as the jurisdiction over the territory, and having granted lands in the same; the compact of 1820 was confirmed by congress. The defendants in the ejectment claimed the lands under titles emanating from the state of North Carolina, in 1786, 1794 and 1795, before the formation of the state of Tennessee, and grants from the state of Tennessee in 1809, 1811, 1812 and 1814, in which the lands claimed by the defendants were situated, according to the boundary of the state of Tennessee, declared and established at the time the state of Tennessee became one of the states of the United States. The circuit court instructed the jury, that the state of Tennessee, by sanctioning the compact, admitted, in the most solemn form, that the lands in dispute were not within her jurisdiction, nor within the jurisdiction of North Carolina, at the time they were granted; and that, consequently, the titles were subject to the compact: *Held*, that the instructions of the circuit court were entirely correct.

It is a part of the general right of sovereignty, belonging to independent nations, to establish and fix the disputed boundaries between their respective limits; and the boundaries so established and fixed by compact between nations, become conclusive upon all the subjects and citizens thereof, and bind their rights; and are to be treated, to all intents and purposes, as the real boundaries. This right is expressly recognised to exist in the states of the Union, by the constitution of the United States; and is guarded in its exercise, by a single limitation or restriction only, requiring the consent of congress.

The grants under which the defendants in the circuit court claimed to hold the land were not rightfully made, because they were originally beyond the territorial boundary of North Carolina and Tennessee; this is, by necessary implication, admitted by the compact between the states of Kentucky and Tennessee.

In the ordinary course of things, on the trial of a cause before a jury, if an objection is made and overruled, as to the admission of evidence, and the party does not take any exception, he is understood to waive it. The exception need not, indeed, then be put in form, or written out at large and signed; but it is sufficient, if it be taken, and the right reserved to put it in form, within the time prescribed by the practice or the rules of the court.

Where a will, devising lands, made in one state, is registered in another state, in which the lands lie, the registration has relation backwards; and it is wholly immaterial, whether the same was made before or after the commencement of a suit.

*In the state of Tennessee, the uniform practice has been for tenants in common in ejectment, to declare on a joint demise; and to recover a part, or the whole, of the premises declared for, according to the evidence adduced. [*186

Fleeger *v.* Pool, 1 McLean 185, affirmed.

Error to the Circuit Court for the district of West Tennessee. John Fleeger and others, the defendants in error, instituted an action of eject-

ment, in 1832, to the September term of the circuit court of the United States for the district of West Tennessee, to recover a tract of land containing 2727 acres, lying in Montgomery county, in the state of Tennessee, and lying south of "Walker's line," the established boundary line between the state of Kentucky and the state of Tennessee, and north of a line called "Mathews's line," which is in latitude 36° 30′ north; being the line which, by the constitution of the state of North Carolina, was declared to be the true northern boundary line of the state of Tennessee, and which is described as such by the charter of King Charles II.

The original title of the plaintiffs in the circuit court, was a Virginia military warrant, No. 2685, dated 3d of March 1784, for 6000 acres of land, in favor of John Montgomery; and the plaintiffs read in evidence the will of Frederick Rohrer, to whom a grant from the state of Kentucky, as the assignee of John Montgomery, was issued, on the 24th of February 1796.

The will of Frederick Rohrer, made and duly admitted to probate in Pennsylvania, of which state he was a citizen, was not registered in the state of Tennessee, until after the institution of this suit.

The plaintiffs introduced in evidence a compact, made on the 2d of February 1820, between the states of Kentucky and Tennessee; which, after reciting that those states were desirous of terminating the controversy which had so long existed between them, relative to their common boundary, and the appointment of commissioners for that purpose, proceeds to declare; that the boundary and separation between the states of Kentucky and Tennessee shall be as follows:

Art. 1. The line run by the Virginia commissioners, in the year 1779–80, commonly called "Walker's line," as the same is now reputed, understood and acted upon by the said states, their respective officers and citizens, from the south-eastern corner of Kentucky, to the Tennessee river, thence with and up the said river *to the point where the line of Alexander *187] and Munsell, run by them in the last year, under the authority of an act of the legislature of Kentucky, entitled "an act to run the boundary line between this state and Tennessee, west of the Tennessee river, approved February 8th, 1819," would cross said river, and thence with the said line of Alexander and Munsell, to the termination thereof, on the Mississippi river, below New Madrid.

Art. 4. The claims to lands lying west of the Tennessee river, and north of Alexander and Munsell's line, derived from North Carolina or Tennessee, shall be considered null and void, and claims to lands lying south of said line, and west of Tennessee river, derived from Virginia or Kentucky, shall in like manner be considered null and void.

Art. 5. All lands now vacant and unappropriated by any person or persons claiming to hold under the states of North Carolina or Tennessee, east of the Tennessee river, and north of the parallel of latitude of 36° 30′ north, shall be the property of, and subject to the disposition of the state of Kentucky, which state may make all laws necessary and proper for disposing of and granting said lands, or any part thereof; and may, by herself or officers, do any acts necessary and proper for carrying the foregoing provisions of this article into effect; and any grant or grants she may make therefor shall be received in evidence, in all the courts of law or equity in the state

of Tennessee, and be available to the party deriving title under the same; and the land referred to in this article shall not be subject to taxation by the state of Tennessee for five years, except so far as the same may in the meantime be appropriated by individuals.

Art. 6. Claims to land east of the Tennessee river, between Walker's line and the latitude of 36° 30′ north, derived from the state of Virginia, in consideration of military services, shall not be prejudiced in any respect by the establishment of Walker's line, but such claims shall be considered as rightfully entered or granted; and the claimants may enter upon said lands, or assert their rights in the courts of justice, without prejudice by lapse of time, or from any statute of limitations for any period prior to the settlement of the boundary between the two states: saving, however, to the holders and occupants of conflicting claims, if any there be, the right of showing such entries or grants to be invalid, and of no effect, or that they have paramount and superior titles to the land covered by such Virginia claims.

*Art. 7. All private rights and interests of lands between Walker's line from the Cumberland river, near the mouth of Oby's river, [*188 to the south-eastern corner of Kentucky, at the point where the boundary line between Virginia and Kentucky intersected Walker's line, on the Cumberland mountain, and the parallel of 36° 30′ north latitude, heretofore derived from Virginia, North Carolina, Kentucky or Tennessee, shall be considered as rightfully emanating from either of those states; and the states of Kentucky and Tennessee reserve to themselves, respectively, the power of carrying into grant, claims not yet perfected, and in case of conflicting claims (if any there be), the validity of each claim shall be tested by the laws of the state from which it emanated, and the contest shall be decided as if each state, respectively, had possessed the jurisdiction and soil, and full power and right to authorize the location, survey or grant, according to her own rules and regulations.

Art. 8. It is agreed, that the foregoing articles shall receive the most liberal construction, for effecting the objects contemplated; and should any disagreement arise as to the interpretation, or in the execution thereof, two citizens of the United States, but residents of neither Kentucky or Tennessee, shall be selected, one by the executive of each state, with power to choose an umpire, in case of disagreement, whose decision shall be final on all points to them submitted.

Art. 9. Should any further legislative acts be requisite to effectuate the foregoing articles and stipulations, the faith of the two states is hereby pledged, that they will unite in making such provisions, and respectively pass such laws as may be necessary to carry the same into full and complete effect.

This treaty was ratified by acts of the several legislatures of the states of Kentucky and Tennessee, in 1803.

The plaintiffs also proved, that the legislature of Tennessee had, by several acts, recognised Mathews's line as being in the position of 36° 30′ north, and that, according to observations made by commissioners appointed by the governor of Tennessee, Walker's line was about eight statute miles north of the true meridian of 30° 30′. They proved, that the land in controversy was to the south of Walker's line, and between it and Mathews's line,

and that Mathews's line was run conformable to the observations of the commissioners.

The defendants objected to the introduction of the will of Frederick *Rohrer, as evidence : 1st, upon the ground that the probate and certificate were not such as to authorize its registration in this state ; 2d, upon the ground, that said will was registered in Tennessee, since the institution of this suit, and more than twelve months after the death of the testator ; and therefore, could only take effect from the date of registration. But these objections were overruled by the court, and the will was read to the jury by the plaintiffs, as evidence of title.

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The defendants proved, that all the lands in their possession lay south of Walker's line, from a half to two miles distance.

The defendants likewise objected to the evidence of title offered by the lessors of the plaintiffs, upon the ground, that their title was a tenancy in common, which would not, in law, support a joint demise, and they moved to nonsuit the plaintiffs, upon this ground. But their objection and motion were overruled by the court, with an intimation that the point would be considered on a motion for a new trial.

No exception to the opinion of the court in permitting the will to be read, was taken in the progress of the trial ; nor was it stated, that the right to do so was reserved. The practice of the court was for exceptions to be taken after trial, if deemed necessary.

The defendants read to the jury the following grants, to wit : No. 1629, from the state of North Carolina to Thomas Smith, for 640 acres, dated 27th of April 1792 ; No. 1140, from the state of North Carolina to James Ross, for 274 acres, dated 14th of March 1786 ; No. 102, from the state of North Carolina to N. Hughes, for 316 acres, dated 7th March 1786 ; a grant from the state of North Carolina to Samuel Barton, for 1000 acres, dated 9th of July 1797 ; a grant from said state to Duncan Stewart, for 370 acres, dated 17th November 1797; and a grant from said state to John McNairy, for 274 acres, dated 6th of December 1797.

The defendants also read the following grants from the state of Tennessee, to wit : No. 913, to John Shelby, for 320 acres, dated 6th of March 1809 ; another grant from the state of Tennessee to John Shelby, for 100 acres, dated 8th March 1814 ; a grant from the state of Tennessee to Robert Nelson, for 300 acres, dated 17th April 1811 ; and a grant from Tennessee to William E. Williams, for 80 acres, dated 6th November 1812.

The defendants then read to the jury regular conveyances, deducing the title to themselves from the different grantees above mentioned, *and proved, that said grants covered their possessions, respectively ; except that each of the defendants whom the jury found guilty of the trespass and ejectment in the declaration mentioned, were in possession of portions of land not covered by any grant older in date than the grant from the state of Kentucky to Frederick Rohrer, under which the lessors of the plaintiffs claimed. The defendants also proved, that the different grantees above mentioned, under whom they claimed, took possession of the different tracts of land contained in the grants by them read, on or about the dates of said grants ; and that they, and those deriving title under them, had continued in possession of the same, ever since, claiming the lands as their own.

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The defendants then read to the jury the statute of Virginia, passed on the 7th of December 1791, ch. 55, recognising and confirming Walker's line, as the boundary between that state and North Carolina; also the act of Virginia, passed on the 18th of December 1789, ch. 53, §§ 14, 15, proposing to erect the district of Kentucky into an independent state; also the act of congress, passed on the 4th of February 1791, ch. 78, §§ 1, 2, assenting to the erection of the said district of Kentucky into an independent state, at a certain future time, and upon certain conditions; also the compact between the states of Tennessee and North Carolina.

The defendants then proved, that the states of North Carolina and Tennessee had claimed up to Walker's line, as the true line of boundary between those states and the states of Virginia and Kentucky; from the time at which it was run, up to the time of the treaty between Tennessee and Kentucky, made for the settlement thereof, in 1820.

The defendant also proved, that the county lines of Tennessee were Walker's line on the north. That in her legislative, judicial and military capacity, Tennessee always claimed possession, and acted up to said line as the northern boundary of the state; that the process of her courts ran up to said line, and was executed up to it; that all criminal acts committed to the south of said line, and north of the southern boundary of Tennessee, were tried and punished in the state of Tennessee, and not in the state of Kentucky; and instances were proved, where persons put upon trial in Kentucky for criminal offences, had been acquitted, upon the sole ground that the offences were committed on the south side of Walker's line. That the inhabitants south of said line all paid taxes in the state of *Tennessee, [*191
and not in the state of Kentucky; that they were always enrolled as militia of the state of Tennessee, and mustered as such, up to said line; that they always voted at elections in Tennessee, as citizens thereof, and not in Kentucky. That, in fact, the state of Tennessee was in full and entire possession of all the lands lying to the south of said line, at and before the emanation of the grant to Frederick Rohrer, under which the lessors of the plaintiffs claimed title, and from the time of the earliest settlements that were made in that part of the country, which took place long before the dates of the titles under which either of the parties claimed. The defendants also proved, that the state of Kentucky, so far as regards the establishment of her county lines, the service of her militia, the payment and collection of taxes, the regulation of her judicial process, and of the right to vote at elections, conformed to Walker's line, as her southern boundary. The defendants also gave in evidence the observations made by Jefferson and Fry, and by Walker and Henderson, and those associated with them; and also proved, that the latitude of Walker's line had, since the running thereof, been taken by Gen. Daniel Smith, a man of science, and who was along with Walker at the running of his line, and that the latter observation of Gen. Smith found Walker's line to be about in latitude 36° 30′. The defendants also proved, that some years since, the latitude had been taken by a scientific gentleman, and from the result of his observation, Walker's line was two or three miles too far south. It also appeared in evidence, that Merewether Lewis, on his return from the expedition to the mouth of Columbia river, had taken an observation somewhere on Cumberland mountain, and that after taking it, he had written a letter to some person in

Kentucky, giving it as his opinion, that Walker's line was too far north; and that after the reception of said letter, there was much talk in the state of Kentucky about claiming to the true latitude of 36° 30′; but it did not appear that any definitive public act of the state of Kentucky had been done in consequence of the reception of the information aforesaid, from Merewether Lewis; or that, so far as Walker's line extended west, the relative possessions and claims of the two states had been interfered with in any way. But it did appear, that about the year 1819, shortly after the treaty with the Chickasaw tribe of Indians, by which the lands lying in Kentucky and Tennessee, between the Mississippi and Tennessee rivers, *192] were acquired, Kentucky sent two commissioners, Alexander *and Munsell, to begin at a point on the Mississippi river, exactly in the latitude of 36° 30′, and to run a line from thence east, to where the same would intersect the Tennessee river; and that said commissioners reported to Kentucky that they did so begin, and so run a line, and that the point where it would have crossed the Tennessee river, was about eleven miles to the south of where Walker's line reached said river, on the east side thereof. Walker's line never was extended farther west than Tennessee river.

The court instructed the jury, that as, by the compact between Kentucky and Tennessee, the boundary line of 36° 30′ north, was fixed several miles south of Walker's line, and of the land in controversy; the titles of the defendants were subject to the compact and could only be sustained under it. That the state of Tennessee, by sanctioning the compact, admitted, in the most solemn form, that the lands in dispute were not within her jurisdiction, nor within the jurisdiction of North Carolina, at the time they were granted; and that, consequently, the titles are subject to the condition of the compact. After the verdict of the jury, the defendants moved the court to grant them a new trial, which motion was overruled by the court.

The verdict of the jury was in favor of the plaintiffs, on which the circuit court entered judgment. To the instructions given by the court to the jury, on the several interlocutory questions raised on the trial, and in overruling the motion for a new trial, the defendants excepted; and tendered a bill of exceptions, which was signed by the court. The defendants prosecuted this writ of error.

A printed argument was submitted to the court by *Washington*, for the plaintiffs in error; and the case was argued at the bar by *Catron*, for the defendants in error, who also submitted a printed argument prepared by *Yerger* and *Forester*, the counsel for the plaintiffs in the circuit court.

The argument of *Washington*, for the plaintiffs in error, stated, that the locality of the land in controversy was not disputed; it lies south of Walker's line; neither is the latitude of that line, it being 36° 30′. It has been ascertained, that Walker's line was run south of the true meridian, thereby tak- *193] ing *from Virginia a portion of territory which properly belonged to her; and to the same extent increasing the territory of North Carolina.

The principal question in the case is, whether Walker's line, whether made correctly or not, did not become the boundary between Virginia and North Carolina; and if it did, whether the latter state had not, at the time of the inception of the title of the plaintiffs in error, such a property to the

land in controversy, as was capable of transmission by the grants under which the plaintiffs in error claim. This is contended for on the part of the plaintiffs, and also that this right continued down to 1820, except so far as North Carolina or Tennessee had transferred the property to individuals. The treaty of boundary was made in 1820, between Kentucky and Tennessee; and so far as the prior boundary of Walker's line was altered or affected thereby, Tennessee might part with her dominion over this territory; but not with property in it, previously transferred by North Carolina or herself, for a full and valuable consideration, and to which titles in full form had been given.

1. Walker's line, after the demarcation, became the boundary between Virginia and North Carolina, by express and positive enactment by the former state. Act of the legislature of Virginia, of December 1791; 1 Laws Va. 75, ch. 55.

2. On the 7th day of December 1791, the date of the passage of said act of assembly, Virginia still retained the sovereignty in what is now Kentucky, and had a right to dispose of the soil within that part of her chartered limits, or agree as to the limits with an adjoining state. On the 18th of December 1789 (1 Laws Va., ch. 53, p. 72), Virginia passed a law authorizing the district of Kentucky to elect members to a convention to form a state government; and authorizing her to become an independent state, with the consent of the congress of the United States; and on the 1st of June 1792, Kentucky became, by a law of the United States, a state of the Union. The law fixing definitely Walker's line as the boundary between Virginia and North Carolina, and which, when Kentucky became a state, was her southern line, was thus established, while Kentucky was a part of Virginia. The fact, that at the time of the adoption of Walker's line by Virginia as a boundary, what is now the state of Tennessee was no part of the dominion of North Carolina, but was the territory of the *United States, south of the Ohio, makes no difference in the case. Virginia [*194 fixed her own boundary, when it was competent for her to do it, without consultation with, or the concurrence of, the adjoining claimant, whoever it might be; provided she did not encroach upon territory not her own; and this is admitted.

3. Without any legislative enactment of Virginia, adopting Walker's line, that must be considered the boundary between Kentucky and Tennessee; in virtue of the principles of usucaption and prescription. The record in this case abundantly shows, that from the time at which Walker's line was run, it was mutually recognised by Virginia and North Carolina; and subsequently, by Kentucky and Tennessee, as the boundary between them. That the counties in those states were laid off on each side of the line, those in Kentucky, calling for it as the southern boundary, and those in North Carolina, as the northern boundary. That the territory on each side of the line was actually possessed by those states, respectively, according to the above designation of county limits. That exclusive jurisdiction was claimed and exercised by Virginia and Kentucky on the northern side, and by North Carolina and Tennessee, on the southern; and that the jurisdictions so claimed and exercised, were mutually conceded and acquiesced in. That both states, not only in the appropriation of territory, but in the settlement of inhabitants, the reputation of their citizenship, the organization of their

militia, the voting at the elections, the collection of taxes, and the administration of their laws, generally, had reference to this line as a common boundary. It is true, that some claims to land situated on the south of this line, and derived under the state of Virginia, do exist; but they are comparatively few, and without a single exception, originated either before the line was marked, or its position had become notorious. A decisive proof that many more private titles to land lying between this line and the true meridian of 36°30′ emanated from North Carolina, than did from Virginia, is to be found in the fact, that by the treaty of 1820, said line was finally established, notwithstanding it was then admitted, on all hands, to have been placed, in the first instance, too far north, and that Tennessee was suffered to retain dominion over the space in question; and that the claims of individuals, holding under her and North Carolina, were sanctioned, except so far as they conflicted with older ones derived under Virginia and Ken-
*195] tucky, and that too, for a very inconsiderable *equivalent. Now, why were these provisions contained in the treaty? For no other reason it is believed, than because almost the whole of this territory had been appropriated by North Carolina and Tennessee, and the citizens of the latter state had a deep interest that things should remain *in statu quo*, and the state itself was under obligations to maintain their rights which had been thus acquired. And for corresponding reasons, the state of Kentucky must have been willing to renounce a claim which had no legal foundation for its support; especially, when her engagements to her own citizens were not much concerned in the matter; and when, at the same time, she was providing security for the most of them against the adverse titles derived from another sovereignty.

The counsel for the plaintiffs in error also contended, that the possession of the lands south of Walker's line, had continued so long in North Corolina and Tennessee, as to amount to a prescription. Between nations there is no specific period during which possession of disputed territory must have remained with one of them, to constitute a title by prescription; because, as between such claimants, there is no supreme power to dictate to them a positive rule of action. But the principle applicable to such a case, which is derived from the law of nations, is, that possession must have endured long enough to evince a distinct acquiescence on the part of the adverse claimant in the rightfulness of the possession; and what length of possession is necessary for that purpose, must, of course, depend upon the peculiar circumstances of each case. To give to possession such an effect, it is requisite also, that it should have been held with the knowledge of the adverse claimant; for the fact of possession operates against the party which seeks to disturb it, as presumptive evidence of abandonment; and it furnishes to the party holding it, proof of the same description, and of equal force, in favor of the existence of the right. In this case, the possession of North Carolina may be coupled with that of Tennessee, or considered as one continuing possession, on account of the relation which those states sustain towards each other; and, for the same reason, the acts of Virginia and Kentucky are to be viewed as identical.

It was contended, that this possession, and the constant assertion by North Carolina and Tennessee, of title to the territory left out by Walker's line, was well known to Virginia, and was acquiesced in by her. This pos-

session commenced, and the acquiescence of *Virginia in it, before the title under which the defendant in error claims, accrued. The argument contained a reference to written testimony and to legislative enactments by Virginia ; as well as to evidence of her frequent recognition of the possession and disposition of this territory by the executive of that state, after the running of Walker's line.

It is a principle of municipal law, perfectly well established, that possession of land for a great length of time, and non-claim, will give a good title ; and that, in support of such a title, almost anything may be presumed ; such as an act of parliament, a grant from the crown, a deed of conveyance, the extinction of an outstanding opposing title, &c. *Chalmer* v. *Bradley*, and *Gibson* v. *Clark*, 1 Jac. & Walk. 63 note 2, 161 ; *Jackson* v. *Hudson*, 3 Johns. 375 ; *Powell* v. *Milbanke*, Cowp. 103 ; 10 Johns. 380 ; 3 Johns. Cas. 118 ; 3 Conn. 630 ; 11 East 280 ; 10 Ibid. 488. This principle also pervades the public law, and is not affected in its operation by the doctrine of *nullum tempus occurrit regi ;* because, whenever it is brought to bear upon questions of public law, both parties are sovereigns, and stand in the same relation to each other as individuals do in ordinary cases.

4. The treaty of 1820, made between Kentucky and Tennessee, does not affect the title of the plaintiffs in error. It has been shown, in the views already taken of this subject, that North Carolina and Tennessee acquired a complete title, including both sovereignty and property, to all the lands on the south side of Walker's line. If so, they were competent to transmit property in any portion of those lands, to the plaintiffs in error ; and that they did so, according to all legal formality, and that for a full and valuable consideration, is shown in the record, by the production of their grants. Then, the plaintiffs in error being once invested with title to the property in dispute, what has divested them ? It is said, that the treaty of 1820 has had the effect ; not by a direct process of divestiture, but by the admission of Tennessee, therein made, that the land, when it was granted, did not lie within her jurisdiction, nor within that of North Carolina. But how was the fact, notwithstanding that admission ? It was, that the land did lie within the jurisdiction of North Carolina and Tennessee, at the time referred to. Then, the question is presented, whether it be competent for a state, by admission or otherwise, to divest a title already conferred upon one of its citizens ? For, change the aspect of it as you will, it is *still a question as to the power to divest, assuming, that the land was not [*197 within the jurisdiction of North Carolina and Tennessee ; and their grant would be void, for want of property in the subject-matter of the grant. But proving, as the plaintiffs in error have done, and surely they stand in a situation to be permitted to make the proof, that the land did belong to the grantor, at the time that they became grantees of it ; and then the admission of the state to the contrary becomes of no avail. It is a principle of law, that when one claims title under another, he will not be permitted to deny the title of him under whom he claims. But the reverse of that principle is by no means true ; that is, where the grantor, after having made and delivered a grant, acknowledges that he had no title at the time of making it ; his grantee is not bound by that acknowledgment. So far is it from being true, that, if the grantor had not, in reality, any title when he

conveyed, but afterwards acquires one, it vests, *eo instanti*, by relation to the date of the grant, in the grantee; and this, too, by operation of law; so that the grantor could not, if he would, afterwards defeat his own sale. How is it possible, then, for a posterior admission of the state of Tennessee to take away from the plaintiffs in error, rights which they undoubtedly had before that admission was made?

It is likewise a principle of law, founded in abstract justice and morality, and highly promotive of good faith, that a party is estopped from denying his own deed. And the doctrine of estoppel does not apply to the execution of the deed simply, for, its being the deed of the party, necessarily implies its execution; but it applies to the operation and effect of it, so that the grantor is bound by all legal inferences and consequences resulting from it. Now, to say, that it lies in the mouth of the grantor, to deny that there was any subject-matter for the grant to act upon, appears to be as effectual a mode of destroying it, and of absolving him from the obligation of it, as any that could be devised. And why should not this principle be enforced against a state? When a state makes a grant to an individual, it is a contract, with all the incidents of any other contract of the same kind attached to it; and in the making of which, the state exerts only the same capacities that an individual would do in a like case; and it must, therefore, be governed by the same rules, regulations and restrictions, in every respect.

When Tennessee and Kentucky entered into the compact of 1820, it was competent for the former to part with what she had, and no *more. *198] She then possessed sovereignty over the land which is the subject of this suit, but no property in it; that belonged to the plaintiffs in error. She might, therefore, have parted with her sovereignty over the land, and have transferred the allegiance of the owners of it to the state of Kentucky; in which case, their right of property would have remained unaffected. But precisely the reverse of this is what, by the compact, she purports to have done; this is, to retain the sovereignty and cede the property; or, what amounts to the same thing, to give such an effect to a certain state of facts, as will enable the defendants in error successfully to hold the property against those in whom the title before existed; when, without such an effect, thus communicated, those facts would have been wholly inefficient for the purpose.

Now, is the doctrine to receive judicial sanction, that a state, although she may be sovereign, can thus tamper with the rights of individuals? In one sense, sovereign power may be competent to do anything; to destroy all the creations that have taken place under the exercise of it; and that, too, without any regard to the consequences of such wantonness. But under our constitution and laws, there is some restraint imposed upon the exercise of the power of the state; the functions of all public bodies, and public officers, are limited and defined; and no interference can take place with private property, that is inconsistent with right, and unwarranted by known rules and regulations. The legislature of Tennessee, in appointing commissioners to make this compact, and in the subsequent ratification of it, and the commissioners themselves in making it, all acted by virtue of a delegated power; and no power was delegated to them, or could be, that was incompatible with the charter whence that power was derived. The 20th section of the declaration of rights, which is a part of the constitution

of Tennessee, says, "that no retrospective law, or law impairing the obligation of contracts, shall be made." Now, here is an express limitation upon the power of the legislature. Has it been observed, in the making of this compact? What is meant by a retrospective law? It is one which changes, or injuriously affects, a present right, by going behind it, and giving efficacy to anterior circumstances to defeat it, which they had not when the right accrued. This compact looks back to the dates of the warrant and grant issued by Virginia and Kentucky, both powerless as emanating from those states; overleaps the intervening title derived from Tennessee and North Carolina, which was *good, if it had been let alone; and by the new life which it breathes into the worthless claim, subverts the other. And what is meant by the obligation of a contract, in the sense of the constitution? As applied to this case, we shall best see by inquiring what was the state of the contract upon which the plaintiffs in error rely, without the provisions of the compact; and what it is with them. Setting aside the compact, there is a grant, which is the highest muniment of title, and which binds the state to defend the possessor in the enjoyment of the land. But taking the compact into consideration, and giving force to it, according to its terms, you destroy the grant, and take away from the holder all the consequences flowing from it; thus most emphatically impairing the obligation which it had created. The passage of such a law would even exceed the competency of the British parliament, notwithstanding its attribute of omnipotence; and the judges there would not fail to pronounce it void, as being in violation of natural justice and inherent right. 18 Johns. 138; 7 Ibid. 497; 2 Dall. 308, 311. [*199

The sixth article of the compact of 1820, under which this suit was brought by the defendants in error, is in the following words: "Claims to land east of the Tennessee river, between Walker's line, and the latitude of 36° 30′ north, derived from the state of Virginia, in consideration of military services, shall not be prejudiced in any respect by the establishment of Walker's line, but such claims shall be considered as rightfully entered or granted; and the claimants may enter upon said lands, or assert their rights in the courts of justice, without prejudice by lapse of time, from any statute of limitations, for any period prior to the settlement of the boundary between the two states; saving, however, to the holders and occupants of conflicting claims, if any there be, the right of showing such entries or grants to be invalid, and of no effect; or that they have paramount and superior titles to the land covered by such Virginia claims."

It has already been shown, in the preceding views exhibited of this case, that, by the establishment of Walker's line, in the first instance, Virginia distinctly admitted, that the land to the south of it was not within her jurisdiction, and did not belong to her; and that North Carolina, by the possession of that land, acquired a complete tide to it. The title thus acquired by North Carolina, would certainly inure to the benefit of the plaintiffs in error, so far as any of that land was granted to them. Then, by the above article of the *compact, Tennessee renounced that title; which renunciation, as applied to this case, did not in the least affect the interest of the state, but only operated to destroy the right vested in her grantees. The article goes further, and says, that the claims under Virginia shall be considered as rightfully entered or granted; and shall [*200

not be prejudiced by lapse of time, or any statute of limitations. In this respect, the compact professed to act directly upon the rights of individuals situated as the parties to this suit are; giving to the one, a title which he had not before, and taking away from the other, that which he had—tying up the hands of one, and furnishing the other with a most deadly offensive weapon. By the provisions thus interposed, lapse of time, presumption and the statute of limitations, are all cut off, as sources from which title might have been acquired; and, in fact, was acquired. If there is any question perfectly well settled in the courts of Tennessee, so that no one thinks of meeting it again, it is, that our statutes of limitation, as applied to land, have a double operation—that is, that they bar the remedy of the plaintiff in ejectment, and give to the defendant, although his paper title was utterly void, a title good against the whole world, by positive prescription. Act of 1715, ch. 27, § 2; Act of 1797, ch. 43, § 4; Act of 1819, ch. 28, § 21; *Porter's Lessee* v. *Cocke*, Peck 47; *Ferguson* v. *Kennedy*, Ibid. 321; 3 Johns. Ch. 142–3; 10 Mod. 206. It appears, therefore, that the sixth article in the compact cannot be sustained, without its operating as a repeal of those statutes, a reversal of those decisions, and a direct judicial sentence.

5. The title under which the defendants in error claim is void for champerty. That title is the grant from the state of Kentucky, operating *proprio vigore;* or it is the above article in the compact; or it is both taken together. Now, considering it either way, there was an adverse possession by the state of Tennessee, or by those claiming under it, at the time of the origin of the title of the defendants in error; and the provisions of the statute of 32 Hen. VIII., c. 9, operate upon the conveyance thus attempted to be made, and render it absolutely void. *Williams* v. *Jackson*, 5 Johns. 498; Co. Litt. 214, § 347.

6. The lessors of the plaintiffs in the court below, have shown a title which makes them tenants in common only; and there is but *one demise in the declaration, and that a joint one. Tenants in common cannot support ejectment upon a joint demise. Although the action of ejectment is fictitious, yet such a demise must be laid as would, if actually made, having transferred the right of possession to the lessor. Ejectment is a possessory action, and each tenant in common is not capable of demising the whole premises; and therefore, a case is not made out upon the face of the declaration, which entitles the lessor to bring suit. Adams on Ejectment 186; *Trepart's Case*, 6 Co. 15 *b*. It is due, however, to the circuit judge who tried this cause, to state, that this defect in the declaration, if it be one, was not discovered until after the trial was gone into; and that, although he overruled the motion for a nonsuit, founded on it, he intimated, that he would reserve the point for further consideration, upon an application for a new trial, if one should be made. And that none but a formal application for a new trial was made, on account of circumstances known to the circuit judge, which caused the sudden and unexpected adjournment of the court.

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7. The will of Frederick Rohrer, under which the defendants in error claim, ought not to have been received in evidence. 1st. On account of the insufficiency of the certificate and probate to authorize its registration in the state. 2d. Upon the ground, that said will was registered in Tennes-

see, after the institution of this suit; and therefore, could only take effect from the date of registration. The will of Frederick Rohrer was a foreign one, that is, made and published in Pennsylvania; and what purported to be a copy only, was produced upon the trial of this cause. It is perfectly clear, that no will, made out of the state of Tennessee, can pass lands situated in it, and that no evidence of a will can be received in the courts there, for the purpose of affecting titles to land; but in strict conformity to the laws of Tennessee. *Kerr* v. *Moon*, 9 Wheat. 571. The probate of the will, and the registration, are all in the record, and the court is respectfully requested to examine them. They will compare them with the provisions of the act of the legislature of Tennessee on the subject. It will be observed, that the act of 1823, ch. 31, authorizes copies of such wills to be recorded in the country where the land lies, provided they shall have been proved according to the law then (1823) in force in the state, as to wills made and executed within the limits of the state (Act of the 1st session of *1784, ch. 22; Act of 2d session of 1784, ch. 10). And when so recorded, [*202 shall have the same force and effect as if the original had been executed in this state, and proved and allowed in our courts; and shall be sufficient to pass lands and other estate. Whether a copy of this will was duly proved and recorded in Tennessee, or not, it was not recorded, until after the commencement of the suit; and there is no principle better understood, or more universally admitted, than that in ejectment, the lessor of the plaintiff must have a title to the premises in dispute, at the date of the demise. And according to the construction of the above statute of 1823, the title to land here does not pass by such a will, until a copy thereof is actually recorded, in the manner therein prescribed; nor then, unless the probate is in due form, and the will itself shall have been executed with the solemnities required.

Catron, for the defendants in error.—By mutual legislation and arrangement between the states of Virginia and North Carolina, commissioners were appointed, as early as the year 1779, two from each state; who met, in September of that year, for the purpose of extending the common boundary of the states on parallel of latitude 36° 30′ north. The line, in part, had been previously run by Fry and Jefferson; beginning at the Currituck inlet, and extending west, 329 miles, to Steep-rock creek, near New-river, at 81° 12′ west longitude from London. (Haywood's History of Tennessee, 473.) The commissioners on the part of Virginia were, Doctor Thomas Walker and Daniel Smith; and those acting in behalf of North Carolina, Colonel Henderson and William B. Smith. The commissioners, by mutual observations, ascertained the precise latitude of 36° 30′ north, being one mile 201½ poles due south of the termination of Fry and Jefferson's line; and there fixed their beginning. After running the line as far as Carter's valley, forty-five miles west of Steep-rock creek, the Carolina gentlemen conceived the line was farther south than it ought to be; and on trial, it was found the variation of the needle had slightly altered. On making observations, it was supposed, the line at that point was more than two miles too far south—one of the Virginia commissioners concurring that this was the fact. The distance was measured off due north, and the line run eastward from that place, by the Carolina commissioners, to Steep-rock creek, aided by one of those from Virginia (Mr. *Smith), for about twenty miles east; when [*203

he became satisfied, from repeated observations, that the second line was wrong and the first right; to this conclusion the Carolina gentlemen refused their assent. Doctor Walker had continued to extend the line west, but was soon overtaken by Mr. Smith. Concurring that the first line was on the true latitude, they accordingly brought it up from Carter's valley, and extended it to the westward, separate from the Carolina commissioners, who did not again act in concert with them, but extended the second line as far as Cumberland mountain, protesting against the line run by the Virginia commissioners; and there they ceased the work and returned home. East of Cumberland mountain, the southern line was afterwards known as Walker's line, and the northern, as Henderson's line—being something more than two miles apart, and extending from Steep-rock creek to Cumberland mountain.

The Virginia commissioners, from Cumberland gap, where they struck the mountain, continued the extension of the line run by them, west, through the mountain, and marked it as far as Deer-fork, 124 miles from the beginning at Steep-rock creek. They there left off, running the line, and went west to Cumberland river, about 109 miles from Deer-fork; ascertained the true latitude of 36° 30′, as they supposed, and from that point ran and marked the line west (crossing the Cumberland river again at 131 miles), to the Tennessee, river, 41 miles from the first crossing of the Cumberland. Their authority extended no further; but on their way home, orders met them from the governor of Virginia to proceed to the river Mississippi, and there ascertain and mark the termination of the line; which service they performed. The line from Cumberland to Tennessee river is known as Walker's line; and where it strikes the Tennessee, is over eleven miles north of 36° 30′, but much less north, where it was commenced at Cumberland river. This circumstance produced the present controversy; to understand which, is has been deemed necessary to give, in something of detail, the history of Walker's line, and why it was not recognised as the true boundary between Kentucky and Tennessee; and the necessity of the compact of 1820, to settle the boundary between the two states.

The constitution of North Carolina declares the northern boundary of that state to be 36° 30′. § 25. It is attempted to be changed by Walker's line, run in 1779–80; and the Virginia act of assembly of the 7th of December 1791, ch. *55. The line had been marked west from Cumber-
*204] land river to the Tennessee river by Walker. In December 1789, a committee of the house of commons of North Carolina, to whom was referred the letter of the governor of Virginia, reported favorable to the establishment of Walker's line, but the senate did not act. At the next session, 11th December 1790, a committee of the house again reported, and recommended a law to be passed confirming Walker's line as the boundary between Virginia and North Carolina, reserving the right of the oldest grants or entries made by either state. The report was concurred with by both houses. (Hayw. Hist. Ten. 484.) To meet the report, Virginia took the first step, and on the 7th of December 1791, passed an act conformably to it. (Ibid. 485.) But North Carolina passed no law upon the subject; for the well-known reason, that in February 1790, she had ceded the western part of the state to the United States; which government (not North Carolina) had the sole power to fix the boundary with Virginia, from the north-

west corner of North Carolina to Cumberland gap. (See Cession Act; Hayw. Hist. 434.) In 1796, Tennessee became a state; and, of course, recognised no act of North Carolina after the cession of the United States. (Hayw. Hist. 8.) Nor did Kentucky recognise the legislation of Virginia west of Cumberland gap, after the 18th of December 1789. Then an act was passed, authorizing the district of Kentucky to call a convention, for the purpose of separating from Virginia, the assent of congress being had. The convention was called, a separation determined upon; and the act of congress of the 4th of February 1791, ch. 78, was passed, receiving Kentucky, according to its actual boundaries on the 18th day of December 1789; Kentucky to come in as a state on the 1st of June 1792. On the 2d of April 1792, Kentucky formed her first constitution, and thereby declared the compact with Virginia a part thereof. (Art. 8, § 7; 1 Marsh. Hist. Ky. 408.) Virginia is concluded by it. *Green* v. *Biddle*, 8 Wheat. 1. The act of congress of the 4th of February 1791, settled the southern boundary of Kentucky, at 36° 30′, and Virginia had no power to change it afterwards; her act of the 7th of December 1791, is, therefore, of no validity in this controversy. But it never was intended to have any force. North Carolina adopted a report (having no legal force), proposing a joint law to Virginia. So far as the latter had power, she passed the law, but North Carolina did not meet it; the object was a compact by mutual *legislation. Is it not most harsh to say, Virginia shall be bound, by her act, to [*205 confirm the North Carolina claims; to surrender territory equal to four counties, and North Carolina shall not be bound?

The act of Virginia, in its terms only, extends to the common boundary between North Carolina and Virginia, as run by Walker. The line was begun at Steep-rock creek, forty-five miles east of Carter's valley, and east of the north-west corner of Tennessee. From Steep-rock creek to the north-west corner of North Carolina, was the only part of the boundary between North Carolina and Virginia, to which the act of December 1791 did or could apply, because, west of this, North Carolina had no jurisdiction. And so Virginia understood the law, as is manifest from her compact of 1801, ch. 29 (1 Scott 716); 1803, ch. 58; by which commissioners from the respective states settled and marked a new boundary, equidistant between Walker's and Henderson's line, from Cumberland gap, east, to the north-west corner of North Carolina.

That either Tennessee or Kentucky ever imagined that the acts of Virginia or North Carolina had affected the common boundary of the states, cannot be pretended; the reverse is prominently manifest from Tennessee acts of 1801, ch. 29; 1803, ch. 63; 1812, ch. 61; 1815, ch. 192; 1817, ch. 157; 1819, ch. 89; and 1820, ch. 20. In fact, and by universal admission on the part of Tennessee and Kentucky, the act of Virginia never affected the question presented by the record Conceding to the act the validity claimed for it, and suppose North Carolina had met it by a corresponding statute, still it could have no binding effect. The constitutions of Virginia and North Carolina conferred jurisdiction to 36° 30′. Could the states, by legislation or by compact, fix the boundary ten miles further north? Would such act give North Carolina jurisdiction over the constitution? That the legislature of North Carolina had no power to authorize grants north of 36° 30′, must be admitted: her grants are clearly void. But then it is contended, the

act of Virginia of December 1791, prescribed Walker's line as the southern limit of the district in Kentucky, where Virginia military warrants could be located; and the plaintiff's grant being south of the line, it is also void; therefore, both titles being void, the plaintiff must fail.

The sixth article of the compact confirms the military grants of Virginia, south of the line and north of 36° 30′. The compact is just as good and effectual a grant as an ordinary patent. *North Carolina granted
*206] 25,000 to General Green, and 200 acres to the town of Nashville, by statute; and each of which grants has received the judicial sanction. So, Tennessee confirmed the military grants made north and east of the military boundary, by her act of 1815; ch. 173, and in various other cases. The compact is the supreme law, by the act of congress adopting it, of 12th of May 1820. (3 U. S. Stat. 609; Const. U. S. art. 6, § 2.) But for the confirmation, the jurisdiction of Tennessee could not extend beyond 36° 30′ north; because the legislature could not alter boundary fixed by the constitution. Congress had made it the supreme law over the constitution of Tennessee.

And in this connection, it may be remarked, that all legislation on the part of Virginia and North Carolina, tending to change the boundary from 36° 30′ to 36° 40′, would have been obnoxious to the 1st art. § 10, of the constitution of the United States, which declares: "No state shall, without the consent of congress, enter into any agreement or compact with another state." The prohibition must comprehend compacts of cession from one state to another; if not, Pennsylvania may treat for half of Delaware, and still leave her with two senators, and one representative in congress; and the ceded half be represented as part of Pennsylvania. Our disputed boundary presents an ample illustration of the necessity that the assent of congress should be had. By our act of 1801, ch. 28, we ordered commissioners to be appointed to treat for all the country south of Green river, including now about twenty-five counties in Kentucky. By the compact of 1820, Tennessee acquired nearly half a million of acres north of 36° 30′; if she could go ten miles north, she might two hundred, and purchase out a sister state, sapping the foundations of the Union.

But suppose, the Tennessee and North Carolina grants the better title, yet it becomes necessary to cede them to Kentucky, as part consideration of the compromise; we, says Kentucky, will give you the sovereignty to Walker's line, in consideration of which you shall give us the right of soil; and it was agreed. Is this not taking private property for public use? 3 Story's Com. 601; 2 Kent. 339 (2d ed.). By the treaties of 1817, 1819, the sovereignty of the Cherokee country was ceded to the United States, with the right of soil, and certain Cherokee occupants had granted to them a mile square each, as a part consideration. One of these reserves covered
*207] *a grant made to Stuart, in 1800, by North Carolina. It was holden, *per* Haywood, Judge, and not denied by any, that the private property of Stuart's assignee could be ceded to the Indian (*Cornet* v. *Winton*, 2 Yerg. 164–6); and congress paid Stuart's assignees for the land.

The provision of the constitution of the United States, that private property shall not be taken for public use, without just compensation, applies, exclusively, to a taking by the United States government, and has no reference to the acts of the states. To be bound, they must be named, as,

that no state shall pass any *ex post facto* law, or laws impairing the obligation of contracts. *Barron* v. *Mayor of Baltimore*, 7 Pet. 243. The constitution of Tennessee (Bill of Rights 21), declares, "no man's property shall be taken, or applied to public use, without the consent of his representatives; or without just compensation being made therefor." 1. By consent of his representatives, means by a law of the land, as where roads are located on private property, and no compensation is made. 2. In time of war, when the militia are called out, fuel, forage, provisions, boats, &c., may be taken, without any law, positively authorizing of it. Then compensation must be made.

STORY, Justice, delivered the opinion of the court.—This is the case of a writ of error to the judgment of the circuit court of the United States for the district of West Tennessee. The original writ was an ejectment, brought by Fleeger and others (the now defendants in error) against Poole and others (the now plaintiffs in error), to recover a tract of land containing 2727 acres, in Montgomery county, in Tennessee, lying south of Walker's line, so called; which constitutes the present boundary line between the states of Kentucky and Tennessee; and north of Mathews's line, so called, which is exactly now in latitute 36° 30′ north; which by the constitution of North Carolina, is declared to be the true northern boundary line of the state, and is so described in the charter of King Charles II.

At the trial, the original plaintiffs proved their title to be as devisees of one Frederick Rohrer, who claimed it by a grant of the state of Kentucky, dated the 24th of February 1796, in part satisfaction of a Virginia military land-warrant, held by Rohrer, as *assignee of one John Montgomery. [*208
They also read in evidence, the compact between the states of Kentucky and Tennessee, of the 2d of February 1820. The defendants claimed title under certain grants from the state of North Carolina, of various tracts, comprehending the premises in question, dated in 1786, 1792 and 1797; and also under certain grants from the state of Tennessee, in 1809, 1811, 1812 and 1814, from which they deduced a regular title to themselves; and they proved, that the same grants covered their possessions, respectively, except that each of the defendants, whom the jury at the trial found guilty of the ejectment, were in possession of portions of land, not covered by any grant, older in date than that to Rohrer. The defendants also proved, that the different grantees under whom they claimed, took possession of the different tracts of land contained in their grant, on or about the date thereof; and that they, and those deriving title under them, have continued in the possession of the same ever since. Various other evidence was introduced by the defendants, the object of which was, to establish that Walker's line had been for a long time acted upon as the boundary line between North Carolina and Virginia, before the separation of Kentucky and Tennessee therefrom; and that after that separation, Tennessee had continued to exercise exclusive jurisdiction up to that line, with the acquiescence of Kentucky, until the compact of 1820. As our judgment turns upon considerations distinct from the nature and effect of that evidence, it does not seem necessary to repeat it on the present occasion.

By the compact of 1820, between Kentucky and Tennessee (art. 1), it was agreed, that Walker's line (which was run in 1780) should be the boun-

dary line between those states; and by the sixth article, it was further agreed, that "claims to land east of Tennessee river, between Walker's line and the latitude of 36° 30′ north, derived from the state of Virginia, in consideration of military services, shall not be prejudiced in any respect, by the establishment of Walker's line; but such claims shall be considered as rightfully entered or granted; and the claimants may enter upon said lands, or assert their rights in the courts of justice, without prejudice by lapse of time, or from any statute of limitations, for any period prior to the settlement of the boundary between the two states; saving, however, to the holders and occupants of conflicting claims, if any there be, the right of showing such entries or grants to be invalid, and of no effect; or that they
*209] have paramount and superior titles to the land covered by such *Virginia claims." By another article (the 4th), it was further agreed, that "all lands now vacant and unappropriated by any person, claiming to hold under the states of North Carolina or Tennessee, east of the Tennessee river, and north of the parallel of latitude of 36° 30′ north, shall be the property of, and subject to the disposition of, the state of Kentucky."

Upon the whole evidence in the cause, the court instructed the jury, "that as by the compact between Kentucky and Tennessee, the boundary line of 36° 30′ north was fixed several miles south of Walker's line, and of the land in controversy; the titles of the defendants were subject to the compact, and could only be sustained under it. That the state of Tennessee, by sanctioning the compact, admitted, in the most solemn form, that the lands in dispute were not within her jurisdiction, nor within the jurisdiction of North Carolina, at the time they were granted; and that, consequently, the titles were subject to the conditions of the compact." To this opinion of the court, the defendants excepted; and the validity of this exception constitutes the main subject of inquiry upon the present writ of error; the jury having found a verdict in favor of the plaintiffs upon this opinion, and judgment having been rendered in conformity thereto, in the court below.

We are of opinion, that the instruction given by the court below is entirely correct. It cannot be doubted, that it is a part of the general right of sovereignty, belonging to independent nations, to establish and fix the disputed boundaries between their respective territories; and the boundaries, so established and fixed by compact between nations, become conclusive upon all the subjects and citizens thereof, and bind their rights, and are to be treated, to all intents and purposes, as the true and real boundaries. This is a doctrine universally recognised in the law and practice of nations. It is a right equally belonging to the states of this Union, unless it has been surrendered, under the constitution of the United States. So far from there being any pretence of such a general surrender of the right, it is expressly recognised by the constitution, and guarded in its exercise by a single limitation or restriction, requiring the consent of congress. The constitution declares, that "no state shall, without the consent of congress, enter into any agreement or compact with another state;" thus plainly admitting, that with such consent, it might be done; and in the present instance, that consent has been expressly given. The compact, then, has full validity, and
*210] all the *terms and conditions of it must be equally obligatory upon the citizens of both states.

Independently of this broad and general ground, there are other ingredients in the present case, equally decisive of the merits. Although, in the compact, Walker's line is agreed to be, in future, the boundary between the two states, it is not so established as having been, for the past, the true and rightful boundary; on the contrary, the compact admits the fact to be the other way. While the compact cedes to Tennessee the jurisdiction up to Walker's line, it cedes to Kentucky all the unappropriated lands north of the latitude of 36° 30′ north. It thus admits, what is in truth undeniable, that the true and legitimate boundary of North Carolina is in that parallel of latitude; and this also is declared in the charter of Charles II., and in the constitution of North Carolina, to be its true and original boundary. It goes further, and admits, that all claims under Virginia, to lands north of that boundary, shall not be prejudiced by the establishment of Walker's line; but such claims shall be considered as rightfully entered or granted. The compact does, then, by necessary implication, admit that the boundary between Kentucky and Tennessee, is the latitude of 36° 30′; and that Walker's line is to be deemed the true line, only for the purpose of future jurisdiction.

In this view of the matter, it is perfectly clear, that the grants made by North Carolina and Tennessee, under which the defendants claimed, were not rightfully made, because they were originally beyond her territorial boundary; and that the grant, under which the claimants claim, was rightfully made, because it was within the territorial boundary of Virginia. So that, upon this narrower ground, if it were necessary, as we think it is not, to prove the case, it is clear, that the instruction of the court was correct.

And this disposes of the argument, which has been pressed upon us, that it is not competent for a state, by compact, to divest its citizens of their titles to land derived from grants under the state; and that it is within the prohibition of the constitution, that "no state shall pass any law impairing the obligation of contracts." If the states of North Carolina and Tennessee could not rightfully grant the land in question, and the states of Virginia and Kentucky could, the invalidity of the grants of the former arises, not from any violation of the obligation of the grant, but from an intrinsic defect of title in the states. We give no opinion, because it is unnecessary in *this case, whether this prohibition of the constitution is not to be understood as necessarily subject to the exception of the right of the states, under the same constitution, to make compacts with each other, in order to settle boundaries and other disputed rights of territory and jurisdiction. [*211

In the progress of the trial, one or two other objections were made, which may require some notice. The defendants objected to the introduction of the will of Frederick Rohrer, under which the plaintiffs claimed as devisees, as evidence; first, because the probate and certificate of that will (it having been made and proved in Pennsylvania) were not such as to authorize its registration in the state of Tennessee; secondly, because the will was not registered in the state of Tennessee, until after the institution of this suit. The court overruled the objection. But it does not appear, that any exception was taken to the opinion of the court upon this point, at the trial. On the contrary, the record states, that "no exception to the opinion of the court, permitting the will to be read, was taken in the progress of the trial,

nor was it stated that the right to do so was reserved; the practice of the court is, for exceptions to be taken after trial, if deemed necessary." Under these circumstances, some difficulty has arisen, as to the propriety of taking any notice whatsoever of this objection. In the ordinary course of things, at the trial, if an objection is made and overruled, as to the admission of evidence, and the party does not take any exception at the trial, he is understood to waive it. The exception need not, indeed, then, be put into form, or written out at large and signed; but it is sufficient, that it is taken, and the right reserved to put it into form, within the time prescribed by the practice or rules of the court. We do not find any copy of the will, nor any probate or certificate thereof, in the record, nor any registration thereof; and it is, therefore, impossible for us to say, whether the ground assumed in the first part of the objection is well founded or not. This leads us strongly to the inference, that the objection was intentionally waived at the trial. The second ground is clearly unmaintainable; for, if the registration was rightfully made in Tennessee, it has relation backwards; and the time of the registration is wholly immaterial, whether before or after the institution of the suit.

Another objection made by the defendants, at the trial, was to the evidence of title offered by the lessors of the plaintiff, upon the ground, that this title was a tenancy in common, which would not in *law support
*212] a joint demise. This objection was overruled, with an intimation that the point would be considered on a motion for a new trial. No exception was taken to this ruling of the court; and the new trial was, upon the motion, afterwards refused. The party not taking any exception, and acquiescing in the intimation of the court, must be understood to waive the point as a matter of error, and to insist upon it only as a matter for a new trial. But it is unnecessary to decide the point upon this ground; for, in the state of Tennessee, the uniform practice has been, for tenants in common in ejectment to declare on a joint demise, and to recover a part or the whole of the premises declared for, according to the evidence of title adduced. This was expressly decided by the court in *Barrow's Lessee* v. *Nave*, 2 Yerg. 227–8; and on that occasion, the court added, that this practice had never been drawn in question, so far as they knew or could ascertain; and in fact, no other, probably, could be permitted, after the act of 1801, ch. 6, § 60, which provided, "that after issue joined in any ejectment on the title only, no exceptions to form or substance shall be taken to the declaration, in any court whatever." The judgment of the circuit court is therefore affirmed, with costs.

Baldwin, Justice.—So far as my general views of the origin and nature of the federal constitution and government may be peculiar, that peculiarity will be carried, of course, into my opinions on constitutional questions. There are none which can arise, in which it is more important to attend carefully to the reasons of one's judgment, than in those where the prohibitions on the states come under consideration; those which have arisen have been found the most difficult to settle, because they involve not only the question of the powers granted to congress, and those reserved to the states, but on account of the nature and variety of the prohibitions and exceptions. In the case of *Briscoe* v. *Bank of Kentucky* (*post*, p. 328),

I gave my views of the three classes of prohibitions, in the first clause of the tenth section of the first article of the constitution, which in their terms are absolute, operating, without any exception, to annul all state power over the prohibited subjects.

The next clause of the same section contains prohibitions of a different kind. "No state shall, without the consent of congress, lay imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net proceeds of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States, and all such laws shall be subject to the revision and control of the congress. No state shall, without the consent of congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another state or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay."

It will be perceived, that these prohibitions apply to two distinct classes of cases; in those embraced in the first sentence, it is not only requisite that congress should consent to state laws laying duties and imposts on imports and exports, but they are made subject to its revision and control. In the second class, nothing more is required, than the consent of congress to the specified acts or laws of a state, giving no power whatever over them, after such consent has been given. There is also one particular in which compacts and agreements between one state and another, or with a foreign power, stand on a peculiar footing; all the other cases to which the prohibition applies, embrace those subjects on which there is a grant of power to congress to legislate, or which have a bearing on those powers; as, to lay duties and imposts, regulate commerce, declare war, &c. Whereas, the sole power of congress in relation to such agreements or compacts, is, to assent or dissent, which is the only limitation or restriction which the constitution has imposed, provided they are not treaties, alliances or confederations which are absolutely prohibited by the first clause of the section, and cannot be validated by any consent of congress. As the compact between Kentucky and Tennessee does not come within this prohibition, and is one merely of boundary between the two states, the subject-matter is not within the jurisdiction of congress, any further than that it is subject to its consent, which, once given, the constitution is *functus officio* in relation to its controlling power over its terms or validity. The effect of such consent is, that thenceforth, the compact has the same force as if it had been made between states who are not confederated, or between the United States and a foreign state, by a treaty of boundary; or as if there had been no restraining provision in the constitution. Its validity does not depend on any recognition or admission in or by the constitution, that states may make such compacts with the consent of congress; the power existed in the states, in the plenitude of their sovereignty, by original inherent right; they imposed a single restraint upon it, but did not make any surrender of their right, or consent to impair it to any greater extent. Like all other powers not granted to the United States, or prohibited to the states, by the constitution, it is reserved to them, subject only to such restraints as it imposes, leaving its exercise free and unlimited in all other respects, with-

out any auxiliary by any implied recognition or admission of the existence of the general power, consequent upon the particular limitation.

Herein consists the peculiarity of my reasons for affirming the judgment of the circuit court in this case; fully concurring with the opinion delivered, as to the original power of the states to make compacts of boundary, as well as to the effect of the prohibition, being "a single limitation or restriction" upon the power. (See 11 Pet. 209.) I can give it no other effect by implication, without impairing the great principle on which the reserved powers of the states rest. Though the result, in this case, would be the same, whether the right of making compacts of boundary is original in the states, or exists by the admissions of the constitution, it might have an important bearing on other questions and cases, depending on the same general principle, as to the granting and restraining power which established that instrument. If it is considered as the source of the powers which are reserved to the states, it necessarily admits that its origin is from a power paramount to theirs, and limits them to the exercise of such as it recognises or tacitly admits, by imposing limited restraints. This is a principle which, once conceded, will destroy all harmony between the state and federal governments, by resorting to implication and construction to ascertain their respective powers, instead of adopting the definite rule furnished by the tenth amendment. That refers to the constitution for the ascertainment of the specific powers granted to the United States, or prohibited to the states, as the certain and fixed standard by which to measure them; and then, by express declaration, reserves all other powers to the states, or the people thereof. The grant in the one case, or the prohibition in the other, must, therefore, be shown, or the given power remains with the state, in its original plenitude, not only independent of any power of the constitution, but paramount to it, as a portion of sovereignty attached to the soil and territory, in its original integrity. By adhering to this rule, there is found a marked line of separation between the powers of the two governments, the metes and bounds of which are visible; so that the portion of power separated from the state by its cession, can be as easily defined, as its cession of a portion of its territory, by known boundaries, a reference to which will bring every constitutional question to an unerring test. I have, therefore, considered those which have arisen in this case, as involving a general principle applicable to all restrictions on states. Though a narrower view would suffice to settle the questions presented upon this compact, or any compact between the states of this Union; yet, when we consider that the power of a state to make an agreement or compact with a *foreign power*, is put on the same footing as one between two or more states, the necessity of an adherence to principle is the more apparent.

It is a settled principle of this court, that the boundaries of the United States, as fixed by the treaty of peace, in 1783, were the boundaries of the several states (12 Wheat. 524); from which it follows, that in a contest between a state and a foreign power, respecting the boundary between them, the state has the same power over the subject-matter, as if the contest was with another state. It must then be ascertained, what is the source of that power, its extent by original right, how far it is restricted by the constitution; and when a compact of boundary is made with the consent of congress, whether their legislative power can be exercised over it to any extent?

When this is done, it must then be inquired, how far the judicial power has been extended over such compacts, by the constitution, and in controversies arising under them, what are judicial questions, on which courts can act, as distinguished from political questions, which must be referred to the parties to the compact?

In this view of the subject, I am disposed to take broader ground than is done in the opinion of the court, and think it necessary to examine, whether the powers of a state depend in any degree on the recognition or admission in the constitution, as the construction put upon it by those who framed or adopted it.

This is a sound principle, when applied to grants of power by paramount authority, to a body subordinate to it, which can act only under the authority of the grant; and fairly applies to the powers of the federal government, which is a mere creature of the constitution. Such is the established rule of this court, where there is an express exception of a particular case, in which any given power shall not be exercised, that it may be exercised in cases not within the exception; otherwise the exception would be useless, and the words of the constitution become unmeaning.

But the principle is radically different, when it is applied to a provision of the constitution, excepting a particular case from the exercise of state legislation, or containing a prohibition that a state law shall not be passed on any given subject, or shall not have the effect of doing what is prohibited; in such cases, there results no implication of power in other cases, for a most obvious reason: That states do not derive their powers from the constitution, but, by their own inherent reserved right, can act on all subjects which have not been delegated to the federal government, or prohibited to states. This distinction necessarily arises from the whole language of the constitution and amendments, and is expressly recognised in the most solemn adjudications of this court. "The government, then, of the United States, can claim no powers which are not granted to it by the constitution; and the powers, actually granted, must be such as are expressly given, or given by necessary implication." *Martin* v. *Hunter*, 1 Wheat. 326. "The powers retained by the states, proceed from the people of the several states, and remain, after the adoption of the constitution, what they were before, except so far as they may be abridged by that instrument." 4 Ibid. 193. So, where there is an exception to the exercise of the power of congress, as in the first clause of the ninth section of the first article of the constitution: "The migration or importation of such persons as any of the states, now existing, shall think proper to admit, shall not be prohibited by congress, prior to the year 1808. The whole object of the exception is to preserve the power to those states which might be disposed to exercise it, and its language seems to convey this idea to the court unequivocally. It is an exception to the power to regulate commerce, and manifests clearly, the intention to continue the pre-existing right of the state to admit or exclude for a limited period. 9 Wheat. 206–7, 216. So, when a state is prohibited from imposing duties on imports, except what may be absolutely necessary for executing its inspection laws. "This tax is an exception to the prohibition on the states to lay duties on imports and exports; the exception was made, because the tax would otherwise have been within the prohibition." 12 Wheat. 436. "If it be a rule of interpretation to which all

assent, that the exception of a particular thing, from general words, proves, that in the opinion of the lawgiver, the thing excepted would be within the general clause, had the exception not been made; we know no reason why this general rule should not be as applicable to the constitution as other instruments. Ibid. 438. In applying this rule to deeds, the language of this court is strong and clear: "It is observable, that the granting part of this deed begins, by excepting from its operation, all the lots, &c., which are within the exception. The words are, doth grant, &c., except as is hereinafter excepted, all those hereafter mentioned and described lots, &c. In order, therefore, to ascertain what is granted, we must ascertain what is within the exception; for whatever is included in the exception, is excluded from the grant, according to the maxim laid down in Co. Litt. 47 *a*. *Si quis rem dat et partem retinet, illa pars quam retinet semper cum eo est, et semper fuit.*" 6 Pet. 310. In a subsequent case, at the same term, the same rule and maxim was adopted, and applied to a treaty with a foreign nation. "It became, then, all-important, to ascertain what was granted, by what was excepted. The king of Spain was the grantor, the treaty was his deed, the exception was made by him, and its nature and effect depended on his intention, expressed by his words, in reference to the thing granted, and the thing reserved and excepted, in and by the grant." 6 Pet. 741. As this was a treaty of cession, granting soil and sovereignty, it is, in the latter respect, precisely analogous to the grant of power, by the constitution, to the federal government; so that its exceptions, prohibitions and reservations, as well as grants, must be interpreted as all other instruments, grants, treaties and cessions, taking the words as the words of the grantor, referred to the subject-matter granted or excepted, &c.

Assuming, on the reason and authority referred to in the preceding general views, that the constitution is a *grant* made by the *people of the several states*, by their separate ratifications, and that the prohibition on their pre-existing powers are their separate voluntary covenants, restraining the exercise of those which are reserved, over the subjects prohibited, these conclusions necessarily follow: That a prohibition upon a state, as to any given subject, can, by no just reasoning, enlarge or vary the powers delegated to congress, so as to bring within its jurisdiction, any matters not within the enumerations of the powers granted. That where the consent of congress is made necessary to validate any law of a state, congress can only assent or dissent thereto or therefrom, but can exercise no legislative power over the subject-matter, without some express authorty to *revise* and *control* such state law, by regulations of its own. And that in the absence of any power in congress, to do more than simply assent or dissent, the assent is a condition; and when once given to an act of a state, it has the same validity as if no prohibition had been made in the constitution against the exercise of any right of the state, to do the act, in virtue of its reserved powers, or any condition, in any way, imposed, to affect its original inherent sovereignty. The assent of congress is made an exception to the prohibition, and when given, takes the case out of the prohibition, and leaves the power of the state uncontrolled, on the common-law rule, that "an exception out of an exception leaves the thing unexcepted." 4 Day's Com. Dig. 290.

"No state shall, without the consent of congress, enter into any agree-

ment or compact with another state, or a foreign power." By the terms then, of this clause, whenever the consent of congress is given to any such agreement or compact, the prohibition is fully satisfied, and ceases to operate; the states stand towards each other, and foreign powers, as they did before the adoption of the constitution, so far as this sentence abridged their reserved powers. But as the consent of congress cannot dispense with the prohibition in the first sentence of this section, it becomes, by necessary implication, a proviso or limitation to the second. That such agreement or compact shall not be a *treaty*, *alliance* or *confederation;* if it does not come within the constitutional meaning of these terms, the agreement or compact is valid, if made with the consent of congress; if it does, it is void by the first part of the prohibition, which annuls whatever is done in opposition to it.

A reference to the articles of confederation will show the sense in which these terms are used in the constitution, in their bearing on this case. Art. 6. "No state, without the consent of the United States in congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance or treaty with, any king, prince or state. No two or more states shall enter into any treaty, confederation or alliance whatever, between them, without the consent of the United States in congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue." (1 U. S. Stat. 5.) Art. 9. "The United States, in congress assembled, shall have the sole and exclusive right and power of sending and receiving ambassadors, entering into treaties and alliances," &c. "The United States," &c., "shall also be the last resort on appeal, in all disputes and differences, now subsisting, or that may hereafter arise, between two or more states, concerning boundary, jurisdiction, or any cause whatever, which authority shall always be exercised in the manner following," &c. (Ibid. 6.) "All controversies respecting the private right of soil, claimed under different grants of two or more states, whose jurisdiction as they may respect such lands, and the states which passed such grants, are adjusted, the said grants or either of them being, at the same time, claimed to have originated antecedent to such settlement of jurisdiction, shall, on petition of either party to the congress of the United States, be finally determined, as near as may be, in the same manner as is before prescribed for deciding disputes respecting territorial jurisdiction between different states." (Ibid. 7.)

From these provisions, it is most manifest, that the framers of the constitution had the whole subject-matter directly before them, and substituted the prohibitions in the tenth section of the first article, for those in the sixth article of confederation, with two important changes.

1. In the discrimination between the prohibition on states, in relation to foreign powers, and between themselves, apparent in the two first sentences of the sixth article of confederation. All embassies to or from, and all conferences or agreements with, foreign powers, are prohibited by the first sentence; while the second sentence prohibits only treaties, alliances and confederations between two or more states. In each sentence, the consent of congress is made a condition; but in the second, there is a further condition, that the purposes and duration of the treaty shall be specified, and the words conference or agreement are omitted, so that it prohibited only

such as were treaties, &c., and left the states free to make agreements or compacts, touching their boundaries, without the consent of congress. Hence we find, that after these articles were ratified, the states made agreements, compacts or conventions with each other, settling their boundaries, or confirming those previously made, of which the following are instances: Pennsylvania with New Jersey, in 1783; 2 Smith's Laws 77; with Virginia in 1784; Ibid. 261; with New York in 1786, confirmed in 1789, Ibid. 510; Georgia with South Carolina in 1787; Laws of Georgia, app'x, 752; none of which refer to any consent of congress. But in the constitution, agreements and compacts between the states and with foreign powers, are put on the same footing, being prohibited, if congress does not consent, and valid, if consent is given, and the condition of specifying the purposes and duration thereof, wholly omitted; thus leaving the power of the states subject only to the condition of consent.

2. The constitution gives congress no power to act on the boundaries of states, or on controversies about the titles to lands claimed under grants from different states; its whole jurisdiction consists in the power of assenting or dissenting to an agreement or compact of boundary. The only part of the constitution which grants any power on this subject to the federal government, is in the third article, which declares, "that the judicial power of the United States shall extend, &c., to controversies between two or more states, between citizens of the same state, claiming land under grants of different states," &c. These are the two cases which were defined in the two sentences of the ninth article of confederation, on which congress could act, but which the constitution has authorized no other than the judicial power to take within its cognisance.

From this view of the constitution, in its application to the agreements and compacts between states respecting their boundaries, the results are, to my mind, most clear and satisfactory; that when congress has exercised the only power confided to them over this subject, by consenting to the compact, their whole jurisdiction is completely *functus officio*. Such compacts are, thenceforth, the acts of sovereign states, which, interfering with no power granted to the United States by the constitution, or prohibited by it to the states, must be deemed to be an exercise of their reserved powers, neither given, nor in any way abridged, by that instrument, and by the 34th section of the judiciary act, are binding as rules of decision by this and all other courts of the United States, "in suits at common law." The consent of congress has been given to this compact, and the present suit is one at common law; there can be then no doubt, that the compact must be taken as made by competent authority, and as prescribing the rules by which the rights of the contending parties must be ascertained. This suit does not present for the action of the judicial power, "a controversy between two or more states," or "between citizens of the same state, claiming lands under grants of different states," but a controversy "between citizens of different states," in which the circuit court was bound to decide precisely as the state courts were (2 Pet. 656; 5 Ibid. 401); in whom the title to the premises in dispute is vested, which lie south of Walker's line, and north of latitude 36° 30′ north.

It is admitted, that the northern charter boundary of North Carolina is 36° 30′ of north latitude, which is so declared in the constitution of that

state and Tennessee ; neither state, therefore, had any right to lands north of that line ; having no original title thereto, any grants from either state would be, on that ground, merely void, according to the settled doctrine of this court. 9 Cranch 99 ; 5 Wheat. 303 ; 11 Ibid. 384 ; 6 Pet. 730. It is clear, then, that as the lands in dispute are situated without this boundary, those states had no title which could pass, by their grants, to the defendants, and that the plaintiffs must recover under their title by warrant under Virginia, consummated by a patent from Kentucky, unless the defendants have, in some way, acquired a better title than the state under whom they claim had, by original right. As Virginia had the oldest charter, no part of her territory could be taken from her, without her consent, or an express grant by the king, by his perogative right of disposing of all the vacant lands in the colonies, before the revolution, except within the provinces granted to proprietaries. Such grant or consent is not pretended, but the defendants rely on the implied consent of Virginia and Kentucky, in laws recognising Walker's line as the boundary between them and North Carolina and Tennessee, and acts of ownership and possession, long exercised by these states, over lands between that line and 36° 30′ north latitude, as giving to them and the grantees under them, a title by prescription. These grounds of defence present very important points for consideration, and in my opinion, are of a political, rather than a judicial nature.

The consent of congress to the compact, strips the case of every provision of the constitution which can affect it, saving the grant of the judicial power over "controversies between two or more states," which I take to be suits between states, touching matters in controversy between them. But here, there is no controversy between states, nor can a suit be sustained in the circuit court, where a state is a party, this court alone having original jurisdiction of such cases ; this is the ordinary action of ejectment, in which each party rests upon his own title ; the plaintiff, on a grant from a state, whose original title and jurisdiction confessedly embraced the land in question ; the defendant, under grants from states, who, as confessedly, had no original right of soil or jurisdiction to the lands they granted ; so that every question affecting the rights of other states, arises collaterally in a suit between two individuals. The states have adjusted all matters heretofore in controversy between them, by a solemn compact, the sixth article of which places the grant to the plaintiff on its original validity under the laws of the states from which it emanated and was perfected, and within whose acknowledged rightful boundary the lands granted are situated. If this compact is valid, the defendant has no standing in court ; if it can be declared invalid, in a collateral action, on the grounds contended for, it follows as a necessary consequence, that any judicial power, state or federal, is competent to annul it, though it is consistent with the constitution of the state, and ratified according to that of the United States. 10 Pet. 474. The exigencies of the defendants' case require them to go to this extent, for the terms of the sixth article are neither ambiguous nor admit of any construction which can give the defendants any protection, unless they can show the plaintiffs' "grant to be invalid and of no effect, or that they have paramount and superior titles to the land covered by such Virginia warrants ;" to do which, they must break through the constitution of the states under whose grants they claim, as well as the compact assented to by con-

gress. There could be no title *paramount* to a Virginia warrant, duly taken out, entered, surveyed and patented, unless that state had in some way lost her original right of soil and jurisdiction, north of latitude 36° 30′; or Kentucky had encroached on the *superior* title of Tennessee, who had no pretensions to the terrritory north of that line, by charter, who renounced them in her constitution, and by solemn compact stipulated expressly that Virginia warrants should be considered as rightfully entered for this land.

This leaves the defendant but one position to assume, in which he can invoke the action of the judicial power, which is, that before the compact was made, the state of Tennessee had, for the reasons set forth in the argument, or on some other ground, become incompetent to make a compact with Kentucky, by which the boundary between them should be any other than Walker's line. In other words, that the state was, by her grants to the defendants, or those under whom they claimed, estopped from so settling her boundaries, as to exclude the lands she had granted; that Virginia and Kentucky were also estopped from making grants of land, within the disputed territory, by their adoption of Walker's line, and because North Carolina and Tennessee had acquired a right by prescription; of consequence, that though these states had granted lands to which they had no title originally, yet when their title by prescription attached, their grants became valid, and no compact between Tennessee and Kentucky could divest them, or impair their legal effect.

So far as the argument rests on the prohibition of the constitution against impairing the obligation of the contract of grant, it is a sufficient answer, that as a grant by a state, of land to which she has no title, is void, there is no obligation in the contract, no right of property to impair or violate. Whether the state will refund the purchase money, or grant an equivalent out of what she does own (as was done by Pennsylvania, as to lands granted to her soldiers, which were within the state of New York), is optional with the state, but such grant cannot estop her from making a compact of boundary, nor impose on her any obligation to confirm a void title. The other points raised in the argument, present the question of how far judicial power can be exercised in settling the boundaries of states.

In a controversy between states, as to their boundaries, the constitution has given original jurisdiction to this court; whether it can be exercised by the inherent authority of the court, or requires an act of congress to prescribe and regulate the mode of its exercise, need not be now examined; but it will be assumed *ex gratiâ*, that it is by a bill in equity, according to the practice of this court, and the mode of proceedings in chancery. In the great case of *Penn* v. *Lord Baltimore*, Lord HARDWICKE laid it down as an established rule, that the court of chancery had no original jurisdiction of a question relating to the boundaries between the two proprietary provinces of Pennsylvania and Maryland, in any other case than where there was an agreement between the two proprietaries for settling their boundaries. In such case, chancery would enforce the agreement, by a decree for a specific performance; but without an agreement, the question was not one within the jurisdiction of the courts of the kingdom, and was only cognisable in council before the king, as the lord paramount under whom the provinces were held in socage, by the tenure of fealty and some nominal reservation.

"The subordinate proprietors may agree how they may hold their rights between themselves;" "if a settlement of boundaries is fairly made, without collusion, the boundaries so made are to be presumed to be the true and ancient limits," made between parties in an adversary interest, each concerned to preserve his own limits, and no other or pecuniary compensation pretended. 1 Ves. sen. 447–54.

It is, then, the agreement or compact, which alone gives jurisdiction to a court of equity, to decree on the boundaries of provinces owned by proprietaries subordinate to the king; otherwise, it is a political question, to be settled in council, and not a judicial one for any court. It cannot be doubted, that the king in council was competent, by an order of council, to settle any question of disputed boundary between those colonies which had royal governments, by their charters, or in those provinces which were under proprietary governments, as he was equally the lord paramount of all. When the colonies and provinces became states, by the revolution, they adopted this principle in the articles of confederation; by delegating to congress, as the then only power which was paramount over contending states, the power to appoint a tribunal to settle their disputed boundaries. On the same principle, the constitution made congress paramount over the states, by making their agreements and compacts, touching their boundaries, subject to its approbation; and by assigning to this court, the cognisance of "controversies between states," which includes those relating to boundaries —made it so. Thus, the line is most distinctly defined, which separates the political and judicial questions which arise touching the boundaries of provinces; where there is an agreement, it is matter of judicial cognisance, to decree what and where the agreed boundary is; where there is none, it was a matter cognisable only before the king in council, before the revolution. But even then, proprietaries were competent to settle the boundaries of their respective provinces, by an agreement, without the license ef the king; and chancery would enforce its execution, by a decree *in personam* on the delinquent proprietary, without any reference to the rights of the king, other than adding to the decree, a clause of *salvo jure coronæ* (1 Ves. sen. 449, 454); which was more form than substance, as those rights continued, be the boundary where it might.

When the prerogative of the king, and the transcendent powers of parliament devolved on the several states, by the revolution (4 Wheat. 651), there could be no paramount power competent to prescribe the boundaries of states which were sovereign by inherent right, until they should appoint some common arbiter, to whose decree they would submit. By the confederation, congress appointed the tribunal, and by the constitution, this court was authorized to decide these questions; but in both cases, the subject-matters referred were "controversies," not "compacts or agreements;" controversies, open and existing, which states could not settle; not those which they had settled by solemn compacts, about which there was no difference in construction, and which both stated had faithfully executed. If a controversy did exist, either as to the terms or the execution of the compact, or, in the absence of a compact, the question of boundary depended on the line of original right, or the joint or separate acts of the contending states, the tribunal thus appointed could settle it, as the umpire between them. But it could exercise no authority which exceeded the submission;

it could not establish a boundary different from what both states had made, or from that which resulted from their antecedent rights and relation with each other, when they could not adjust them amicably. The umpire must base his award on the compact, if one exists; if not, on the right of the states, as adverse claimants to the same territory; he cannot look through or over the compact, and make an award on grounds which would annul any of its provisions, by giving to either state anything which she had renounced, or stipulated that it should be held by the other state, its citizens or grantees, "as rightfully granted." No arbiter between nations ever assumed such power; no nation would submit to its exercise; no such power is granted to this court, and any construction of the constitution which should so torture its plain language, and most manifest intention would shake the Union to its centre.

If these views are correct, their application to this case is decisive. It comes up on a writ of error from a circuit court, in a suit at common law, between citizens of Pennsylvania, claiming under Virginia and Kentucky, and citizens of Tennessee, claiming under that state and North Carolina, in which the circuit court, and the courts of the state, have, by the 11th section of the judiciary act, a concurrent jurisdiction, and on which this court acts by its appellate power. The plaintiff claims to recover the land, in virtue of a title confirmed by the compact. The defendant does not attempt to show, that the plaintiff's title is invalid, of no effect, on any construction of the compact, or any doubt as to what or where the agreed boundary is; but rests his whole case on showing that Walker's line had been so definitely established, before the compact, as to annul those provisions which confirm the plaintiff's title. As the effect of so adjudicating on the rights of the parties, would be an assumption by the ordinary judicial power of a state, or an inferior court of the United States, of an authority to force upon two states, a boundary which both disclaim, a power which this court, as the constitutional arbiter between them, could not exercise, in virtue of its original jurisdiction, it is clear, that it cannot so act by appellate power. In deciding suits between individuals claiming lands by grants of different states, between whom there was a compact of boundary, this court looks only to the compact, its terms and construction, to ascertain the relative rights of the parties, without looking beyond it in order to find out what the boundary ought to have been. See *Sims's Lessee* v. *Irvine*, 3 Dall. 425, 456, &c.; *Lessee of Marlatt* v. *Silk*, at the present term (11 Pet. 1), arising under the compact between Pennsylvania and Virginia. Adopting the principles of the common law, laid down in *Penn* v. *Baltimore*, that where boundaries are doubtful, it is a proper case for an agreement, which being entered into, the parties could not resort back to the original rights between them (1 Ves. sen. 452), and those of the law of nations, laid down in the opinion of the court in this case, it follows— That the only questions for our judicial cognisance, by appellate power, are those which arise on the construction of the compact, and the locality of the boundary as agreed and declared by a compact ratified by congress, to be decided by the same principles as a question arising on a cession by a state of territory to the United States, of which the case of *Handly's Lessee* v. *Anthony* (5 Wheat. 374) is an illustration. That case arose on the cession by Virginia to the United States, of the North-western territory; one party claimed under Kentucky,

the other under the United States, by a grant of land in Indiana; the question of the boundary between these states, came up collaterally, and was decided on the terms and construction of the act of cession, and the compact between Virginia and Kentucky. 5 Wheat. 375.

But in the case of *Foster* v. *Neilson* (2 Pet. 253), where the title to the land in dispute turned upon the boundaries of the cession of Louisiana by Spain to France, and by France to the United States, it was otherwise. The land was situated south of lat. 31° N., west of the Perdido, east of the Mississippi, and north of the Iberville; being part of what the United States had long contended was ceded as part of Louisiana, and which Spain insisted was retained by her as part of West Florida; one party claimed by a Spanish grant made after the cession, the other by mere possession, on the ground, that the Spanish grant was void. This court held, that the question of boundary was one which must be acted on by the political department of the government, and "that it was the province of the court to conform its decision to the will of the legislature, if that will has been clearly expressed." 2 Pet. 307. That case presented the precise question on which this turns—"to whom did the country between the Iberville and Perdido rightfully belong, when the title now asserted by the plaintiffs was acquired?" Ibid. 300. Had there been a compact by the two governments, declaring that the land belonged to one of them or its grantees, or the boundary not contested, it would have been purely a judicial question between individuals, as to which had the title; but as it depended on a boundary contested by both nations, the court was not competent to settle it. This principle was affirmed in the *United States* v. *Arredondo*, which turned on the construction of the treaty with Spain, ceding the Floridas to the United States; and this court held, that without an act of congress, submitting the question to the decision of the court, as a judicial one, it would have been a political question, on which congress must act, before it was cognisable by the court. 6 Pet. 710, 735, 743.

Now, as the necessary consequence of over-riding the compact, is to throw the parties back to the original right of the different states, to revive an old controversy between them about their boundaries, and to make the title of the parties depend on the very question which, in the case of *Foster* v. *Neilson*, this court declared itself incompetent to decide—"to whom did the country between latitude 36° 30′ and Walker's line, belong rightfully, when the title, now asserted by the plaintiffs, was acquired?" my answer is, that was a political question between the two states, who have settled it by a compact, in virtue of the requisite sanction of the constitution to the exercise of a power reserved to the states; and that compact declares, that the grants of lands in this territory, made in virtue of Virginia warrants "shall be considered as rightfully entered or granted." And being fully convinced that I am bound to take this compact as the rule for my judgment, the law of this case, the test by which the rights of parties are to be settled, and finding in it abundant authority for affirming the judgment of the circuit court, I should feel, that by any further consideration of the points made in the argument of the plaintiffs in error, it might be inferred, that I entertained doubts of the soundness of the principles on which my opinion is founded. These principles are, in my judgment, as unquestion-

able as they are fundamental, and cannot be impaired without great danger to the harmony, if not the permanency of the Union.

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 now here 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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*213] *Williams Waters *v.* Merchants' Louisville Insurance Co.

Marine insurance.—Proximate cause of loss.

The steamboat Lioness was insured on her voyages on the western waters, particularly from New Orleans to Natchitoches on Red river, and elsewhere, the Missouri and Upper Mississippi excepted, for twelve months; one of the perils insured against was fire; the vessel was lost by the explosion of gunpowder. On the trial of the cause, the judges of the circuit court of Kentucky were divided in opinion, on the following questions, which were certified to this court: 1. Does the policy cover the loss of the boat by a fire, caused by the barratry of the master? 2. Does the policy cover a loss of the boat by fire, caused by the negligence, carelessness or unskilfulness of the master and crew of the boat, or any of them? 3. Is the allegation of the defendants in these pleas, or any of them, to the effect that the fire by which the boat was lost, was caused by the carelessness or unskilful conduct of the master and crew, a defence to this action? 4. Are the pleas of the defendant, or either of them, sufficient?

A loss by fire, when the fire was directly and immediately caused by the barratry of the master and crew, as the efficient agents, when the fire was communicated, and occasioned by the direct act and agency of the master and crew, intentionally done from a barratrous purpose, is not a loss within the policy, if barratry is not insured against.

If the master or crew should barratrously bore holes in the bottom of a vessel, and she should thereby be filled within water and sink, the loss would probably be deemed a loss by barratry, and not by a peril of the seas, or of rivers, though the water should co-operate in producing the sinking.

The doctrine, as applied to policies against fire on land, has, for a great length of time, prevailed, that losses occasioned by the mere fault or negligence of the assured, or his servants, unaffected by fraud or design, are within the protection of the policy, and as such, are recoverable from the underwriters; this doctrine is fully established in England and America.

It is a well-established principle of the common law, that in all cases of loss, we are to attribute it to the proximate cause, and not to the remote cause; this has became a maxim to govern cases arising under policies of insurance.

In the case of the Columbia Insurance Company *v.* Lawrence, 10 Pet. 507, this court thought, that in marine policies, whether containing the risk of barratry or not, a loss, whose proximate cause was a peril insured against, is within the protection of the policy, notwithstanding it might have been occasioned, remotely, by the negligence of the master and mariners; the court have seen no reason to change that opinion.[2]

As the explosion on board the Lioness was caused by fire, the fire was the proximate cause of the loss.

If taking gunpowder on board a vessel insured against fire, was not justified by the usage of the trade, and therefore, was not contemplated as a risk, by the policy, there might be great reason to contend, that, if it increased the risk, the loss was not covered by the policy.

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[1] Reported below, in 1 McLean 275.

[2] American Ins. Co. *v.* Insley, 7 Penn. St. 223; Phœnix Fire Ins. Co. *v.* Cochran, 51 Id. 143; Mathews *v.* Howard Ins. Co., 11 N. Y. 9. The negligence or carelessness of a competent master does not amount to barratry. Stowe *v.* Atlantic Mutual Ins. Co. 63 N. Y. 77.