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REPORTS OF CASES

ARGUED AND ADJUDGED

IN THE

SUPREME COURT

OF THE

UNITED STATES,

JANUARY TERM 1839.

BY RICHARD PETERS,

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

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EDITED, WITH NOTES AND REFERENCES TO LATER DECISIONS,

BY

FREDERICK C. BRIGHTLY,

AUTHOR OF THE "FEDERAL DIGEST," ETC.

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THE HON. THOMAS TODD,

FORMERLY CHIEF JUSTICE OF THE STATE OF KENTUCKY, AND LATE ONE OF THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

A BIOGRAPHICAL notice of the late Mr. Justice TODD has been procured for the reporter, by the kindness of an eminent and much valued judicial friend.

It has long been desired to insert in the reports of the decisions of the supreme court, a memoir of the life of one known and esteemed for every private virtue, and by every judicial qualification and attainment. This was due to the state of his birth, the state in which he lived, distinguished and honored ; and where he died, deeply lamented by all. Such a memoir is now presented. Part of it was originally inserted in "The Western Monthly Magazine ;" and part of it has been written by the judicial associate and friend of Mr. Justice TODD ; who shared in his high official labors, and who holds his memory in sacred regard.

OBITUARY.

THOMAS TODD, youngest son of Richard Todd, was born on the 23d of January 1765, in the county of King and Queen, on York river, in the state of Virginia. His father was descended from one of the most respectable families in the colony ; his ancestors being among the early emigrants from England ; his mother was Elizabeth Richards. At the age of eighteen months, his father died, leaving a considerable estate ; which, by the laws of primogeniture of that day, descended to the eldest son, William, afterwards high sheriff of Pittsylvania county, in that state. This event rendered it necessary that his mother should exert herself to provide for the support and education of her orphan son. She repaired, for this purpose, to Manchester, opposite to Richmond ; and by the proceeds of a boarding-house, under her care and management, she was enabled to give, at her death in 1776, a handsome patrimony to her son, in the care of his guardian and her executor, Dr. McKenzie, of that place. By the aid of his friend, Thomas Todd received a good English education, and advanced considerably in a knowledge of the Latin language, when his prospects were clouded by the unexpected embarrassment of his guardian, which terminated in the loss of the patrimony bequeathed him by his mother.

At a tender and unprotected age, he was again thrown upon the world, to depend, for his support, education and character, upon his own efforts.

To these contingencies, which seemed at the time to be remediless misfortunes, may be traced that energy and enterprise which afterwards signalized his character. During the latter period of the revolutionary war, he served a tour of duty for six months as a substitute ; and often in after-life referred to the incident, as being the first money he had ever earned. He was afterwards a member of the Manchester troop of cavalry, during the invasion of Virginia by Arnold and Philips. He was shortly afterwards invited by his relation, the late Henry Innes, of Kentucky, who was a cousin of his mother, to reside in his family, then in Bedford county. By his friendship at that interesting period (a friendship cemented by forty years of affectionate intercourse through life), he obtained a knowledge of surveying and of the duties of a clerk. In 1785, Judge Innes visited Kentucky ; and having resolved to remove his family, the following year, committed them to the care of his young friend, who arrived at Danville in the spring of 1786. Mr. Todd's pecuniary means were so limited, that whilst residing in the family of Judge Innes, at Danville, he was engaged during the day in teaching the daughters of his friend, and at night, prosecuting the study of the law by fire-light. This was an interesting period in the history of Kentucky ; the people were actively engaged in measures to procure a separation from the parent state ; and such was the opinion entertained of his capacity for business, that he was chosen clerk of all the conventions held from that period until 1792, for the purpose of erecting the former into an independent member of the Union.

He commenced the practice of law, very soon after he came to the state, and made his first effort at Madison old court-house. His horse, saddle and bridle, and 37½ cents in money, constituted his whole means, at the commencement of the court ; at the close of the term, he had made enough to meet his current expenses, and returned to Danville with bonds for two cows and calves, the ordinary fees of that day. The high judicial stations he afterwards occupied, with such reputation to himself, and such benefit to the country, are a proud commentary on the spirit of our institutions ; and form the noblest incentives to industry and perseverance in the prosecution of a profession.

Mr. Todd was appointed clerk of the federal court for the district of Kentucky, the duties of which he performed until the separation from Virginia ; when he was appointed clerk of the court of appeals, under the new constitution. He held this office, until December 1801, when he was appointed by Governor Garrard fourth judge of the court of appeals ; an office created, it is believed, with the special object of adding some younger man to the bench, already filled by judges far advanced in life. In this station, he continued, until the resignation of Judge Muter, in 1806, when he was appointed, during the administration of Governor Greenup, to be Chief Justice. During the session of congress of 1806–7, the increase of business and of population in the western states, and the necessity of bringing into the supreme court some individual versed in the peculiar land law of those states, induced congress to extend the judiciary system, by consti-

tuting Kentucky, Tennessee and Ohio, as the seventh circuit, and adding another member to the supreme court. In filling this new office, Mr. Jefferson adopted a mode somewhat different from that pursued in later times. He requested each delegate from the states composing the circuit to communicate to him a nomination of their first and second choice. Judge Todd was the first or second upon the nomination of every delegate, although to some of them he was personally unknown. His appointment was the first intimation to him that he had been thought of for the office. In this high and arduous station, he continued until his death, February 7th, 1826.

In 1791, before the separation, he was commissioned by Governor Randolph of Virginia, to be captain of a company of cavalry, in Lincoln county; and in May of that year, he was appointed a lieutenant of a troop of cavalry, of which Major Thomas Allen, late clerk of Mercer county, was captain, and the Hon. James Brown, late minister to France, was a lieutenant, upon the campaign led against the Wea towns, on the Wabash, by General, afterwards Governor, Scott.

In June 1792, soon after the organization of the state, he was commissioned by Governor Shelby to be lieutenant-colonel of the militia of Lincoln county; and he was elected, without opposition, to the office of clerk of the House of Representatives of the General Assembly, for the first fifteen years of the state government. These various offices, civil and military, were indications of the estimation in which his character was held by his contemporaries; and are the more decided, as it is known that he never solicited any of them. It was a maxim with him so to act, that office should seek him—not that he should seek office.

In 1788, he married Elizabeth Harris, a niece of William Stewart, from Pennsylvania, an early adventurer to Kentucky, who fell in the battle of the Blue Licks. Five of their offspring, three sons and two daughters, arrived to maturity; only two survived him, the youngest daughter and the second son, Col. C. S. Todd, advantageously known as an officer of the late war, and as the first public agent of the United States in Colombia, South America. In 1811, Mrs. Todd died, and in 1812, Judge Todd married the widow of Major George Washington, a nephew of General Washington, and the youngest sister of Mrs. Madison, wife of the late President. He left one daughter and two sons by this marriage.

Mr. Todd possessed in an eminent degree the respect and esteem of his friends. His stability and dignity of character, united with manners peculiarly amiable, left a deep impression on all with whom he had intercourse. His deportment on the bench, as well as in the social circle, secured him universal veneration. The benevolence of his character was manifested in the patronage and support he extended to many indigent young friends and near relations, whole families of whom he advanced in life, by his friendly influence and means. There is one incident of this sort, which, being connected in some degree with his official career, deserves to be mentioned.

In 1805–6, some influential members of the legislature of Kentucky pre-

vailed on Justice Muter to resign, upon an assurance of being allowed a pension during life. He had devoted his property, and the prime of his days, to his country, in the revolutionary war ; and was now in indigent circumstances, and far advanced in life. The pension was granted by the legislature, at the next session, but repealed at the second session after the grant. In the meantime, Judge Todd had succeeded his old friend as chief justice ; and about the time the legislature repealed the pension, he was appointed a judge of the supreme court of the United States, with a salary more than double that of the chief justice of Kentucky. He proposed to his friend Muter to come and reside with him ; especially, as a better adverse claim had deprived Muter of his home. The offer was accepted ; and Muter, who had commanded a ship of war, during the revolution, with the rank of colonel ; and who had, without reproach, presided in the civil tribunals of the state, from its early settlement, spent the remainder of his days upon the bounty of Judge Todd. As a testimony of his gratitude and affection, Muter, having no family, made Todd his heir and residuary legatee, though, at the time, his debts greatly exceed his available means. But, as though Heaven had decreed, that an act so generous in an individual, when contrasted with the ingratitude of the state, should not go unrewarded, even in this world, the revolutionary claims of Judge Muter have been acknowledged by congress, and the proceeds have descended to the widow and younger children of Judge Todd.

The land-law of Kentucky, originally an act of the assembly of Virginia of 1789, forms a peculiar system, and has been established chiefly upon principles of law and equity contained in decisions of the appellate court. To this result, the labors of Judge Todd eminently contributed, as well in the state court as in the supreme court of the United States. His opinions had a prevailing influence in the decisions of the state authorities ; and his decisions in the circuit court were rarely reversed in the supreme court at Washington—an exalted tribunal, whose character is illustrated by the genius and attainments of Marshall, Story, Washington and Trimble. He was cherished with peculiar regard by his associates in the state and national tribunals ; his judgment and acquaintance with the principles of the land-law having, in one instance in particular (the Holland Land Company of New York), rescued the reputation of the supreme court from the effects of an erroneous decision, which, at one time, nearly all of the judges would have pronounced, against his advice.

Mr. Todd entered upon the duties of judge of the supreme court, at the age of forty-two ; the station required an experienced head upon a younger man's shoulders. He possessed, at that time, the abilities to act under the system which made it the duty of the judge to sit twice a year in the three western states, and once a year at Washington ; but no constitution could long survive under the operation of this incongruous system ; and the last years of Judge Todd were worn down with the duties of his office. A dyspepsy which impaired his general health, gradually reduced his

strength ; and for the last two years of his life, he rarely attended the court.

Judge Todd's person was finely proportioned, and his face a model of beauty and intelligence. The soundness of his judgment, the dignity of his manners, and the probity of his conduct, made him the esteemed associate of Shelby, and other patriotic statesmen who adorned the early annals of the state ; as well as of those who, in latter days, have shed imperishable lustre on the genius and character of the first republic in the wilderness of the great west. Posterity will long venerate the name of a citizen, who, among such contemporaries, by the force of his talents and the integrity of his heart, rose to the first offices of his country.

"Mr. Justice Todd possessed many qualities admirably fitted for the proper discharge of judicial functions. He had uncommon patience and candor in investigation ; great clearness and sagacity of judgment ; a cautious but steady energy ; a well-balanced independence ; a just respect for authority, and at the same time, an unflinching adherence to his own deliberate opinions of the law. His modesty imparted a grace to an integrity and singleness of heart, which won for him the general confidence of all who knew him. He was not ambitious of innovations upon the settled principles of the law ; but was content with the more unostentatious character of walking in the trodden paths of jurisprudence : *super antiquas vias legis.* From his diffident and retiring habits, it acquired a long acquaintance with him, justly to appreciate his juridical as well as his personal merits. His learning was of a useful and solid cast ; not perhaps as various or as comcomprehensive as that of some men ; but accurate, and transparent, and applicable to the daily purposes of the business of human life. In his knowledge of the local law of Kentucky, he was excelled by few ; and his brethren drew largely upon his resources, to administer that law, in the numerous cases which then crowded the docket of the supreme court from that judicial circuit. What he did not know, he never affected to possess ; but sedulously sought to acquire. He was content to learn, without assuming to dogmatize. Hence, he listened to arguments, for the purpose of instruction, and securing examination ; and not merely for that of confutation or debate. Among his associates, he enjoyed an enviable respect, which was constantly increasing as he became more familiarly known to them. His death was deemed by them a great public calamity ; and in the memory of those who survived him, his name has ever been cherished with a warm and affectionate remembrance.

No man ever clung to the constitution of the United States with a more strong and resolute attachment. And in the grave cases which were agitated in the supreme court of the United States, during his judicial life, he steadfastly supported the constitutional doctrines which Mr. Chief Justice Marshall promulgated, in the name of the court. It is to his honor, and it should be spoken, that, though bred in a different political school from that of the chief justice ; he never failed to sustain those great principles of

constitutional law on which the security of the Union depends. He never gave up to party, what he thought belonged to the country.

For some years before his death, he was sensible that his health was declining, and that he might soon leave the bench; to whose true honor and support he had been so long and so zealously devoted. To one of his brethren, who had the satisfaction of possessing his unreserved confidence, he often communicated his earnest hope that Mr. Justice Trimble might be his successor; and he bore a willing testimony to the extraordinary ability of that eminent judge. It affords a striking proof of his sagacity and foresight; and the event fully justified the wisdom of his choice. Although Mr. Justice Trimble occupied his station on the bench of the supreme court for a brief period only; yet he has left on the records of the court enduring monuments of talents and learning fully adequate to all the exigencies of the judicial office. To both these distinguished men, under such circumstances, we may well apply the touching panegyric of the poet:

"Fortunati ambo!———
Nulla dies unquam memori vos eximet Ævo."

JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES,

DURING THE PERIOD OF THESE REPORTS.

Hon. ROGER B. TANEY, Chief Justice.

" JOSEPH STORY,
" SMITH THOMPSON,
" JOHN MCLEAN,
" HENRY BALDWIN,
" JAMES M. WAYNE,
" PHILIP P. BARBOUR,
" JOHN CATRON.
" JOHN MCKINLEY,

} Associate Justices.

FELIX GRUNDY, ESQ., Attorney-General.

WILLIAM T. CARROLL, Clerk.

ALEXANDER HUNTER, Marshal.

The cases of Downes *v.* Church; Williams *v.* Suffolk Insurance Co.; Wilcox *v.* Hunt; Burton *v.* Smith; Anthony *v.* Butler; Story *v.* Livingston; Meredith *v.* United States; Carr *v.* Hoxie; New England Insurance Co. *v.* The Brig Sarah Ann; Bank of Augusta *v.* Earle; Bagnell *v.* Broderick; and Ex parte Myra Clarke Whitney, were decided after the 1st of March 1839. From that day, Mr. Justice Thompson was absent from the court, in consequence of indisposition in his family.

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OF THE

NAMES OF THE CASES REPORTED IN THIS VOLUME.

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CASES DETERMINED

IN THE

SUPREME COURT OF THE UNITED STATES.

JANUARY TERM, 1839.

CLEMENT WOODWARD, Plaintiff in Error, *v.* JAMES BROWN AND SARAH JANE, his Wife, Defendants in Error.

Amendment in appellate court.—Landlord and tenant.—Notice to quit.—Ejectment.

Where by a misprision of the clerk of the circuit court, the judgment, in a case brought up by a writ of error, had not been entered according to the declaration, the supreme court allowed an amendment to be made, by the entry of the judgment, without awarding a *certiorari* to the circuit court. This was done in a case which had been brought up by a writ of error to the previous term of the court.

It is a well-established principle of law, that a tenant cannot dispute the title of his landlord; and where the marshal of the district of Columbia, having a writ of *habere facias possessionem* for the west half of a lot in the city of Washington, took possession of the east half of the lot, and the tenant of the persons who claimed to be the owners of the lot, attorned to the plaintiffs in the writ, such attornment was without authority, and void.

A tenant who disclaims the landlord's title, is not entitled to notice to quit and deliver up possession.[1]

In an action of ejectment, the day of the ouster need not be alleged; it is sufficient, that it be laid after the demise.

The specific date, under a *videlicet*, is not necessary, in a declaration in ejectment, and may be rejected as surplusage; if it sufficiently appear on the face of the declaration, that the ouster was after the entry under the several demises.

The rule is well established, that when the right of entry is by ouster of the title of the wife, the demise may be laid in the name of the husband, or in the names of the husband and wife.

ERROR to the Circuit Court of the District of Columbia, and county of Washington.

Brent, for the defendants in error, moved for a writ of *certiorari* to the clerk of the circuit court of the county of Washington, on the allegation of a diminution of the record of the cause in that court. The clerk, had, by

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[1] A tenant who purchases a hostile title is not entitled to notice to quit. Sharpe *v.* Kelly, 5 Den. 431. And see Eysaman *v.* Eysaman, 24 Hun 430.

a misprison, made an error in not entering the judgment, according to the declaration.

Coxe, for the plaintiff in error, objected to the allowance of the motion. The case came up to the last term of this court; and it is now too late to
*2] issue the *certiorari* asked for. The error cannot be *amended without an application to the circuit court for authority to make the amendment. The clerk cannot, therefore, send up an amended record.

Brent.—In a writ of error in the king's bench in England, amendments of the record can be made after the writ issued. He cited 5 Burr. 2730. 2 Str. 908.

THE COURT allowed the amendment to be made in this court.

The case, as stated in the opinion of the court, was as follows: An action of ejectment was commenced by the defendants in error against the plaintiffs, to recover possession of the eastern half of lot No. 2, in square No. 348, in the city of Washington. Several distinct demises were laid in the declaration, of different dates and for different periods of time. One of the demises was in the name of Jane Stinger, while she was single, but now Sarah Jane Brown, wife of the said James Brown; and another, in the names of James Brown and Sarah Jane Brown, his wife. The general issue was pleaded, and the jury found a general verdict of guilty.

On the trial, the plaintiffs proved, that up to the 22d November 1834, the defendant was the tenant of Sarah Jane Stinger, who intermarried with the plaintiff, Brown, in the fall of the year 1835. That after November 1834, he refused to pay rent, and claimed to hold possession of the premises as tenant of the Bank of the United States. That at the time the premises were rented to the defendant, the said Sarah Jane was seised and possessed of the same in fee-simple. And that about the time of his refusal to pay rent, notice was given to the defendant to quit; and also afterwards, in January 1835. Upon this evidence the plaintiffs rested their case; and the defendant's counsel moved the court to instruct the jury, that they were not entitled to recover on the evidence, which instruction the court refused to give; and the defendant excepted to this opinion of the court.

The defendant proved, that the deputy-marshal, having a writ of *habere facias possessionem* against the defendant, for the west half of said lot, but supposing the writ to be for the east half, of which the defendant was in possession, he was required by the deputy-marshal to surrender the possession of the east half of the lot to the agent of the Bank for the United States; and he did surrender the possession to him, and the defendant agreed to hold possession under the bank. But the court overruled this evidence, to which opinion of the court the defendant also excepted." The writ of error was prosecuted by the defendant in the circuit court.

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

The counsel for the *plaintiff* in error presented two questions for the con-
*3] sideration of the court on the first bill of exceptions. *1st. Whether in case of a tenancy from month to month, where the tenant held over after the expiration of the tenancy, and continued so to hold, without

paying rent, for a period of fourteen months, the notice to quit at the expiration of the ensuing month was sufficient. 2d. Whether such notice as was set forth in the bill of exceptions, by an agent whose appointment was merely oral, and the notice verbal, was sufficient.

On the second bill of exceptions, the plaintiff's counsel objected to the ruling of the circuit court, by which the objection of the defendants in that court to evidence offered by the plaintiff was refused. The defendant, to sustain the issue on his part, produced a competent witness, who testified, that, on the 22d day of November 1834, he, as the deputy-marshal of this district, went to the premises mentioned in the said declaration, then in the occupancy of the said defendant, with a writ of *habere facias possessionem* against the said defendant, in company with W. W. Corcoran, the agent of the Bank of the United States, named as the lessor of the plaintiff in said writ, and which was supposed by the said parties to comprehend, but did not, in fact, comprehend, the premises mentioned in the declaration; that it was then and there represented to the defendant, by the said agent and the marshal, that the latter had such a writ for said premises, and the said defendant, supposing it to be such a writ as represented, voluntarily and peaceably surrendered the possession of said premises to the said agent of the said bank, who indorsed upon the said writ and acknowledgement of the delivery of the possession of the said lot and premises therein described to him as such agent; and afterwards, on the same day, the said defendant entered into an agreement to hold the said premises in the declaration mentioned, as the tenant of the said Bank of the United States; and the defendant then offered further to prove, that he, the said defendant, from the 22d November 1834, held, and still holds, possession of the said premises, under the said agreement last named, and that the said Bank of the United States then had, and now has, a good and lawful legal title to the said premises; to the admission of the said testimony, so offered to be given as aforesaid, the plaintiff, by his counsel, objected, and the court sustained the objection, and refused to permit such testimony to be given.

Brent and *Brent*, for the defendants in error, contended: 1. That the possession of the premises, claiming to hold in fee-simple, by the plaintiffs, was *primâ facie* evidence of a fee. *Ricard* v. *Williams*, 7 Wheat. 59. The bill of exceptions shows the possession of the plaintiffs below, and that they held in fee. 2. Notice to quit is not necessary, when the tenant disclaims. *Catlin* v. *Washburn*, 3 Vt. 25; *Jackson* v. *Wheeler*, 6 Johns. 272; *Jackson* v. *McLeod*, 12 Ibid. 182; Cowp. 621; Bull. N. P. 96; 1 Wheat. Selw. 585; 5 Am. Com. *Law 43–4; 3 Pet. 45. But if, in a case like this, notice to quit is necessary, it was given. 3. The defendant, now the plaintiff in error, being tenant, could not dispute the title of his landlord. *Jackson* v. *McLeod*, 12 Johns. 182; 3 Ibid. 223, 504; *Blight's Lessee* v. *Rochester*, 7 Wheat 535; *Willison* v. *Watkins*, 3 Pet. 47; 5 Am. Com. Law, 41, 42; 1 Wheat. Selw. 566–7. 4. The plaintiff in error cannot, by a constructive ouster and attornment, set up an adverse title; and if he could, the attornment, through mistake, is void. *Love* v. *Dennis*, 1 Harper (S. C.) 70; 1 Marsh. 558; 6 Taunt. 206; 8 Eng. Com. Law 237, 239; 9 Ibid. 10; 13 Ibid. 58–9; 3 Pet. 43; *Wilkins* v. *Mayor*, 6 Har. & Johns. 533; 1 T. R. 760; 3 Ibid. 14; 9 Ibid. 62; 2 Stark. on Evid. 532. 5. The bank of the

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United States cannot be received in this case to defend the title of the tenant to the plaintiff, in the circuit court. 1 Chitty's Plead. 134 ; 3 Com. Dig. 579, 582 ; 4 Maule & Selw. 347. 6. The demise by Brown and wife is well laid. 2 Chitty's Plead. 878, note *t.*

McLean, Justice, delivered the opinion of the court. After stating the case :—The counsel for the plaintiffs contend, that the ruling of the court was erroneous, and that the declaration is essentially defective. It appears from the bill of exceptions, that the plaintiffs not only proved title, but also that the defendant entered into the possession of the premises under their title, as tenant. These facts being proved, the court very properly refused to instruct the jury, as stated in the first bill of exceptions, that the plaintiffs were not entitled to recover.

And there is no doubt that the court properly excluded the evidence stated in the second bill of exceptions. The writ of possession, which is admitted to have been issued in pursuance of the judgment, did not call for the east half of the lot, of which the defendant was in possession, and the marshal had no right to change his possession of this lot. And the attornment to the agent of the bank was voluntary, and without authority. The well-established principle, therefore, that a tenant shall not be permitted to dispute his landlord's title, excludes the defendant from setting up the title of the bank.

The objection as to the sufficiency of the notice to the defendant cannot be sustained. He had disclaimed his landlord's title and attorned to the bank. Under such circumstances, he was not entitled to notice. 3 Pet. 48; 1 Wheat. Selw. 585. But if notice to quit had been necessary, it was given; and, as appears from the bill of exceptions, all objection to its "sufficiency and legality" was waived by the defendant.

The declaration, it is insisted, is defective in several particulars.
*5] *That the demises are inconsistent, and that the ouster is alleged two years before the last demise. On the part of the plaintiff, it is intimated, that as the case is brought up on bills of exception, the defects in the declaration are not before the court for consideration. The assignment of errors is not limited to the bills of exception, but may embrace any errors which appear on the face of the record.

The last demise is stated to have been made in 1836, and the ouster alleged, "by virtue of which said several demises, the said Richard entered into all and singular the premises aforesaid, with the appurtenances thereunto belonging, and was thereof possessed ; and the said Richard being so thereof possessed, the said John Doe, afterwards, to wit, on the 25th day of November, in the year of our Lord 1836, with force and arms," &c. The day of the ouster need not be alleged, and it is sufficient if laid after the demise. 2 Chit. 881 ; 1 Wheat. Selw. 590. In this declaration, it is averred, that the plaintiff entered under the said several demises, and being in possession, the said John Doe afterwards, to wit, on, &c. The specific date under a *videlicet* was unnecessary, and may be rejected as surplusage ; it sufficiently appearing on the face of the declaration, that the ouster was after the entry under the several demises.

There is no repugnancy in the several demises laid : one, in the name of Jane Stinger, was before the marriage, and the last demise being subsequent

to the marriage, it is well laid in the names of the husband and wife. The rule is well established, that where the right of entry is by virtue of the title of the wife, the demise may be laid in the name of the husband, or in the names of both husband and wife. 2 Chit. 878.

It is not perceived, how the demises as laid in this declaration, can prejudice the rights of the defendant in an action for the mesne profits. They will enable the lessor of the plaintiff to recover the profits from the time the defendant refused to pay the rent, and this he is entitled to. Upon the whole, we think there is no error in the proceedings of the circuit court, and the judgment is, therefore, affirmed, with costs.

Judgment affirmed.

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*Paulina S. Whiting and Helen B. Whiting, Heirs-at-Law of Ruggles Whiting, deceased, James Richardson, Administrator of Ruggles Whiting, and Enfield Johnson and Gabriel J. Johnson, Appellants, *v.* The Bank of the United States. [*6

Chancery practice.—Bill of review.

According to the course of practice in the courts of the United States, in chancery cases, an original decree is to be deemed recorded and enrolled, as of the term in which the final decree was passed.[1] A bill which seeks to have alleged errors revised, for want of parties, or for want of proper proceedings after the decree against his heirs, after the decease of one of the parties, is certainly a bill of review, in contradistinction to a bill in the nature of a bill of review; which lies only where there has been no enrollment of the decree.[2]

An original bill, in the nature of a bill of review, brings forward the interests affected by the decree, other than those which are founded in privity of representation.

In England, the decree always recites the substance of the bill and answer, and the pleadings, and also the facts on which the court founds its decree: but in America, the decree does not, ordinarily, recite these, and, generally, not the facts on which the decree is founded; with us, the bill and answer, and other pleadings, together with the decree, constitute what is properly considered as the record.

The bill of review must be founded on some error apparent upon the bill, answer, and other pleadings and decree; a party is not at liberty to go into the evidence at large, in order to establish an objection to the decree, founded on the supposed mistake of the court in its own deductions from the evidence.[3]

No party to a decree can, by the general principles of equity, claim a reversal of a decree, upon a bill of review, unless he has been aggrieved by it; whatever may have been his rights to insist on the error, at the original hearing, or on an appeal.

A decree of foreclosure of a mortgage and sale are to be considered as the final decree, in the sense of a court of equity; and the proceedings on the decree are a mode of enforcing the rights of the creditor, and for the benefit of the debtor; the original decree of foreclosure is final on the merits of the controversy.[4] If a sale is made, after such a decree, the defendant not having appealed, as he had a right to do, the rights of the purchaser would not be overthrown or invalidated, even by a reversal of the decree.

After a decree of foreclosure of a mortgage and a sale, and the death of the defendant after the decree, it is not necessary to revive the proceeedings against the heirs of the deceased party, before the a sale of the property can be made.

Whiting *v.* United States Bank, 1 McLean 249, affirmed.

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[1] Dexter *v.* Arnold, 5 Mason 303; Jenkins *v.* Eldredge, 1 W. & M. 61.

[2] Massie *v.* Graham, 3 McLean 41; Mauro *v.* Ritchie, 3 Cr. C. C. 147; Jenkins *v.* Eldredge, 3 Story 299.

[3] Dexter *v.* Arnold, 5 Mason 303; Putnam *v.* Day, 22 Wall. 60; Buffington *v.* Harvey, 95 U. S. 89; Thompson *v.* Maxwell, Id. 397.

[4] Bronson *v.* Railroad Co., 2 Black 524. Where the whole law of a case is settled by the decree, and nothing remains to be done, unless a new application shall be made at the foot of the decree, it is a final one. French *v.* Shoemaker, 12 Wall. 86.

APPEAL from the Circuit Court of Kentucky. The case, as stated in the opinion of the court, was as follows :

This was the case of a bill, purporting to be a bill of review. The substantial facts, as they appeared on the record, were as follows : Gabriel J. Johnson, being the owner in remainder of a five acre lot, No. 9, in Louisville, Kentucky, of which his mother, Enfield Johnson, was tenant for life, under the will of his father, and being also the owner in fee, by another title, of another piece of land adjoining the five acre lot, a part of the slip No. 2, on the 12th day of November, A. D. 1818, conveyed the same in mortgage to James D. Breckenridge, to secure the latter for his indorsements of three certain notes of Johnson to Ruggles Whiting, each for $4000, and for any other notes and contracts which Breckenridge should thereafter make, execute, accept or indorse for the benefit of Johnson. Afterwards, on the
*7] 9th day of August, A. D. 1820, *Johnson, and Breckenridge, as his surety, being indebted to the Bank of the United States in the sum of $9931.37, arrangements were made between them and Whiting, by which Whiting assumed the payment of the same debt, and gave his note therefor to the bank accordingly ; and as security for the due payment thereof, Johnson and his mother, Enfield Johnson, Breckenridge and Whiting, on the same day, executed a mortgage of the five acre lot and slip of land above mentioned to the Bank of the United States, reciting, among other things, the foregoing arrangement. The condition of the mortgage, among other things, stated, that it was agreed by the parties, that after the satisfaction of the said demands due by Whiting to the bank, and by Gabriel J. Johnson to Whiting, the estate, or the residue thereof, or any surplus in money, by the sale thereof, should be paid or conveyed to Enfield Johnson, or her assigns. The mortgage also contained a stipulation for the sale of the premises, to meet the payment of the debt due to the bank. In April 1823, the debt due and thus secured to the bank remaining unpaid, a bill for a foreclosure and sale was brought by the bank, in the circuit court of the United States for the district of Kentucky ; and to that bill Gabriel J. Johnson, Enfield Johnson and Whiting were made parties ; but Breckenridge was not made a party. At the November term of the circuit court, A. D. 1826, a decree of foreclosure of all the equity or right of redemption of the defendants in the mortgaged premises, was passed ; and a further decree, that the premises should be sold by commissioners. The sale took place accordingly ; the bank became the purchasers, and the sale was confirmed by the circuit court, at May term 1827. In the intermediate time between the original decree of foreclosure and the sale, viz., on the 26th of February 1827, Whiting died, in Massachusetts, leaving the plaintiffs in the present bill, Paulina Whiting and Helen B. Whiting, and one L. R. Whiting (since dead without issue), his children and heirs-at-law—who were then infants under age ; and the youngest, Helen, did not come of age until 1831.

The present bill was brought by Paulina Whiting and Helen B. Whiting, by James Richardson, administrator of Ruggles Whiting, and by Gabriel J. Johnson and Enfield Johnson, against the Bank of the United States ; and after stating the proceedings in the original suit upon the mortgage, and that the sale was made at a great sacrifice of the property, it relied on the following grounds of error in the proceeding, decree and sale

in the original suit. 1. That it was irregular and erroneous, to entertain the bill, and pronounce the decree for foreclosure and sale, without Breckenridge being made a party defendant. 2. That it was irregular and erroneous, to sell the property mortgaged, without a revival of the suit against the heirs of Whiting. 3. That it was unjust and oppressive, to sell in the manner and at the price at which the sale took place.

The answer of the bank denied all equity in the plaintiffs, and insisted, that the decree and sale were fair and just. It also denied, that *Whiting and Breckenridge had any title to the property; and [*8 insisted, that they joined in the mortgage merely to complete the arrangements made between Johnson and themselves. It also denied, that the death of Whiting was known at the time of the sale. It stated, that the property was, after the purchase by the bank, improved, and parts thereof sold to *bonâ fide* purchasers, for valuable considerations; and by reason of the improvements, and the extension of the city, parts of the grounds so sold were now among the most beautiful and densely-built parts of the city. The answer also stated, that Whiting died insolvent and deeply indebted to the bank, by certain other judgments and notes.

The case was argued by *Underwood*, at the bar, and by a printed argument submitted by *Lovering*, for the appellants; and by *Sergeant*, for the appellees.

For the *appellants*, Paulina and Helen Whiting, it was contended, they had an evident interest in the land. Being all infants at the death of their father, in February, and at the rendition of the last decree in May, they are within the exceptions of every statute of limitations operating, by direct or remote analogy, on this case; and their rights being joint, the disabilities must be removed, before the statute can run. In England, the limitation to bills of review is twenty years, and by the law of the United States, five years, on writs of error; which furnishes the criterion in this case. Act of the Legislature of Kentucky of 1816; *May* v. *Marsh*, 2 Litt. 148. The interest of Whiting in the land was also certain and evident, and material. The title to the bank was his only security for a part, at least, of his large demand, and the only consideration for his assumption of the debts of Johnson to the bank. The hopeless insolvency of Johnson rendered the security of the land the only means of indemnity for his responsibility for the debt of $10,000—the bank held the property as a trustee for his benefit.

The proceeding in the original cause was to be regulated by the laws of Kentucky; and as Breckenridge had an interest in the property, he should have been made a party. The record shows the existence of this interest, and he has been deprived of it by the decree of the court; and yet no notice of the proceedings has been given to him. By the laws of Kentucky, the assignee of a promissory note is liable to the assignor, if due diligence has not been used to collect the note; and Breckenridge was the indorser of notes given for a steamboat. Whiting had proceeded on the notes, against Johnson, and had obtained judgment against Johnson. He then made an agreement to discharge Johnson, holding Breckenridge liable on his indorsements. The mortgage was the means of indemnity to Breckenridge, and for this reason, he was a necessary party in the proceedings to foreclose. Any balance which should remain after paying the debt to the bank, would

have been applied for the relief of Breckenridge, on the notes of Johnson.
*9] *Morret* v. *Westerne*, *2 Vern. 663 ; *Haines* v. *Beach*, 3 Johns. Ch. 456 ; 4 Ch. Rep. 605 ; *Ensworth* v. *Lambert*, 6 Ibid. 450 ; 5 Wheat. 313 ; *Caldwell* v. *Taggart*, 4 Pet. 190 ; *Mayo* v. *Tompkies*, 6 Munf. 520.

The sale of the property, after the decree of foreclosure, was irregular, without reviving the proceedings against the representatives of Whiting. His death before the sale made it as necessary to make his heirs and representatives parties, as it was originally necessary to make Whiting a party. If it be said, that there was a right to sell under a levy made before the death of the defendant ; a number of authorities sustain the contrary position. The party defendant has a right to come in, after a sale, and object to it, if anything in the proceedings has been irregular or illegal. If the return to the order of sale had stated that all the parties were dead, would the court have confirmed the sale? By the laws of Kentucky, the defendant has a right to point out what part of the estate may be sold under an order of sale. The necessity of the presence of the defendant at the sale, is therefore apparent. Both Breckenridge and Whiting were dead, at the time of the sale, and yet the sale was confirmed. The decree confirming the sale should therefore be opened, and the parties now before the court should be allowed to come in and redeem. *Allen* v. *Belchers*, 2 Hen. & Munf. 595. Also, *Mackey* v. *Bell*, 2 Munf. 523 ; *Lovell* v. *Dana*, Ibid. 367 ; *Forman* v. *Hunt*, Ibid. 622.

The interest in the complainants is sufficient for a bill of review ; 4 J. J. Marsh. 500. This case shows that a bill of review will lie in such a matter as that now presented to the court. This case will be decided by the cases which have been decided in the courts of Kentucky. In Kentucky, bills of review are allowed for errors on the face of the record, and not in cases where the error is in the decree only. In Kentucky, a bill of review lies for any error in the proceedings in the case. There, the decree does not, as in England, set forth the whole matter in the cause ; and to deny a bill of review, on the principles which apply to the cases in the court of chancery in England, would be to deny it altogether. If this is the law, and it will not be denied, the record exhibits such errors as may be brought before the court by a bill of review. Breckenridge was a necessary party. He had a deep interest in the proceedings against the land.

No exception will lie to the bill, on the ground of the interference of the statute of limitations. It was filed within five years after the sale, and the termination of the minority of the children of Whiting. The law of the United States saves the rights of minors.

While it is admitted, that no case has been cited, in which a bill of review has been sustained, principally like that now before the court ; yet it is claimed, that in such a case, a writ of error would lie, if the proceedings had been at law ; and the bill of review in a chancery case is analogous to a writ of error in a case at law. The argument for the appellees is, that if,
*10] in the course of the proceedings *to sell the property, exceptions were not taken to their regularity, they cannot now be taken notice of by a bill of review. Yet writs of error are maintained in suits, on the ground of want of parties. The practice is to send back the proceedings, and allow amendments to be made which will bring the merits of the case forward. This is a similar case. 6 J. J. Marsh. 197. The heirs may come in and

show they were not parties to the sale, and may examine the manner in which it was conducted. This is essential to the proceedings in the case.

It is said, that the decree is final on the order of foreclosure of the mortgage; but this is erroneous. The proceedings in the case are not final, until the property is sold, and the proceedings of sale confirmed by the court. The equity of redemption continues, until the sale of the property and the ratification of the sale. A party who has a decree of foreclosure in his favor, in proceedings on a mortgage, cannot hold the property under the decree. By the decisions of the courts of Kentucky, a sale of the mortgaged premises must be made, and the residue of the proceeds of the sale, after payment of the debt, must be paid to the mortgagor. Suppose, part of the estate sold and the mortgage satisfied; does not the residue belong to the mortgagor? This shows a continuing interest in the property mortgaged, until the proceedings of sale are completed.

Sergeant, for the appellees.—The objections by the appellants are to the sale of the property. The first matter to be noticed is, that the interests in the land sold under the decree of foreclosure, have essentially changed. The property has been sold without warranty, and large and expensive buildings have been erected upon it. This is stated in the answer of the Bank of the United States to the complainants' bill; and in the agreed statement of facts. "It is admitted, that the bank pulled down a plain brick dwelling-house, as appears in said bill, No. 2, on said lot where Fifth Cross street, if extended, would run and extend said street to Walnut street, and they sold, as stated in the answer, to different persons, and the improvements stated of the Roman Catholic church and others, extension of the street and other improvements have been made and put upon the ground, and that the persons named are living on the lot aforesaid." All these persons have expended large sums in the improvement of the property, and the question before the court is, whether all that was done in 1827 shall be undone; and the parties be permitted to come in and redeem. This is what is asked. It is not the course of a court of equity, on a bill of review, to bring into review what has been decided. If such a bill were allowed, it would be in the nature of an answer, and bring again into controversy all that had been passed upon by the court. The *res adjudicata* is in equity as at law. The rule must be the same.

There are bills of review in the nature of original bills, as when *a person has not been made a party to the original proceedings, and [*11
may be affected by them. Mr. Breckenridge might in this case have come in, if he had been injured. There are two other descriptions of bills of review, in England. 1. A bill filed after the original bill has been enrolled, or there has been a final decree. 2. A bill filed when the decree has not been made, and before enrollment. The error must be apparent on the face of the decree, and the court cannot go into the evidence in the original proceedings. Story's Equity 334; Lord Eldon, in *Perry* v. *Phelips*, 17 Ves. 178. No persons but parties or privies can have a bill of review. Gilb. For. Rom. 186; *Slingsby* v. *Hale*, 1 Chan. Cas. 122. And none but those who have an interest in the proceedings can maintain such a bill; nor unless they suffer from the particular error assigned, or pointed out in the decree. *Webb* v. *Pell*, 3 Paige 368; Mitford (by Jeremy) 205. Other per-

sons in interest, and privies in title or estate, who are aggrieved by the decree, may have an original bill in the nature of a bill of review, so far as their own interests are concerned. Wyatt 98, 100; Mitf. 92.

Opportunities, during the proceedings on a bill in chancery, to interpose and correct errors, are always afforded, as by demurrer or by plea, when proper parties may be introduced. 16 Ves. 325; Cowp. 185; 3 Paige 222; 2 Ibid. 281. The court will then decide on the matters presented, and if necessary, there may be an amended bill, or a supplemental bill. But such a decision would not be an error in the decree, to entitle to a bill of review. This is much stronger where a party has been omitted and does not complain; as in the case before the court, in which Breckenridge is not a party.

But in addition to all these matters, Whiting had not a title to the property, nor any interest in it. It had never been his, and the proceeding to foreclose against him, divested every equitable claim he could set up. The decree of foreclosure was in the lifetime of Whiting, barring him and his heirs, and the statute of limitations began to run from the time of the decree. An execution levied does not stop by the death of the party. The sale did not require, as a pre-requisite to its proceeding and completion, that the heirs should be brought in.

Finally, the bill of review is barred by length of time. *Elmendorf* v. *Taylor*, 10 Wheat. 152. More than five years have elapsed from the decree to the filing of the bill of review. The statute, as has been said, began to run its course in the life of Whiting; and it was not stopped by disabilities occurring on his death.

Story, Justice, delivered the opinion of the court.—This is the case of a bill, purporting to be a bill of review. The substantial facts, as they appear on the record, are as follows: Gabriel J. Johnson, being the owner
*12] in remainder of a five acre lot *No. 9, in Louisville, Kentucky, of which his mother, Enfield Johnson, was tenant for life, under the will of his father, and being also the owner in fee, by another title, of another piece of land adjoining the five acre lot (a part of the slip No. 2), on the 12 day of November, A. D. 1818, conveyed the same in mortgage to James D. Breckenridge, to secure the latter for his indorsements of three certain notes of Johnson to Ruggles Whiting, each for $4000, and for any other notes and contracts which Breckenridge should thereafter make, execute, accept or indorse, for the benefit of Johnson. Afterwards, on the 9th day of August, A. D. 1820, Johnson, and Breckenridge, as his surety, being indebted to the Bank of the United States in the sum of $9941.37, arrangements were made between them and Whiting, by which Whiting assumed the payment of the same debt, and gave his note therefor to the bank accordingly; and as security for the due payment thereof, Johnson and his mother, Enfield Johnson, Breckenridge and Whiting, on the same day, executed a mortgage of the five acre lot and slip of land above mentioned, to the Bank of the United States, reciting, among other things, the foregoing arrangement.

The condition of the mortgage, among other things, stated, that it was agreed by the parties, that after the satisfaction of the said demands due by Whiting to the bank, and by Gabriel J. Johnson to Whiting, the estate,

or the residue thereof, or any surplus, if money, by the sale thereof, should be paid or conveyed to Enfield Johnson, or her assigns. The mortgage also contained a stipulation for the sale of the premises, to meet the payment of the debt due to the bank. In April 1823, the debt due and thus secured to the bank remaining unpaid, a bill for a foreclosure and sale was brought by the bank, in the circuit court of the United States for the district of Kentucky; and to that bill, Gabriel J. Johnson, Enfield Johnson, and Whiting were made parties; but Breckenridge was not made a party. At the November term of the circuit court, A. D. 1826, a decree of foreclosure of all the equity or right of redemption of the defendants in the mortgaged premises was passed; and a further decree, that the premises should be sold by commissioners. The sale took place accordingly; the bank became the purchasers; and the sale was confirmed by the circuit court, at the May term 1827. In the intermidiate time between the original decree of foreclosure and the sale, viz., on the 26th of February 1827, Whiting died, in Massachusetts, leaving the plaintiffs in the present bill, Paulina Whiting and Helen B. Whiting, and one L. R. Whiting (since dead without issue), his children and heirs-at-law; who were then infants under age; and the youngest, Helen, did not come of age until 1831.

The present bill is brought by Paulina Whiting and Helen B. Whiting, by James Richardson, administrator of Ruggles Whiting, and by Gabriel J. Johnson and Enfield Johnson, against the Bank of the United States; and after stating the proceedings in the original suit upon the mortgage, and that the sale was made at a great *sacrifice of the property, it relies on the following grounds of error in the proceedings, decree and sale in the original suit. 1. That it was irregular and erroneous, to entertain the bill and pronounce the decree for foreclosure and sale, without Breckenridge being made a party defendant. 2. That it was irregular and erroneous, to sell the property mortgaged, without a revival of the suit against the heirs of Whiting. 3. That it was unjust and oppressive, to sell in the manner and at the price when the sale took place. [*13

The answer of the bank denies all equity in the plaintiffs, and insists, that the decreee and sale were fair and just. It also denies, that Whiting or Breckenridge had any title to the property; and insists, that they joined in the mortgage merely to complete the arrangements made between Johnson and themselves. It also denies, that the death of Whiting was known at the time of the sale. It states, that the property was, after the purchase by the bank, improved, and parts thereof sold to *bonâ fide* purchasers, for valuable considerations; and by reason of the improvements and the extension of the city, parts of the grounds so sold are now among the most beautiful and densely built parts of the city. The answer also states, that Whiting died insolvent and deeply indebted to the bank, by certain other judgments and notes.

Such are the material facts and statements in the case, and upon them, so far at least as the present bill of review is concerned, there is no controversy between the parties. The prayer of the bill is, that the proceedings may be *revived* (as the word stands on the record, probably by mistake, for *reviewed*); and that the decrees and sale may be set aside; that the plaintiffs may be permitted to redeem; and for other relief.

Some suggestions have been made as to the nature and character of the

present bill—whether it is to be treated as a bill of review, or what other is its appropriate denomination. As the original decree which it seeks to review was, properly, according to our course of practice, to be deemed recorded and enrolled as of the term in which the final decree was passed, it is certainly a bill of review, in contradistinction to a bill in the nature of a bill of review; which latter bill lies only when there has been no enrollment of the decree. Being a bill brought by the original parties and their privies in representation, it is also properly a bill of review, in contradistinction to an original bill in the nature of a bill of review; which latter bill brings forward the interests affected by the decree other than those which are founded in privity of representation. The present bill seeks to revive the suit, by introducing the heirs of Whiting before the court; and so far it has the character of a bill of revivor. It seeks also to state a new fact, viz., the death of Whiting, before the sale; and so far it is supplementary. It is, therefore, a compound bill of review, of supplement, and of revivor; and it is entirely maintainable as such, if it presents facts which go to the merits of the original decree of foreclosure and sale.[1]

It has also been suggested at the bar, that no bill of review lies *14] *for errors of law, except where such errors are apparent on the face of the decree of the court. That is true, in the sense in which the language is used in the English practice. In England, the decree always recites the substance of the bill and and answer and pleadings, and also the facts on which the court founds its decree. But in America, the decree does not ordinarily recite either the bill, or answer, or pleadings; and generally, not the facts on which the decree is founded. But with us, the bill, answer and other pleadings, together with the decree, constitute what is properly considered as the record. And therefore, in truth, the rule in each country is precisely the same, in legal effect; although expressed in different language; viz., that the bill of review must be founded on some error apparent upon the bill, answer and other pleadings, and decree; and that you are not at liberty to go into the evidence at large, in order to establish an objection to the decree, founded on the supposed mistake of the court in its own deductions from the evidence.

Having made these explanations, which seemed proper with reference to the arguments pressed at the bar, we may now return to the consideration of the direct points presented for the consideration of the court. The third and last error relied on in the bill, has been abandoned at the argument; and therefore, it need not be examined. The other two remain to be disposed of.

And first, as to the supposed error, in not making Breckenridge a party to the original bill. Assuming that he was a proper party to that bill, still it is to be considered, that it was an objection which ought properly to have been taken by the present parties at the original hearing, or upon the appeal (if any) before the appellate court. And upon a bill of review, it cannot properly be relied on as matter of error, unless it can be shown that the non-joinder has operated as an injury or mischief to the rights of the present plaintiffs. No such injury or mischief has been shown, nor is pretended. Breckenridge is not bound by the original decree, because he was no party

[1] See Kennedy *v.* Georgia State Bank, 8 How. 586.

thereto ; and therefore, his interests cannot be prejudiced thereby. But if they were, he, and he alone, has a right to complain, and to seek redress from the court ; and not the plaintiffs, who are not his representatives, nor intrusted with the vindication of his rights. Breckenridge has made no complaint and sought no redress. We think, therefore, that this error, if any there be, not being to the prejudice of the plaintiffs, cannot furnish any ground for them to maintain the present bill ; for no party to a decree can, by the general principles of equity, claim a reversal of a decree, upon a bill of review, unless he has been aggrieved by it ; whatever may have been his rights to insist on the error, at the original hearing, or on an appeal.

In the next place, as to the sale of the mortgaged premises, after the death of Whiting, without a revival of the suit against his heirs. It is not even pretended, in the bill of review, that there was any fraud in the sale ; nor upon the argument, has any irregularity even been insisted on. What, then, is the *gravamen?* That the land was sold honestly and fairly, but for a less price than its real value. *Now, such an objection, even in the mouth of Whiting himself, if he had been living, would have constituted no valid objection to the sale, or the confirmation thereof ; but, at most, would have furnished only a motive to induce the court, in its discretion, to have ordered a resale, or to have opened the biddings. It would be no matter of error whatever. If this be a correct view of the subject, it is plain, that the heirs of Whiting cannot be entitled to be put in a better predicament than Whiting himself ; and no decree in equity ought to be reversed for matter of mere favor, and not of right. [*15

But is the objection itself, in principle, well founded ? That depends upon this—whether the decree of foreclosure and sale is to be considered as the final decree, in the sense of a court of equity, and the proceedings on that decree, a mere mode of enforcing the rights of the creditor, and for the benefit of the debtor ; or whether the decree is to be deemed final only after the return and confirmation of the sale by a decretal order of the court. We are of opinion, that the former is the true view of the matter. The original decree of foreclosure and sale was final upon the merits of the controversy. The defendants had a right to appeal from that decree, as final, upon those merits, as soon as it was pronounced, in order to prevent an irreparable mischief to themselves. For, if the sale had been completed under the decree, the title of the purchaser under the decree would not have been overthrown or invalidated, even by a reversal of the decree ; and consequently, the title of the defendants to the lands would have been extinguished ; and their redress, upon the reversal, would have been of a different sort from that of a restitution of the land sold. In *Ray* v. *Law*, 3 Cranch 179, it was held by this court, that a decree of sale of mortgaged premises, was a final decree, in the sense of the act of congress, upon which an appeal would lie to the supreme court. This decision must have been made upon the general ground, that a decree, final upon the merits of the controversy between the parties, is a decree upon which a bill of review would lie, without and independent of any ulterior proceedings. Indeed, the ulterior proceedings are but a mode of executing the original decree, like the award of an execution at law. If this be the true view of the present decree, and the proceedings thereon, then it is plain, that this bill of review is not maintainable for two reasons, each of which is equally conclusive. The first is, that no error is

shown in the original decree, for the only pretended error is in the sale under the decree. The second is, that this bill of review was not brought within five years after the original decree was rendered in the lifetime of Whiting; and the statute of limitations, having once begun to run, cannot be stopped by any subsequent intervening disabilities.

If, then, the original decree was unobjectionable and conclusive; if there has been no fraud in the subsequent sale, pursuant to that decree; and if there has been, in a legal sense, no prejudice to any rights of the plaintiffs in the original decree, or the sale, then, *although there was no revivor before the sale, there is no error upon which a bill of review will lie, to entitle the parties to a reversal. We do not say, whether the circuit court might, or might not, in its discretion, have required a revival of the suit before the sale was confirmed, if the fact of the death of Whiting had been distinctly brought to its knowledge. But we do mean to say, that the non-revival was not matter of error, for which the proceeding on the sale under the original decree (for that is all which the present bill seeks to redress) can or ought to be reversed.

*16]

The decree of the circuit circuit, dismissing the bill, is, therefore, affirmed, with costs.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Kentucky, and was argued by counsel: On consideration whereof, it is now here ordered and decreed by this court, that the decree of the said circuit court in this cause be and the same is hereby affirmed, with costs.

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*17] John T. Van Ness and William Jones, Plaintiffs in error, *v.* The Bank of the United States, Defendant in error.

Courts of the District of Columbia.—Acknowledgment of deeds. Ejectment.

The proceedings of the courts of the state of Maryland, and the laws of that state prior to the passing of laws by congress providing for the government of the district of Columbia, were in full force and operation in that part of the district ceded by the state of Maryland until congress had legislated for the government of the district of Columbia; and the decree of the court of chancery of Maryland, affecting property in the district of Columbia, in a cause entertained in that court, operated in the district, until congress took upon itself the government of the district.

The state of Maryland, and the United States, both intended that suits pending in the courts of Maryland, should be proceeded in, until the rights of the parties should be definitively decided; and that the judgments and decrees there made, should be as valid and conclusive as if the sovereignty had not been transferred.

Congress, by the 13th section of the act of February 27th, 1801, placed judgments and decrees thereafter to be obtained in the state courts of the state of which the district of Columbia had formed a part, on the same footing with judgments and decrees rendered before.

If a guardian appointed by the court of the state of Maryland, in a cause instituted after congress had legislated for the district of Columbia, had been ordered, by a decree of the court, to make a deed of lands within the district, and had died, or had refused to make the conveyance as ordered, the court of the district would, on application, have been bound to appoint another person to execute the deed; and would not have been authorized to open again and re-examine the questions which had been decided in the Maryland court.

A deed was executed and acknowledged "W. M. Duncanson, guardian for Marcia Burnes;" and

acknowledged by the guardian "to be his act and deed, as guardian aforesaid, and thereby the act and deed of the said Marcia:" this is a good execution and acknowledgment.

The acts of the assembly of Maryland, prescribing the mode in which deeds should be acknowledged for the conveyance of real property, were adopted by congress, in the act assuming jurisdiction in the district of Columbia, together with the other laws of Maryland then in force. The acts of the assembly of Maryland relating to the acknowledgment of deeds, do not require that justices of the peace, or other officers who have authority to take acknowledgments, shall describe in their certificates their official character; whenever it is established by proof, that the acknowledgment was made before persons authorized to take it, it must be presumed to have been taken by them in their official capacity.[1]

The soundest reasons of justice and policy seem to demand that every reasonable intendment should be made, to support the titles of *bonâ fide* purchasers of real property.

In a declaration in ejectment, various demises were laid, and the verdict of this jury, and the judgment of the circuit court, were entered on one of the demises only; and it was contended, that the court ought not to have entered a judgment on the issue found for the plaintiff, but should have awarded a *venire de novo*; and that this irregularity might be taken advantage of upon a writ of error: *Held*, that if this objection had been made in the circuit court, on a motion in arrest of judgment, the plaintiff would have been permitted to strike out all the demises in the declaration but that on which the verdict was given; the omission to strike out these demises was only, therefore, an omission of form; and the act of congress of 1789, ch. 20, § 32, expressly provides, that no judgment shall be reversed for any defect or want of form, but that the courts of the United States shall proceed and give judgment, according as the right of the cause and matter in law shall appear to them, without regarding any imperfections, defects or want of form in the judgment or course of proceeding, except that specially demurred to.[2]

United States Bank *v.* Van Ness, 5 Cr. C. C. 294, affirmed.

ERROR to the Circuit Court of the District of Columbia, sitting for the county of Washington.

This case came before the court from the district of Columbia, *and was argued by *Coxe*, for the plaintiffs in error; and by *Key*, for the defendants. The case is fully stated in the opinion of the court, delivered by— [*18

TANEY, Ch. J.—This case comes before the court upon a writ of error, directed to the judges of the circuit court for the district of Columbia, sitting for the county of Washington. It is an action of ejectment, brought by the Bank of the United States, to recover sundry lots of ground in the city of Washington. The declaration contains four demises, purporting to have been made for the same premises, by different lessors. The jury found for the plaintiff, upon one of the demises, but said nothing of the other three; and the judgment of the court is entered, in like manner, upon the particular demise on which the jury found for the plaintiff; and without taking any notice of the others.

At the trial in the circuit court, it was admitted, that David Burnes was seised in fee of the premises in controversy, in his lifetime, and that he died seised thereof, intestate, leaving Marcia Burnes his only child and heir-at-law. The plaintiff in the court below, then offered in evidence, the exemplification of a record from the court of chancery of Maryland, duly certified, by which it appeared, that a certain Isaac Pollock, on the 17th of May 1800, filed his bill in the said court, against Marcia Burnes, then an infant, in order to obtain the conveyance of a large number of lots, in the

[1] United States Bank *v.* Benning, 4 Cr. C. C. 81.

[2] Townsend *v.* Jemison, 7 How. 706.

city of Washington, among which are the lots now in controversy; claiming the same under a contract made with David Burnes, in his lifetime, which had not been carried into execution, by proper conveyances, at the time of his death. It further appeared by the said record from the court of chancery, that after various proceedings in the case, the chancellor, on the 1st of November 1800, decreed, that upon the complainant's securing the purchase-money, to the satisfaction of the chancellor, the infant defendant, Marcia Burnes, should, by William Mayne Duncanson, who had been appointed her guardian *ad litem*, convey the said lots to Pollock in fee. Afterwards, further proceedings having been had, the court, on the 26th of October 1801, passed another decree, approving the security which Pollock offered (which was security on other real property), and directing that, upon the complainant's executing mortgages for the said real property to the said Marcia, to secure the payment of the purchase-money, she should make the conveyance, by her guardian, as directed by the former decree. It is unnecessary to state more in detail the proceedings in the Maryland court, because, it is admitted, that they were fully warranted by the laws of that state. The plaintiff in the circuit court offered also in evidence, together with this record, the deeds of mortgage executed by the said Pollock, pursuant to the aforesaid decree; and also a deed of conveyance for the said lots, from Marcia Burnes to Pollock, executed by William Mayne Duncan-
*19] son, as her guardian. This deed is dated *January 12th, 1802, after congress had assumed the government of this district. The defendant in the circuit court objected to the admissibility and competency of all the evidence above stated; but the objection was overruled by the court, and this forms the first exception.

In the further progress of the trial in the circuit court, various other deeds were offered in evidence on the part of the plaintiff, in order to show a title derived from Isaac Pollock; and among the deeds thus offered, was one from Walter Smith to Benjamin Stoddart, dated March 5th, 1807, acknowledged before Richard Parrott and Thomas Corcoran. This acknowledgment was dated "District of Columbia, Washington County, to wit:" but it was not stated in the acknowledgment, nor did it appear by that instrument, that Parrott and Corcoran were justices of the peace for Washington county. In point of fact, however, they were such justices, and it is so admitted in the exception. The defendant objected to the admissibility of this deed; and this forms the substance of the second exception; for although other papers are mentioned as objected to at the time, the only point raised here, is upon the acknowledgment of this deed.

Upon the first exception, the plaintiffs in error insist, that the deed of conveyance from Marcia Burnes to Pollock, of the 12th of January 1802, executed by her guardian, as above mentioned, pursuant to the decree of the Maryland court of chancery, conveyed no title; that the sovereignty of Maryland over Washington county, in this district, having terminated on the 27th of February 1801, when congress assumed the jurisdiction, the decree of the state court could not be executed, without filling an exemplification of the record, according to the 13th section of the act of congress; which provided for the government of the territory; and obtaining an order for the execution of the decree, from the chancery court of this district. This objection cannot be sustained. The act of assembly of Maryland, of

1791, ch. 45, which ceded the territory to the United States, provided, "that the jurisdiction of the laws of the state over the persons and property of individuals residing within the limits of the cession, should not cease or determine, until congress should by law provide for the government thereof, under their jurisdiction." The United States accepted the cession made by this law of the state; and the conditions above mentioned, therefore, formed a part of the contract between the parties; and consequently, the laws of Maryland, and the jurisdiction of its courts, continued in full force, until congress took upon itself the government of the district; and as it was uncertain, at what time the United States would assume the jurisdiction, it must have been foreseen, that whenever that event should happen, many suits would be found pending and undetermined in the state courts. It was certainly not the intention of the parties to the cession, that such suits should abate, and *that individuals who had rightfully instituted pro- [*20
ceedings in the tribunals of the state, and incurred the expense and delays which are unavoidable in such cases, should, immediately upon the assumption of jurisdiction by the United States, be compelled to abandon the state courts, and to begin anew in the courts of the district. There could be no reason of policy or justice for adopting such a measure: and without stopping to inquire what, upon general principles of law, would be the effect of a cession of territory, upon suits then pending in the courts of the ceding sovereignty, it is evident, that in this case, the state and the United States both intended, that the suits then pending in the Maryland tribunals should be proceeded in, until the rights of the parties should be finally decided; and that the judgments and decrees there made, should be as valid and conclusive as if the sovereignty had not been transferred.

We have already stated the provisions of the act of assembly of Maryland; and congress, in assuming the jurisdiction, recognised the rights of the state courts, and by the 13th section of the act of February 27th, 1801, placed judgments and decrees thereafter to be obtained in the state courts, in suits then pending, upon the same footing with judgments and decrees rendered before. In either case, upon filing an exemplification of the proceedings had in the state courts, it authorized process of execution from the district court of the United States, in the same manner as if the judgment or decree had been there rendered. It makes no exception in regard to real property situated in the district; and the rights to such property then in litigation are placed on the same ground with rights to personal property and personal rights, and like them, are left to the final adjudication of the courts of the states. And although, upon a strict and technical construction of the 13th section of the act of congress before referred to, it may be doubted, whether this decree falls within that description of judgments and decrees for which provision is there made; yet, when the conditions upon which the cession was made by Maryland, and accepted by congress, are considered, it is very clear, that if the guardian appointed by the state court had died, or had refused to make the conveyance as ordered, the court of this district would, upon the application of Pollock, have been bound to appoint another person to execute the deed, and would not have been authorized to open again and re-examine the questions which had been decided in the Maryland court. And in such a case, the conveyance to Pollock, by the infant heiress of Burnes, would have owed its validity altogether to the

decree of the state tribunal; and the title of the grantee would have received no additional strength from the order of the district court. We can, therefore, see no necessity for an order from that court, when the guardian appointed was willing to execute it, and did execute it, in obedience to the decree of the Maryland court.

An objection has also been taken to the manner in which this deed is signed and acknowledged. It is signed, "W. M. Duncanson, guardian for Marcia Burnes;" and he acknowledges it "to be *his act and deed, as guardian as aforesaid, and thereby the act and deed of the said Marcia." It is argued, that it should have been signed "Marcia Burnes, by her guardian W. M. Duncanson," and in like manner acknowledged "as her act and deed." This is a case, where no question arises as to the manner of executing an authority given by private persons, as to which the case of the *Lessee of Clarke* v. *Courtney*, 5 Pet. 319, 349–50, may justly apply. But this the case where an authority is to be exercised under the decree of a court of chancery, and therefore, where a liberal construction may and ought to prevail. These two forms of signature and acknowledgment mean precisely the same thing; and as this deed substantially conforms, in the manner of its execution, to the directions contained in the decree, we consider it to be valid and effectual to convey the property therein mentioned.

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Upon the second exception, the plaintiff in error contends, that the acknowledgment of the deed from Walter Smith to Benjamin Stoddart is defective, and the deed inoperative, because it does not appear in the certificate of acknowledgment, indorsed upon the deed, that the persons before whom it was made were, at that time, justices of the peace for Washington county; and he insists, that this omission cannot be supplied by parol. This question depends upon the construction of the acts of assembly of Maryland, which prescribe the mode in which deeds shall be acknowledged for the conveyance of real property; those acts of assembly having been adopted by congress, in the act assuming jurisdiction, together with the other laws of Maryland then in force. We perceive nothing in the Maryland acts of assembly which requires justices of the peace or other officers, to describe in their certificates, their official characters. It is, no doubt, usual and proper to do so, because the statement in the certificate is *primâ facie* evidence of the fact, where the instrument has been received and recorded by the proper authority. But such a statement is not made necessary by the Maryland statutes. And whenever it is established by proof, that the acknowledgment was made before persons authorized to take it, it must be presumed to have been taken by them in their official capacity; and when their official characters are sufficiently shown by parol evidence, or by the admissions of the parties, we see no reason for requiring more, where the acts of the legislature have not prescribed it. On the contrary, the soundest principles of justice and policy would seem to demand, that every reasonable intendment should be made to support the titles of the *bonâ fide* purchasers of real property; and this court is not disposed to impair their safety, by insisting upon matters of form, unless they were evidently required by the legislative authority.

If the Maryland courts had given a contrary construction to these acts of assembly, we should, of course, feel it to be our duty to follow their decision. But we do not find the point decided in any of the Maryland

reports. In the case of *Connelly* v. *Bowie*, 6 Har. & Johns. 141, the certificate of acknowledgment did not state that the persons by whom it was taken were justices of the peace, and there was no evidence in the record to prove their official character. The deed was, therefore, clearly inadmissible; and it was so ruled by the court of appeals. But it does not follow, that the decision would have been the same, if parol evidence had been given to prove their official character; and from the language of the court in that case, it may rather be inferred, that if other evidence had been offered, it would have been deemed admissible, to supply the omission in the certificate indorsed on the deed.

The objection made to the verdict and judgment applies altogether to the form of the proceeding, and does not in any degree affect the merits of the controversy. The verdict and the judgment, it appears, are upon one of the demises only; and it is insisted, that as the jury did not find all of the issues committed to them by the pleadings, the circuit court ought not to have entered a judgment for the plaintiff, upon the issue found in his favor, but should have awarded a *venire de novo*; and that this irregularity in the proceedings may be taken advantage of, upon a writ of error. It is not necessary to examine, whether this objection could be maintained upon the practice and decisions of the English courts in relation to the action of ejectment. For the act of congress of 1789, ch. 20, § 32, expressly provides, among other things, that no judgment shall be reversed for any defect or want of form; but that the courts shall proceed and give judgment according as the right of the cause and matter in law shall appear to them, without regarding any imperfections, defects or want of form in the judgment or course of proceeding, except those specially demurred to. Now, the demises laid in a declaration in ejectment are known to be fictitious and mere form; and if the appellant had taken this objection in the circuit court, in arrest of judgment, the plaintiff would undoubtedly have been permitted to strike these demises from the declaration, and thus obviate the objection. The omission of the plaintiff to do this was nothing more than an omission of a matter of form; and if, therefore, this proceeding in the circuit court should be held to be irregular, it is nothing more than an error of form; and as such, furnishes no ground for the reversal of the judgment. The judgment of the circuit court is, therefore, affirmed, with costs.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the county of Washington, 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.

* The State of Rhode Island *v.* The State of Massachusetts.

Suits between states.

The state of Rhode Island, on leave granted at January term 1838, to amend a bill previously filed by the state against the state of Massachusetts, amended the bill at this term, by inserting in it references to papers filed at the term of 1838. The state of Massachusetts was allowed until the term of 1840 to answer.

The rules which govern courts of equity as to the allowance of time for filing an answer and other proceedings in suits between individuals, will not be applied by the supreme court to controversies between states of the Union; the parties in such cases, must, in the nature of things, be incapable of acting with the promptness of an individual.

Southard, for the complainants, stated, that the state of Rhode Island, with the consent of the court, obtained at last term, had amended the bill filed in this case; and he moved the court for a rule on the state of Massachusetts to answer within a short time, so that the case might be disposed of during the term.

Webster stated, that, although not authorized to appear in the case, he thought it proper to say, that the opinions of the court delivered at the last term in this cause had been submitted to the government of Massachusetts. It was a short time before the adjournment of the legislature of the state, that they were communicated to them. The subject will be again presented by the governor to the legislature, at the session now held; and it is expected, that some action upon it will take place. In the posture in which the case stood at the last term of this court, the attorney-general of the state of Massachusetts has not thought it proper to do anything. The movements of such bodies, as the defendants in this case, are slow.

Hazard had no objection to an allowance of time to the defendants to answer. He had a strong impression, that he had seen some proceedings of the legislature of Massachusetts, at its last session, in 1838, by which the direction of this case was left to the counsel employed by the state. He did not think that the slow movements of such bodies should be allowed, when other parties are concerned. He desired that a time for the filing of an answer, by the state of Massachusetts, should be definitely fixed.

Taney, Ch. J., delivered the opinion of the court.—A motion was made by the complainant, on Saturday last, for an order on the defendant to answer the amended bill of the complainant, on or before the 26th day of the present month of January. In deciding upon this motion, it is necessary to refer to the orders of the court heretofore passed in this case, and to see what steps have been taken under them. At the last term, leave was given to Rhode Island to withdraw the general replication filed in the case, and to amend the bill; the amendment to be made on or before the first Monday
*24] of August *last. At the same term, upon the motion of the counsel for Massachusetts, leave was granted to withdraw the plea which the defendant had filed, and also to strike out the appearance of Massachusetts to the suit. Nothing has since been done by the defendant, under this leave, for reasons which have been stated at the bar. And as the appearance of Massachusetts has not yet been withdrawn, and as Rhode Island has a right to the usual orders to enable that state to proceed in the suit, the court, in passing them, must look to the condition of the case, as it appears on the

record, and consider Massachusetts as still in court, and as appearing in the case.

When the motion was made at the last term to amend the bill, two documents which Rhode Island desired to introduce into the cause were filed with the motion; but the leave to amend was general, and not confined to the papers then filed. Nothing appears to have been done by the complainant, until the second day of the present term, when the bill was amended, by inserting in it the proper allegations, in relation to the two papers above mentioned; and adding also certain interrogatories, in relation to sundry matters charged in the bill, which the complainant prays that the defendant may be required to answer. The amendment, therefore, was not made, until the second day of the present term. The defendant could not have answered, until it was made; and consequently, is not in default for not answering. The question, now, is, what time ought to be given?

From the character of the parties, and the nature of the controversy, we cannot, without committing great injustice, apply to this case the rules as to time, which govern courts of equity in suits between individuals. In the last-mentioned cases, the material allegations in the bill are comparatively few in number, and rest in the personal knowledge of the individual who is to put in his answer. But a case like this, and one too of so many years standing, the parties, in the nature of things, must be incapable of acting with the promptness of an individual. Agents must be employed, and much time may be required to search for historical documents, and to arrange and collate them, for the purpose of presenting to the court the true grounds of the defence. It is impossible for the court to foresee, what additional inquiries and explanations may be found necessary, in consequence of the new allegations and documents introduced into the bill; and the new interrogatories as to the verity of various papers stated in the bill, which the defendant is now called upon to answer. And as the court have received the amendment of the complainant, at the present term, upon the leave granted at the last term, as hereinbefore mentioned; we think that the same time should be given to the defendant to answer. The court will, therefore, pass the following order.

THE bill heretofore filed by Rhode Island in this case, having been amended on the second day of the present term, it is ordered by *the court, that Massachusetts be allowed until the first Monday in August [*25 next, to elect whether that state will withdraw its appearance, pursuant to the leave granted at January term 1838; and if the appearance of Massachusetts be withdrawn, within the time above mentioned, that Rhode Island be, thereupon, at liberty to proceed *ex parte*. And if the appearance of Massachusetts shall not be withdrawn, within the time above mentioned, it is then ordered, that the said state answer the amended bill of the complainant, on or before the second day of January term 1840. The motion made by the complainant on Saturday, the 19th of the present month, is overruled. January 26, 1839.

BALDWIN, Justice, did not consider the state of Massachusetts before the court, after what had passed at the last term; not considering Massachusetts before the court, he had taken no part in the order now made by the court.

WILLIAM SMITH, Appellant, *v.* GUY RICHARDS, Appellee.

Rescission of contracts.

A bill was filed in the circuit court of the southern district of New York, praying that a contract for the purchase and sale of a portion of a tract of land, in Goochland county, in the state of Virginia, on which there was a gold mine, should be rescinded; the purchaser alleged fraudulent misrepresentations as to the gold mine, and other acts of the seller, by which he was induced to make the purchase. The court affirmed the decree of the circuit court of the southern district of New York, by which the contract was ordered to be rescinded.

It is an ancient and well-established principle, that whenever *suppressio veri*, or *suggestio falsi* occur, and more especially, both together, they afford sufficient ground to set aside any release or conveyance.

The party selling property must be presumed to know whether the representation which he makes of it is true or false; if he knows it to be false, that is fraud of the most positive kind; but if he does not know it, then it can only be from gross negligence, and in contemplation of a court of equity, representations founded on a mistake resulting from such negligence, is fraud. The purchaser confides in them, upon the assumption that the owner knows his own property, and truly represents it; and it is immaterial to the purchaser, whether the misrepresensation proceeded from mistake or fraud; the injury to him is the same, whatever may have been the motives of the seller.[1] The misrepresentations of the seller of property, to authorize the rescinding a contract of sale by a court of equity, must be of something material, constituting an inducement or motive to purchase; and by which he has been misled to his injury; it must be in something in which the one party places a known trust and confidence in the other.

Whenever a sale is made of property, not present, but at a remote distance, which the seller knows the purchaser has not seen, but which he buys upon the representation of the seller, relying on its truth, then the representation in effect amounts to a warranty; at least, the seller is bound to make good the representation.[2]

APPEAL from the Circuit Court for the Southern District of New York. The case is fully stated in the opinion of the court.

It was argued by *Patton* and *Webster*, with whom was *Botts*, and *Ogden*, for the appellant; and by *Berry* and *Crittenden*, for the appellee.

In the circuit court for the southern district of New York, a bill was filed by Guy Richards, for the purpose of rescinding a contract made by the appellee with William R. Smith, for the purchase of a part of Goochland gold-mine, in the state of Virginia, the contract being alleged to be fraudulent. It was agreed by the counsel for the parties, that a decree should be entered in the circuit court *pro formâ*, against the complainant; and accordingly, on the 22d of April 1837, a decree was entered, rescinding and annulling the contract in relation to the purchase of the Goochland mine, ordering that it be given up to said Guy Richards; that the appellant Smith repay all moneys advanced by said Guy Richards upon said contract, and upon the promissory notes made by complainant and delivered to the defendant, so far as said notes had been paid by complainant, &c. From this decree, an appeal was prayed and allowed to this court.

The counsel for the *appellant* insisted, that the decree was erroneous and ought to be reversed, and the bill dismissed.

*27] *1. Because the said complainant has wholly failed to prove that the representations and description of the Goochland mine, alleged

[1] Daniel *v.* Mitchell, 1 Story 172; Hough *v.* Richardson, 3 Id. 659; Warner *v.* Daniels, 1 W. & M. 90; Mason *v.* Crosby, Id. 343; Smith *v.* Babcock, 2 Id. 246.

[2] Tyler *v.* Black, 13 How. 230.

in the bill to be unfair and untrue, are other than fair, accurate and just descriptions and representations; and that on the contrary thereof, the proofs in the cause show that the representations, declarations and descriptions made and given of said mine, so far as the same are complained of in said bill, were and are true, just and faithful.

2. Because the opinions and estimates made by the appellant of the value of said mine, and of its richness and great worth, and which are alleged in the bill to have been false, exaggerated and deceptive, and made for the purpose of defrauding and deceiving the complainant; were not only his real honest and *bonâ fide* opinions, but were such as he was well warranted in entertaining and expressing.

3. Because, even if the court should be of opinion, that the estimates of the value and richness of the mine and vein, expressed by the appellant, were exaggerated and extravagant; he is in no manner, at law or in equity, responsible for such exaggerated and unfounded statements as to the value and richness of said mine, and its veins or deposites of gold.

4. Because, even if all the descriptions of said mine, and all the declarations made in regard to it, by said complainant, as set forth in said bill as untrue, inaccurate and erroneous, were so in fact; it would not be competent, either at law or in equity, to rescind the contract which had been executed for the purchase and sale of the property, unless it had been proved, that the appellant knew that such descriptions and declarations were inaccurate, erroneous and false.

5. Because, so far from the plaintiff having succeeded in showing any such knowledge, the testimony clearly proves, that the appellant did believe, and had just reason to believe, that his descriptions of said mine, and representations of its value, were strictly and literally true, just and accurate.

6. Because it is distinctly and expressly admitted by the complaint, and proved by the testimony, that certain specimens or washings of gold ore, forwarded by the appellant, Smith, to Nathaniel Richards, and alleged to have been taken from said Goochland mine, and exhibited to him as fair samples of said mine, were exceedingly rich in particles of gold, and gave every indication that the mine from which they were taken, if the said specimens were proper and fair samples of such mine, must be very abundant in gold, and of great intrinsic value. And it is clearly and conclusively shown, that the said specimens were really and fairly taken from said mine, in a way and manner to insure their being fair and proper samples of the mine; and that many other specimens had been taken from it by others, before Smith was interested in or knew anything of said mine, of equal richness with the specimens forwarded to Nathaniel Richards by him.

*7. Because, even if the proof should be considered as having established that the cuts, searches, examinations and explorations made since the purchase by the complainants and others, from the appellant, have demonstrated that the mine is not as valuable as the indications warranted Smith to believe, or even that the property is wholly worthless as a mine (and it is by no means admitted, that such examinations have been sufficiently extensive or well-conducted to justify such conclusions), yet that the appellant is not responsible for such failure of the mine to realize the expectations justly founded upon the indications of value and richness which [*28

existed at the time of, and before, the sale; whether the disappointment has resulted from the veins giving out, being intercepted by rock, or whatever cause of the like kind. Such contingencies and disappointments are always to be hazarded in every kind of speculative adventure; and adventures in gold-mining have never been, in any country, remarkable for exemption from them. And the appellant in this case did not undertake to insure against them, by any act or expression. On the contrary, it is proved, that the complainant and those who united with him in the purchase, were fully alive to the risks and hazards attendant upon all gold-mining adventures and speculations; and were emphatically admonished of these hazards, when the appellant exonerated himself from responsibility for their occurrence, by the explicit declaration, made at the time of the contract, that he sold the mine 'for what it is, gold or snow-balls.'

8. Because the property being expressly sold with all faults ('for what it is, gold or snow-balls'), according to the settled rules of law applicable to such a contract, the vendor cannot be made responsible for any defect in the quality of the thing sold, nor for any misdescription, known or unknown to the said vendor; unless it also appear, that he committed positive fraud, by resorting to some means of concealing the defects and misdescription, and by artifice and contrivance prevented the purchasers from discovering them.

The counsel for the appellant, in support of the third point, "that even if the court should be of opinion, that the estimates of the value and richness of the mine and vein, expressed by the appellant, were exaggerated and extravagant, he is in no manner at law or in equity responsible for such exaggerated and unfounded statements as to the value and richness of said mine, and its veins or deposites of gold," cited following authorities: Sugd. on Vend. 2; *Chandelor* v. *Lopus*, Cro. Jac. 4; 1 Roll. Abr. 801, pl. 16; *Harvey* v. *Young*, Yelv. 21 *b*, and notes to the American edition; *Fenton* v. *Browne*, 14 Ves. 144; *Risney* v. *Selby*, 1 Salk. 211; s. c. 2 Ld. Raym. 1118; Sugd. on Vend. 4, in note (Amer. edit. of 1828); *Kinnard* v. *Lord Dean*, 1 Coll. Dec. 332; *Roswel* v. *Vaughan*, Cro. Jac. 196; *Sherwood* v. *Salmon*, 2 Day 128; *Davis* v. *King*, 1 Stark. 61; *Whitefield* v. *McLeod*, 2 Bay 380–4; 1 Lev. 102; *Pollard* v. *Lyman*, 1 Day 156.

*29] *In support of the fourth proposition, that "even if all the descriptions of said mine, and all the declarations made in regard to it by said complainant, set forth in the said bill as untrue, inaccurate and erroneous, were so in fact, it would not be competent, either at law or in equity, to rescind the contract which had been executed for the purchase and sale of the property, unless it had been proved that the appellant knew that such descriptions and declarations were inaccurate, erroneous and false." The counsel for the appellant cited: 1. Cases showing the distinction between the degree of unfairness and proof of fraud, required to authorize a court of equity to refuse specific performance, and that necessary to justify a rescission of a contract. *Ellard* v. *Lord Llandaff*, 1 Ball & Beat. 241; *Cathcart* v. *Robinson*, 5 Pet. 276; 10 Ves. 292. 2. Cases showing that the rule *caveat emptor*, prevails in England, New York and Virginia, both as to real and personal property; and that to rescind a contract, there must be actual fraud and intentional misrepresentation. 3. That in sales of real estate, the

rule applies even as to title, viz: *Roswel* v. *Vaughan*, Cro. Jac. 196; *Pollard* v. *Lyman*, 1 Day 156; *Hitchcock* v. *Giddings*, 4 Price 135; Yelv. 21 *b*, notes (Am. ed.); *Commonwealth* v. *McClenahan*, 4 Rand. 482; *Chesterman* v. *Gardiner*, 5 Johns. Ch. 29; *Abbott* v. *Allen*, 2 Ibid. 523.

As to defects of quality or misdescription, there can be no rescission or responsibility upon the vendor, unless there be a warranty, fraud, or intentional misrepresentation. *Parkinson* v. *Lee*, 2 East 314; *Sands* v. *Taylor*, 5 Johns. 395; *Duke of Norfolk* v. *Worthy*, 1 Camp. 337; *Seixas* v. *Wood*, 2 Caines 48; *Oldfield* v. *Round*, 5 Ves. 508; *Dyer* v. *Lewis*, 7 Mass. 284; *Legge* v. *Croker*, 1 Ball & Beat. 506.

As to the eighth point, "that the property being expressly sold with all faults (for what it is, gold or snow-balls), according to the settled rules of law applicable to such a contract, the vendor cannot be made responsible for any defect in the quality of the thing sold, or for any misdescription, known or unknown to the said vendor; unless it also appears, that he committed positive fraud, by resorting to some means of concealing the defects and misdescription, and by artifice and contrivance prevented the purchasers from discovering them." The counsel for the appellant cited *Oldfield* v. *Round*, 5 Ves. 508; *Baglehole* v. *Walters*, 3 Camp. 154; *Schneider* v. *Heath*, 3 Ibid. 506; *Pickering* v. *Dowson*, 4 Taunt. 779; *Sherwood* v. *Salmon*, 2 Day 128; *Tucker* v. *Cocke*, 2 Rand. 57, GREEN'S opinion, p. 65; *Vernon* v. *Keys*, 12 East 632; s. c. 4 Taunt. 488.

Berry and *Crittenden*, for the appellee, insisted, that the description of the property sold was materially false in the particulars set forth in the brief of the appellee; that the false description *was given by the appellant, with the design to deceive, and that he adopted measures [*30 to conceal the matters of false description; and contended, that even if the contract of the parties could be construed a sale with all faults, that the case came within the principles decided in the case of *Schneider* v. *Heath*, 3 Camp. 506. But they contended, that the contract was not to be construed a sale with all faults; and referred to *Pickering* v. *Dowson*, 4 Taunt. 779. If so, they contended, that the sale was fraudulent and ought to be set aside, on the authority of adjudged cases; and cited *Boyce's Executors* v. *Grundy*, 3 Pet. 210; 1 Meriv. 26; *Donelson* v. *Weakley*, 3 Yerg. 178; *Sherwood* v. *Salmon*, 5 Day 439.

They further contended, that if the false representations should be considered as made by mistake, that being so in matters which formed the inducement to the contract on the part of the appellee, a court of equity ought to relieve, by rescinding the contract: and cited 1 Story's Eq. 202, 204; *McFerran* v. *Taylor*, 3 Cranch 270; *Glassell* v. *Thomas*, 3 Leigh 113; *Chamberlane* v. *Marsh*, 6 Munf. 283; *Pearson* v. *Morgan*, 2 Bro. C. C. 389; *Allen* v. *Hammond*, 11 Pet. 63; *Calverley* v. *Williams*, 1 Ves. jr. 213; *Hitchcock* v. *Giddings*, 4 Price 133; *Lowndes* v. *Lane*, 2 Cox 363.

BARBOUR, Justice, delivered the opinion of the court.—This case comes before us, by appeal from a decree of the circuit court for the southern district of New York. It was a suit in equity, brought by the appellee against the appellant, to set aside a contract for fraud.

It appears, that in December 1832, a tract of land, embracing a gold-mine, called the Goochland mine, lying in the county of Goochland, Virginia,

was purchased by the appellant, one-third for himself, and two-thirds for Nathaniel Richards, of the city of New York, at the price of about $14,000. In May 1833, the appellant sold one-half of his third to Nathaniel Richards, for $15,000. In June 1833, he sold five-sixths of the other half to the appellee and others, at the rate of $45,000 for the whole of that half. The interest which the appellee acquired in this property, was one-eighth part of one-sixth, at the price of $5625; as evidence of which he received from Nathaniel Richards, who acted as the appellant's agent in making the sale, a writing, dated July 4th, 1833, acknowledging the receipt of the purchase-money, in cash and several notes of hand. This paper described the property thus sold and bought, as one-eighth part of one-sixth of 456 acres of land, and of 100 acres purchased of David Moss, the deeds bearing date 17th of May 1833; both parcels lying in the county of Goochland, and state of Virginia, and called the Goochland mine. It declares, that the receipts (that is of the cash and notes) entitle Guy Richards (the appellee) to the
*31] one-eighth portion of one-sixth *part of said property; and it assumed that form, as the paper shows, because the title to all was in Nathaniel Richards, although one sixth part belonged to the appellant. In the same paper, is contained the following provision: "It is hereby expressly understood and agreed to, by the said Guy Richards, that he is to contribute his full proportion of any expenses already incurred, or which may be incurred hereafter, on the said premises, in searching for or developing any mine or mines, in the erection of buildings, the purchase of machinery, and any other expenses for the above general object, which I may deem necessary. Signed by Nathaniel Richards."

This is the contract which the bill seeks to set aside; it alleges, that the appellee was induced to make it, by various representations and declarations of the appellant, especially those contained in certain letters, particularly referred to in the bill, written by the appellant to Nathaniel and Charles H. Richards, which the bill charges to have been false, fraudulent and deceptive, and made for the purpose of deluding and deceiving the appellee and other persons, and inducing them to purchase at an exorbitant and unconscionable price; and by specimens of washings of said gold mine, which were exhibited to the appellee, as fair specimens and samples of the Goochland mine, which the bill charges were not fair samples; and that the appellant knew that they were not fair samples, and that he caused them to be exhibited to the appellees, as fair specimens and samples of said mine, for the express purpose of defrauding him, by inducing him to purchase a part of his interest in said mine, upon the faith of said specimens, as well as the false, fraudulent and deceptive representations. The bill further charges, that one of the letters of the appellant to Nathaniel Richards, dated January 21st, 1833, containing a description of the Goochland mine, was read to him, and the specimen exhibited to him, at the express request of the appellant, by Nathaniel Richards, in the month of June 1833, a short time before his purchase. It further charges, that the appellant had represented to the appellee, that he was well skilled in the business of mining, having been employed in that business in South America; that he understood the directions of veins in a mine, and the cost and expense of extracting gold from the foreign materials, by which it is surrounded, and in which gold is most usually found. That the Virginia Mining company, relying

upon the fitness of the appellant for the business aforesaid, and his skill in the principles and procees of mining, employed him as their agent; and that during the whole time of the negotiations and representations concerning the Goochland mine, he was the agent of the Virginia Mining company. That the appellee never was at the Goochland gold-mine, nor did he ever visit the tract of land in which it was represented by the appellant to be situated; but that in the months of June and July 1833, believing the appellant to be a man of strict honor, honesty, truth and veracity, he reposed the most implicit faith in his declarations *with regard to said gold-mine, and relied exclusively upon his representations, especially his letter [*32 of the 21st January 1833, to Nathaniel Richards, and his several letters to Charles H. Richards, as containing accurate, fair and correct descriptions of the Goochland mine.

The bill then proceeds to charge certain specific misrepresentations in the following particulars, to wit: 1st. That there are not, and never have been, any veins of gold whatever in the Goochland mine, and that that fact was well known to Smith, at the time when he wrote the letters, and made the representations before stated; and that neither one hundred nor any other number of feet, on a vein in said mine, was or were, at the date of the letter from the appellant to Nathaniel Richards, or at any other time, opened or developed. 2d. That so far from there being rich veins of gold in the mine, as the appellant in the last-mentioned letter (that is, as we understand it, of the 21st of January 1833, to Nathaniel Richards) asserted; that there were cuts and searches, which had recently, and since his purchase, been made, at the said mine, in various directions, and no veins of gold whatever could be discovered; and that the purchasers thereof, including the appellee, had been compelled, after many searches, sinking shafts, making cuts and experiments, and expending a great deal of money in the enterprise, to abandon the search after gold in said mine; to dismiss their workmen, and give up the project of mining altogether. 3d. That there are, and were at the time of the appellant's representations in relation to said mine, fine particles of gold to be found on the premises, included within the bounds of the Goochland mine. But that such particles are and were so minute, so few, and so mixed up with sand and other foreign substances, that the cost of extracting the gold from such materials would far exceed the value of the gold, when extracted; and that the 456 acres, and the 100 acres of land specified in the receipt of Nathaniel Richards, before stated, are utterly worthless as a gold-mine; and the appellee's interest therein is of no value whatever. 4th. That the specimens of washings of said gold-mine, exhibited to the appellee and others, by the order and direction of the appellant, as fair specimens and examples of said gold-mine, are not, and were not at the time when they were forwarded by the appellant to Nathaniel Richards, fair samples or specimens of said mine; and the appellee expresses his belief, that they were not taken from the Goochland mine. 5th. That the Goochland premises do not contain veins of gold, nor any considerable deposites of gold; nor are they rich in gold, or of any value whatever, for any purpose of mining, either for gold or any other metal.

The answer of the defendant, in various parts of it, utterly and unqualifiedly denies any intention or purpose to deceive or delude *the [*33

appellee, or that he had ever done, or permitted to be done, anything to produce that effect. It denies, that he ever made any inflated representations, or false descriptions of the mine, to induce any person to give an inordinate price for his interest therein. It insists, that in the letter of the 21st January 1833, to Nathaniel Richards, his object was to give a true and accurate account of the Goochland mine, so far as the facts could be ascertained by his own observation, and from the information of others on whom he could rely ; and that in those addressed to Charles H. Richards, no fact was stated, as being known to him, which was untrue, so far as facts are given, in reference to the Goochland mine ; and that as well in the beforementioned letter to Nathaniel, as in those to Charles H. Richards, so far as opinions were expressed, they were honestly entertained, without any intention, motive or purpose to deceive the appellee, or any person whatever. It insists, that the specimens of gold-ore sent by him to Nathaniel Richards were fair samples of the mine ; and denies that these specimens were directed by him to be exhibited to the appellee, or any other person, with a design of deceiving or defrauding any person to whom they might be shown. It insists, in general, that in all the statements he ever made, at any time, to any person, concerning the Goochland mine, whether in writing or verbally, so far as facts were given, within his knowledge, they were strictly true ; so far as the information derived from others was given, he believed it to be true ; and so far as his opinion had been expressed on the subject of the Goochland mine, such opinion was honestly entertained, without any interest, motive or view, directly or indirectly, to deceive the appellee or any other person. It insists, that there are and were veins of gold in the Goochland mine, and that from personal examination, before any representation was made, he knows that the Goochland mine contains veins of gold of extraordinary richness, and of great intrinsic value. It insists, that at the time he wrote the letter to Nathaniel Richards, there were an hundred feet or upwards, according to his best judgment, developed on the vein in said mine.

The answer admits, that the appellant may have been informed by Nathaniel Richards, that he had shown or read the letter of the 21st January 1833, to the appellee and others, but at what time, he is unable to state ; that he was informed by Charles H. Richards, that said letter had been read to him and others, including the appellee, before the purchase made by him and them of his interest in the Goochland gold mine ; that he had been informed, and believes it to be true, that about the month of June 1833, Nathaniel Richards did exhibit to the appellee and others, the specimens or washings of gold-ore, forwarded by the appellant, as specimens of the Goochland mine, and its productions of gold ; that in June 1833, the appellant wrote several letters to Charles H. Richards ; that in describing the Goochland mine, in those letters, he used language of a very decided character, as
*34] being the very richest mine in Virginia, *or in the United States ; that the appellant esteemed himself well skilled in the business of mining, and that the appellee relied on such skill in making the purchase ; that during the whole time of the negotiation and representations concerning the Goochland mine, he was employed as the agent of the Virginia Mining Company ; that the appellee did not visit the mine, or the tract of land on which it was, before he bought an interest therein ; that the negotia-

tion for the purchase of the mine was carried on principally through Nathaniel and Charles H. Richards; that he believes the appellee, when he purchased an interest in the gold-mine, fully believed the declarations and representations and letters of the appellant to be true, so far as he may have been informed thereof; and that he purchased an interest therein, in the full reliance that whatever this defendant had said, declared or written on the subject of the Goochland mine, was strictly true; but does not admit, that the appellee purchased solely on the faith of his representations, declarations and letters.

Having thus stated the material allegations in the bill, and as well the denials, as the admissions, in the answer, we are enabled to see what the questions are which we are called upon to decide. But, before we state them, we will present, in a condensed form, those parts of the representation, the alleged falsehood of which constitutes the *gravamen* of the appellee's bill. In the letter from the appellant to Nathaniel Richards, under date of January 21st, 1833, in which he professes to give an account and his views of the Goochland mine, amongst other things, he states, that there has been upwards of one hundred feet on the vein developed, which proves to be very rich indeed, much richer than anything yet discovered in the United States; and the quality of the gold surpasses any heretofore discovered in any country; that the surface is rich in gold. In regard to the formations in which the ore is found, he says—"it is quite wide, a distance in one place of twelve feet has been cut, and the veins are disseminated throughout the whole formation, in threads of from two to six inches wide, and in many, have several concentrated together; at another point, it has been found to be several feet wider; and that there is ore from this mine that will, without doubt, give several hundred pennyweights of gold to the hundred pounds." This letter was written after the appellant had, as he himself says, made a careful personal examination of the vein, so far as it had been developed, which he says was for a distance of one hundred feet lengthwise. On the 11th of June 1833, the appellant wrote to Nathaniel Richards, requesting him to show all the specimens, washing, plat and description of the mine, to Guy (the appellee) and others. This letter and these specimens, washings, &c., were shown to the appellee, in compliance with this request.

The representations in relation to the mine, then, consist, in part of the statements above extracted from the letter of the 21st of January 1833, which was shown or read to the appellee; and in part of the specimens, washings, &c., *exhibited to him, at the appellant's request, whilst a negotiation was going on between the appellant and Charles H. Richards, for the purchase of the appellant's interest in the mine, for himself and others, of whom the appellee was one, and but a very short time before the purchase was made. [*35

The first question in order is, were these representations true or untrue? We have examined the evidence in the record, on both sides, with much care. And we think it unnecessary to go into a detailed examination and comparison of that evidence here, inasmuch as it would extend this opinion to a useless length. We, therefore, will only state the conclusions of fact at which we have arrived. They are these:—We think it not true, that there was one hundred feet developed on the vein, which proved to be very rich

indeed. We do not mean to say, that a continuous exposure of the vein for one hundred feet was implied by the use of the term developed ; on the contrary, we are of opinion, from the evidence, that the sinking shafts, or making cuts, at intervals, for that distance, would satisfy the meaning of this expression, and that we think was done. But we mean to say, that although there was a small quantity of ore found in part of this vein, which was rich, yet in any one of the pits it was relatively a small proportion ; that in some, there was but little, and in one, we think the weight of evidence is, that there was none at all. We think it not true, that the surface was rich in gold. We think it not true, that the formation was at any point twelve feet wide, or that the veins were disseminated throughout the whole formation, in threads of from two to six inches wide, and in many, had several concentrated together. We think it not true, that there was ore from that mine, that would give several hundred pennyweights of gold to the hundred pounds. We will not say, that there might not be a small piece selected which would yield at that rate ; but we think that this representation was calculated to produce the impression, and justify the belief, than an hundred pounds of ore might be gotten together, which would produce several hundred pennyweights of gold. Any other interpretation of this language would, in our opinion, impute to the appellant the grossest deception. We think that the specimens and washings which were forwarded to Nathaniel Richards were not fair samples of the mine. The only proper purposes for which they could have been exhibited, was to enable purchasers to form an estimate of the richness of the mine ; the appellant, therefore, in our opinion, ought to have caused to be exhibited, either specimens of the richest and poor st quality, so as to show the extremes, or some of an average quality, knowing that the persons to whom he requested them to be exhibited, and amongst them the appellee, had never seen the mine. Any other course, under the circumstances, could not fail to produce a false estimate of its value.

*36] *Having come to these conclusions in relation to the facts of this case, the next inquiry in order is, what is the law of the case? It is an ancient and well-established principle, that whenever *suppressio veri* or *suggestio falsi* occur, and more especially both together, they afford a sufficient ground to set aside any release or conveyance. This ancient principle, thus expressed with so much sententious brevity, is laid down in terms somewhat more comprehensive, and having a direct bearing on the present case, by a modern text-writer on equity. In 1 Madd. Chan. 208, it is thus stated : If, indeed, a man, upon a treaty for any contract, make a false representation, whether knowingly or not, by means of which he puts the party bargaining under a mistake upon the terms of bargain, it is a fraud, and relievable in equity. The doctrine thus laid down is almost in the very words used by the chancellor, in the case of *Neville* v. *Wilkinson*, 1 Bro. C. C. 546, with the exception of the words, whether knowingly or not ; and the part of the proposition embraced by these words, is founded upon the case of *Ainslie* v. *Medlycott*, 9 Ves. 21, which fully sustains Mr. Maddock. In this latter case, the following strong language is used. "No doubt, by a representation, a party may bind himself just as much as by an express covenant. If, knowingly, he represents what is not true, no doubt, he is bound. If, without knowing that it is not true, he takes upon himself to

make a representation to another, upon the faith of which that other acts no doubt he is bound ; though his mistake was perfectly innocent."

But the doctrine is laid down with more comprehensiveness and precision by a still more modern writer on equity; who gives us, in the form of distinct propositions, what he considers the result of the various cases on the subject, and marks, with particularity, the modifications which belong to it. In 1 Story's Equity, 201–2, it is thus stated. "Where the party, intentionally, or by design, misrepresents a material fact, or produces a false impression, in order to mislead another, or to entrap or cheat him, or to obtain an undue advantage of him ; in every such case, there is a positive fraud, in the truest sense of the terms ; there is an evil act, with an evil intent ; *dolum malum, ad circumveniendum.* And the misrepresentation may be as well by deeds or acts, as by words ; by artifices to mislead, as by positive assertions." Whether the party thus misrepresenting a fact, knew it to be false, or made the assertion, without knowing whether it were true or false, is wholly immaterial ; for the affirmation of what one does not know, or believe to be true, is equally, in morals and law, as unjustifiable, as the affirmation of what is known to be positively false. And even if the party innocently misrepresents a fact, by mistake, it is equally conclusive ; for it operates as a susprise and imposition on the other party. Or, as Lord THURLOW expresses it, in *Nevill* v. * *Wilkinson*, "it misleads the parties contracting, on the subject of the contract." [*37

The author of the treatise last cited thus states the modifications of the doctrine : The misrepresentation must be of something material, constituting an inducement or motive to the act, or omission, of the other, and by which he is actually misled, to his injury. In the next place, the misrepresentation must not only be in something material, but it must be in something, in regard to which the one party places a known trust and confidence in the other. It must not be a mere matter of opinion, equally open to both parties for examination and inquiry ; and where neither party is presumed to trust to the other, but to rely on his own judgment.

The doctrine of these text-writers is illustrated by the cases in the books, some of which present very strong applications of it ; for it is held to extend not only to the parties to the contract, but also to others, who, from gross negligence, are guilty of misrepresentation. Thus, for example, in the case of *Pearson* v. *Morgan*, 2 Bro. C. C. 385, where A., being interested in an estate in fee, which was charged with 8000*l.* in favor of B., was applied to by C., who was about to lend money to B., to know whether the 8000*l.* was still a subsisting charge on the estate. A. stated that it was, and C. lent his money to B. accordingly. It appeared, afterwards, that the charge had been satisfied ; yet it was held, that the money lent was a charge on the lands in the hands of A.'s heirs, because he either knew, or ought to have known, the fact of satisfaction, and his representation was a fraud on C. Of a similar character was the case of *Hobbs* v. *Norton*, 1 Vern. 136, where one entered into an agreement for the purchase of an annuity, charged on the lands of a third person, and was encouraged, in the course of the transaction, by the latter, who suggested his own title, and it afterwards appeared, that such title was of a nature to have enabed the owner to avoid the annuity ; yet he was, as to the purshaser, held under an obligation to confirm it.

Cases of this class present the principle in its strongest aspect; because in these cases, the parties making the representation were bound by it to prevent a loss to others, although they themselves derived no advantage from it; whereas, in those instances in which the parties to the contract made the representation, they would receive benefit to the amount of the loss which the misrepresentation would produce to the other party, who acted on the faith of it; if the court did not relieve against it.

This principle has been adopted in the courts of our own country. In *Fulton's Executors* v. *Roosevelt*, 5 Johns. Ch. 174, the case was this: Fulton was induced by the representations of Roosevelt, that he had discovered a valuable coal-mine on the bank of the Ohio river, to contract for the purchase of a tract of land, stated by Roosevelt to embrace the mine; and besides giving to Roosevelt $4400, Fulton covenanted to pay him $1000 annu-
*38] ally, for twenty *years; but the annuity was to cease, if, after the mine was faithfully worked by Fulton, it should not produce at least $12,000, &c.; and the land was accordingly conveyed to Fulton. It appeared, that there was no coal-mine within the boundaries of the land conveyed; although there was coal adjoining it, in the bed of the river, which was navigable, deep and rapid; but the working of the mine, if practicable, would be very hazardous, expensive and unprofitable. The contract on the part of Fulton was held to be founded in mistake and misrepresentation; and Roosevelt was perpetually enjoined from bringing any suit against Fulton, to recover the annuity agreed to be paid him. In that case, the chancellor says, whether the defendant made the statements in his letter to Fulton, through mistake, or under the delusions of his own imagination, or by design, I am not able to say. It is sufficient for the decision of this case that the representations are not supported, but are contradicted by proof, and that the claim of the annuity, upon such a state of the case, is unconscientious and unjust. And this decree was affirmed in the court of errors. 2 Cow. 129.

In the case of *McFerran* v. *Taylor*, in this court, in 3 Cranch 281, the court, after remarking that there was a material misrepresentation, and that the defendant had contended, that it originated in mistake, not in fraud, say: "From the situation of the parties, and of the country, and from the form of the entry, it was reasonable to presume, that this apology is true in point of fact; but the court does not conceive that the fact will amount to a legal justification of the person who has made the misrepresentation. He who sells property on a description given by himself, is bound to make good that description; and if it be untrue in a material point, although the variance be occasioned by a mistake, must still remain liable for that variance."

The principles of these cases we consider founded in sound morals and law. They rest upon the ground, that the party selling property must be presumed to known whether the representation which he makes of it is true or false. If he knows it to be false, that is fraud of the most positive kind; but if he does not know it, then it can only be from gross negligence; and in contemplation of a court of equity, a representation founded on mistake, resulting from such negligence, is fraud. 6 Ves. 180, 189; Jeremy 385–6. The purchaser confides in it, upon the assumption that the owner knows his own property, and truly represents it; and, and as was well argued in the

case in Cranch, it is immaterial to the purchaser, whether the misrepresentation proceeded from mistake or fraud. The injury to him is the same, whatever may have been the motives of the seller.

We will next inquire, whether the misrepresentation in this case comes up to the rule which has been laid down. In the first place, it must be of matters of fact; and it has been argued by the appellant's counsel, that the letter of the 21st of January 1833, did not profess to state matters of fact, but to express opinions. It is certainly *true, that matters of opinion between parties dealing on equal terms, although falsely stated, [*39 are not relieved against; because they are not presumed to mislead, or influence the other pary, when each has equal means for information. But we consider the representation in this case not the expression of opinion, but the statement of facts. The appellant, in giving a description of a mine in Virginia, which he desired to be exhibited to the appellee in New York, says, that one hundred feet on the vein had been developed, which proved to be very rich, much richer than anything yet discovered in the United States. That the surface was rich in gold; that the formation was quite wide, and in one place twelve feet; that the veins were disseminated throughout the whole formation, in threads of from two to six inches wide; and that there was ore from the mine that would, without doubt, give several hundred pennyweights of gold to the hundred pounds. Now as to one of these statements, beyond all question, it is a matter of fact; we mean the one which describes the width of the formation and veins.

Having made a personal examination, he declares the formation to be wide, gives the actual width in one place, and then the width of the veins, in terms not of conjecture, but of the most positive assertion. He gives their dimensions by feet and inches. This statement, then, comes up to the standard of mathematical certainty. And even in regard to the others, he does not profess to speak of them from conjecture, but speaks of them as they are, without qualification. Take, for example, this:—The surface is rich in gold. Not that he thinks it will turn out to be rich, but that it is rich. It was argued, that there was no standard by which to decide what quantity of gold would justify calling it rich. There is none by which it can be decided with mathematical certainty; but the law does not require it. Suppose, that a seller was to describe to a distant purchaser, a tract of land as being rich, and it were proven to be poor, or very poor. Can it be, that a court of equity would not give relief in such a case? The certainty in the one case is as great at in the other; and the misrepresentation as to richness must be proved in each case, by the evidence of those who understood the quality of the one or the other.

In the next place, the misrepresentation must be of something material, constituting an inducement or motive to the appellee to purchase, and by which he has been actually misled to his injury. Now, in our opinion, that is emphatically the case in the suit before us. The mine, we think, not only constituted a motive, but the sole motive to the purchaser; he was induced to purchase an interest, at a high price, in that which has turned out to be worthless; and he has, therefore, been misled greatly to his injury.

It must, in the next place, be in something in which the one party places a known trust and confidence in the other. Nothing could be stronger than the confidence here, because the appellee had never seen the mine, and the

appellant knew it; the appellee had seen the letter of description and speci-
*40] mens, and the *appellant knew that he had; the appellee confided in the truth of the appellant's representation, and his skill in mines, and in mining operations, and the appellant knew that he did.

But it has been earnestly contended at the bar, that whatever might be the effect of misrepresentation, in cases in which there was nothing to countervail it; that in this case, at least, it cannot avail the appellee, on account of the particular character of the contract. The purchase of an interest in the gold mine was made through the agency of Charles H. Richards, acting for himself and others, and amongst them, for the appellee. Richards, by his letter of the 18th June 1833, to the appellant, amongst other things, said: "But after all the above-named gentlemen (amongst whom was the appellee) had seen your letter, we concluded, at any rate, we would look at the samples of ore, and have done so, and your letter describing the premises to N. R. (Nathaniel Richards), he read to us. The ore is rich beyond dispute; but how much there is of it, remains to be seen. In regard to the extent of the mine, and its richness, we must, of course, rely on your judgment." The appellant, in his letter of the 21st of June 1833, in reply to the above letter of Charles H. Richards, speaking of the gold-mine, says: "I, however, sell it for what it is, gold or snow-balls; and I leave it to you to decide, whether you will take it at my price, or not." It is said, that the contract having been concluded, upon the basis of this correspondence, the purchase was one, with all faults; that is in effect, that the seller was absolved from all liability, by reason of any representation which he had made, in relation to the mine.

In support of this proposition, several cases have been cited at the bar: let us examine them. The case of *Baglehole* v. *Walters*, 3 Camp. 154, was this: The defendant being about to sell a vessel, the subject of the suit, had printed particulars of sale, of which a copy was delivered to the plaintiff, in the following words: "For sale, the good brig Iris, burthen, per register, 208 tons; will carry 17 keels of coal and glass, or 300 loads of timber; has lately delivered a cargo of sugar from the West Indies, in excellent condition; is well found in all kind of stores, which are in good condition; hull, masts, yards, standing and running rigging, with all faults, as they now lie." The plaintiff purchased two-thirds of the ship, which defendant conveyed to him, in the common form. The plaintiff undertook to prove, that at the time of the sale, the ship had several secret defects in her; that these were known to the defendant; and that he did not disclose them to the plaintiff. And he relied upon a previous case of *Mellish* v. *Motteux*, Peake's Cases, 115, in which Lord KENYON had held, that the seller of a ship is bound to disclose to the buyer, all latent defects known to him; observing, that the terms to which the plaintiff acceded of taking the ship, with all faults, and without warranty, must be understood to relate only to those faults which the plaintiff could have discovered, or which the defend-
*41] ants were unacquainted with. But Lord ELLENBOROUGH, *disapproving of the doctrine of the case above cited, held, that where a ship is sold with all faults, the seller is not liable to an action, in respect of latent defects which he knew of, without disclosing, at the time of the sale, unless he used some artifice to conceal them from the purchaser.

In the same volume of Campbell, p. 505, a case in reported of *Schneider*

v. *Heath*, which was tried before MANSFIELD, Chief Justice; the opinion expressed by the chief justice is founded in so much good sense and justice, that we should have felt disposed, in a conflict of authorities, to have adopted it, even if it had not been, as, in the sequel of this opinion, we shall show it was, subsequently recognised and acted upon by the court. The opinion is in these words: "The words," that is, with all faults, as they lie, "are very large to exclude the buyer from calling upon the seller for any defect in the things sold; but if the seller was guilty of any positive fraud in the case, these words will not protect him. There might be such fraud, either in a false representation, or in using means to conceal some defect. I think the particular is evidence here, by way of representation; that states the hull to be nearly as good as when launched, and that the vessel required a most trifling outfit. Now, is this true or false? If false, it is a fraud, which vitiates the contract. What was the fact? The hull was worm-eaten, the keel was broken, and the ship could not be rendered seaworthy, without a most expensive outfit. The agent tells us, he framed this particular, without knowing anything of the matter. But it signifies nothing, whether a man represents a thing to be different from what he knows it to be, or whether he makes a representation which he does not know, at the time, to be true or false, if, in point of fact, it turns out to be false." As it appeared in the case, that means had been taken, fraudulently to conceal the defects in the ship's bottom, the case may not be an authority in favor of the opinion above quoted; yet it serves to show, that the doctrine on this subject was not then settled.

About the time that this last case was decided, the case of *Pickering* v. *Dowson*, reported in 4 Taunt. 779, was decided in the common pleas. That also was the sale of a ship, with all faults. A copy of the particulars was delivered by the seller to the buyer, which, amongst other things, represented the ship as being copper-fastened, and as having recently undergone a thorough repair. It was proved, that the ship was not copper-fastened, and that the defendant knew she was leaky. The court adhered to the doctrine of Lord ELLENBOROUGH, in *Baglehole* v. *Walters*, and held, that the seller was not resposible. Now, it will be observed, that all these cases were cases of ships, where the thing which was the subject-matter of the contract was in such situation that the buyer had a full opportunity to inspect and examine the truth of the representation; and this we take to be the ground of decision in them. The meaning, says HEATH, Justice, in *Pickering* v. *Dowson*, of selling with all faults, is, "that the purchaser shall make use of his eyes and understanding, *to discover what faults there are." This [*42
implies, in our opinion, that the thing must be in such situation as to enable him to make use of his eyes and understanding; and accordingly, in that case, "the full opportunity of the purchaser to inspect and examine the truth of the representation," is included in the marginal note of the case, as one of the terms of the proposition which exempts the seller from liability.

Now, we think that this case is strikingly contradistinguished from that in the most important particular; that in this the purchaser had not full opportunity to inspect and examine. It is true, that it would have been in the purchaser's power to have travelled some hundreds of miles to Virginia, to examine the mine; so it was in the case which has been quoted from Johnson's Chancery reports; but the chancellor does not even intimate an idea

that it was necessary for him to do so: so also, in the case of *Sherwood* v. *Salmon*, 5 Day 439, the purchaser might, by extraordinary diligence, have examined the land; but the court, in reference to this very subject, say, that where, from the remote situation of the land, or any other cause, a contract is made for the sale of land, without viewing it, there is the same reason that the seller should be responsible for a false affirmation respecting its quality, as for any other fraud.

We think we may safely lay down this principle, that wherever a sale is made of property, not present, but at a remote distance, which the seller knows the purchaser has never seen, but which he buys upon the representation of the seller, relying on its truth, then the representation, in effect, amounts to a warranty; at least, that the seller is bound to make good the representation. No part of the reasoning of the cases which we have been reviewing applies to such a case; they proceed upon the idea, that where the subject of the sale is open to the inspection and examination of the buyer, it is his own folly and negligence not to examine. Chancellor Kent, in the second volume of this Commentaries, 484–5, has justly said, that the law does not go to the romantic length of giving indemnity against the consequences of indolence and folly, or a careless indifference to the ordinary and accessible means of information. We think that this imputation cannot be made with any propriety against the appellee. The subject of the purchase was several hundred miles from him; he had never seen it; the seller knew that he had never seen it; in this situation, he made a representation, both by description in his letter, and by the exhibition of specimens; the appellee bought upon the faith of that representation, the appellant knowing that the appellee had read the letter and seen the samples; finally, the appellee had a double confidence in the appellant; first, in his integrity, and secondly, in his skill in mining; and the appellant admits his belief that the appellee had this double confidence in him.

If, under these circumstances, the seller were not bound by his representation, we know not in what cases we ought to apply the *well-known and excellent maxim, "*fides servanda est.*" We have now compared the cases, and upon principle, have shown, that they do not apply to this. But we will conclude our opinion, by referring to a case, later than all those which we have been examining, the reasoning of which is conclusive, as we think, in favor of the view which we have taken. It is the case of *Shepherd* v. *Kain*, 5 Barn. & Ald. 240. It was case for the breach of warranty, as to the character of a ship. The advertisement for the sale of the ship described her as a copper-fastened vessel; but there were subjoined these words, "the vessel, with her stores, as she now lies, to be taken with all faults, without allowance for any defects whatever." It appeared at the trial, that the ship, when sold, was only partially copper-fastened, and that she was not what was called in the trade, a copper-fastened vessel. It appeared also, that the plaintiff, before he bought her, had a full opportunity to examine her situation. The court said, the meaning of the advertisement must be, that the seller will not be responsible for any faults which a copper-fastened ship may have. Suppose, a silver service sold, with all faults, and it turns out to be plated; can there be any doubt, that the vendor would be liable? With all faults, must mean, which it may have consist-

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ently with its being the thing described. Here, the ship was not a copper-fastened ship at all ; and therefore, the verdict was right.

This case decides, that even where the plaintiff had a full opportunity of examination, the term, all faults, did not exempt the seller from liability for any defect but what was consistent with its being the thing described ; and, in effect, that the description amounted to a warranty. In the case before us, where the appellee had no opportunity for examination (and in that respect the case is much stronger in his favor than the one just cited), the terms of the sale, in our opinion, put upon the appellee no hazard or risk, but those which were consistent with the mine being such as it was described ; that those terms in no degree exempted him from liability for misrepresentation ; but if the mine had been such as described, then that they would have exempted him from any liability for failure in its anticipated produce. It may be, that the appellant made the representation under the influence of delusion ; but it is sufficient, to decide this case, for us to know, that the representation was untrue in material parts of it. The decree of the circuit court is affirmed, with costs.

Story, Justice. (*Dissenting.*)—In this case, I have the misfortune to differ from a majority of my brethren. The bill seeks to set aside and rescind an executed contract, upon the ground of gross premeditated fraud, the contract being confessedly one of great hazard, and founded in speculation. The answer fully and pointedly denies every allegation of fraud, and insists upon the most perfect good faith. The decree, by rescinding the contract, affirms the material charges of fraud stated in *the bill.

After a careful consideration of the evidence in the record, my [*44 opinion is, that there is no just foundation for, or proof of, these charges. I do not propose to review the evidence, though I take a very different view of it from what has been expressd in the opinion delivered by my brother Barbour ; and there are many facts and circumstances, which have struck my mind with great force, which, I regret to find, are not deemed of equal importance by my brethren. I am not willing, by my silence, to sanction imputations upon the appellant, which cast so deep a shade upon his character, which the record shows has hitherto been without stain or reproach. In my opinion, the appellant stands acquitted of fraud, the victim, if you please, of a heated and deluded imagination, indulging in golden dreams ; but in this respect, he is in the same predicament with the appellee, and none other.

McLean, Justice, dissented, stating that he agreed altogether with Mr. Justice Story.

Baldwin, Justice, dissented, both as to the facts and the law as stated in the opinion of the court delivered by Mr. Justice Barbour.

On appeal from the circuit court of the United States for the southern district of New York. This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the southern district of New York, and was argued by counsel : On consideration whereof, it is adjudged and decreed by this court, that the decree of the said circuit court in this cause be and the same is hereby affirmed, with costs.

The counsel for the appellant afterwards presented a petition, praying for a rehearing of this case, but the court unanimously overruled the application.

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*45] *William Ross and Henry King, Plaintiffs in error, *v.* James S. Duval and others, Defendants in error.

Execution.—Process act.—Limitation.—Jurisdiction.

A judgment was obtained in the circuit court of the United States for the district of Virginia, in December 1821, and a writ of *fieri facias* was issued on this judgment, in January 1822, which was not returned; and no other execution was issued, until August 1836, when a *capias ad satisfaciendum* was issued against the defendant: *Held*, that this execution issued illegally, in consequence of the lapse of time between the rendition of the judgment, and the issuing of execution in 1836.

The result of the opinion of the supreme court, in the case of Wayman *v.* Southard, 10 Wheat. 1, delivered by Chief Justice Marshal, was, that the execution laws of Kentucky, having passed subsequent to the process acts, did not apply to executions issued by the circuit courts of the United States; and that under the judiciary and process acts, the courts had power to regulate proceedings on executions. The power of the court to adopt such rules, was not embraced in the point certified for the decision of the court, and was not expressly adjudged; but it is the clear result of the argument of the court.

The act of the legislature of Virginia, of 1792, to regulate proceedings on judgments, is substantially and technically a limitation on judgments; and is not, therefore, an act to regulate process; it is a limitation law, and is a rule of property; and under the 34th section of the judiciary act, is a rule of decision for the courts of the United States.

The act of the legislature of Virginia, of 1792, limits actions and executions on judgments rendered in the state courts; and the same rule must be applicable to judgments obtained in the courts of the United States.

The process act of congress of 1828 was passed shortly after the decision of the supreme court of the United States, in the case of Wayman *v.* Southard, and the United States Bank *v.* Halstead; and was intended as a legislative sanction of the opinions of the court in those cases. The power given to the courts of the United States by this act, to make rules as a regulation of proceedings on final process, so as to conform the same to those of state laws on the same subject, extends to future legislation, and as well to the modes of proceeding on executions, as to the forms of writ.

Acts of limitation are of daily cognisance in the courts of the United States; and in fixing the rights of parties, they must be regarded as well in the federal as in the state courts.

The rule is well settled, that to avoid a statute, a party must show himself to be within its exceptions.

A declaration in the circuit court of the United States for the Virginia district, stated the plaintiffs to be "merchants, and partners trading under the firm, and by the name and style of Duval & Co., of Philadelphia, in Pennsylvania." This was insufficient to give jurisdiction to the court in the action, if the exception had been taken by plea, or by writ of error, within the limitation of such writ.

Construction of the act of limitations of Virginia of 1829. It is a sound principle, that where a statute of limitations prescribes the time within which suit shall be brought, or an act done, and a part of the time has elapsed, effect may be given to the act; and the time yet to run, being a reasonable part of the whole time, will be considered the limitation in the mind of the legislature in such cases; this rule is believed to be founded on principle and authority.[1]

Error to the Circuit Court for the Eastern District of Virginia. On the 7th of December 1821, James S. Duval, Lewis Duval and John Rheinhart obtained a judgment against William Ross. A writ of *fieri facias* was issued on the judgment, on the 10th of January 1822, which was never

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[1] See Lewis *v.* Lewis, 7 How. 776; Sohn *v.* Waterson, 17 Wall. 596.

returned. No other execution was issued on the judgment, until the 11th of August 1836. A *capias ad satisfaciendum* was then sued out, and executed on the body of Ross, who gave up property in discharge of his body, and entered *into a bond, with Henry King as surety, for the forthcoming of the property, on the day and at the place of sale. This [*46 bond was forfeited, and a motion was made upon it for an award of execution; the award of execution was opposed, on the ground of the lapse of time between the rendition of the judgment and the award of execution, in August 1836; and it was insisted, that the execution had issued illegally, and that the same, as well as the forthcoming bond taken under it, ought to be quashed.

The circuit court overruled the motion to quash the execution and the bond; and gave judgment for the plaintiff for the amount of the bond. The defendants prosecuted this writ of error.

The case was argued by *Robinson*, for the plaintiffs in error; and by *Nicholas*, for the defendants.

For the plaintiffs in error, the following points were submitted to the court:

1. That it having been laid down in *Wayman* v. *Southard*, 10 Wheat. 24, that the 14th section of the judiciary act must be understood as giving to the courts of the Union the power to issue exexcution on their judgments, and that section declaring, that the writs issued shall be agreeable to the principles and usages of law, the court, in determining within what time executions may be issued, "agreeable to the principles and usages of law," should adopt the rule of decision prescribed by the 34th section, to wit, the laws of the state in cases where they apply. In this view, the Virginia act of 1792 would give the rule; and there being no proof that the persons entitled to the judgment were not within the commonwealth, at time of the judgment being awarded, the second execution, and the forthcoming bond taken under it, should be quashed. Even if there were such proof, it would be of no avail, since the Virginia act of 1826. Sup. to Rev. Code of 1819, p. 260, § 3.

2. That if, in determining within what time writs of execution may be issued, "agreeable to the principles and usages of law," the court should resort, for a rule of decision, to the common law of England; still, the second execution must be held to have issued illegally, and the court should quash that and the bond also; because, at common law, though execution had issued within the year, yet unless it were returned and filed, a second execution could not issue after the year.

3. That if the process act be considered as giving the rule, and the inquiry be, what was the mode of process used and allowed in Virginia, in this respect, in 1789, still, the result must be the same; because the mode of process must either have been according to the common law, or according to the statutes of Virginia. The common-law rule has already been stated; and the statutes remaining in force in 1789 will be of no help to the judgment-creditors. According to these statutes, no judgment was of force, longer than seven years. See reference to them, in note to 1 Rev. Code of 1819, p. 489.

*Robinson, for the plaintiffs in error, argued:—The proposition maintained in the court of the United States for the district of Virginia was this: that upon a judgment in that court, if execution has once issued, thought it might never be returned, a second execution might issue afterwards, indefinitely as to time. In other words, that there was no limitation of time within which the issuing of the second execution was confined. This proposition has been advanced, in Virginia, for the first time, in this cause, and the period at which it is urged, is remarkable.

It would not have been very surprising to have heard it, a few years ago, when the English courts, and some of the American, seemed to set at defiance all the statutes of limitation which the wisdom of the legislature had prescribed. But it is remarkable, that it should be urged now, when the courts, everywhere, both in England and America, are construing all statutes of limitation according to their plain meaning, and giving to them full effect. When the parliament of England, and the state legislatures, to make the limitation more certain, are requiring a written acknowledgment of debt to remove a case from the operation of the statute; when the courts of equity, in cases where no statute applies, are enforcing, with almost the regularity and certainty of a statute, the rules adopted by them for repressing antiquated and stale demands; and when the best legal writers of the day are supporting the policy of the statutes, with commendable earnestness and ability.

In a late work, which has added not a little to the reputation of a member of this bench, it is said, that "Laws thus limiting suits are founded in the noblest policy; they are statutes of repose, to quiet titles, to suppress frauds, and to supply the deficiency of proofs from the ambiguity and obscurity of transactions. They presume, that claims are extinguished, because they are not litigated within the prescribed period. They take away all solid grounds of complaint, because they rest on the negligence or *laches* of the party himself; they quicken diligence, by making it in some measure equivalent to right. They discourage litigation, by burying in one common receptacle all the accumulations of past times, which are unexplained and have now become inexplicable." This passage is from page 482 of the Conflict of Laws. The author adds, that it has been said by Voet, with singular felicity, that controversies are limited, lest they should be immortal, whilst men are mortal.

Shall I be told, that the policy in which statutes limiting actions are founded, does not apply to the limitations of executions, after judgment. This, surely, is not so. So far from its being the case, we are told by the common-law writers, that where execution is not sued out within a year after the judgment, the court concludes that the judgment is satisfied and extinct; and acts upon this presumption, by declining to issue a new execution. 3 Bl. Com. 421. And where execution has issued within the year, and never been returned, the presumption of satisfaction is equally strong.

*48] *For if it had been put into the hands of an officer, we may reasonably conclude, that the creditor would have proceeded against the officer. If he has not proceeded against the officer, the presumption is, that the execution had not been delivered to an officer. And his failure to deliver it to an officer, is best accounted for, by supposing that the claim had been adjusted between the parties. The common-law rule conformed to this

reasoning; for it will be presently shown, that it placed the creditor who took out execution and never returned it, upon the same footing with him who had taken out none.

The presumptions, then, which lie at the bottom of the statutes limiting actions, are equally applicable to limitations of execution. And if the present decision should be sustained, it will be in opposition to those presumptions, and opposed to the general spirit which now prevails both in legislative bodies and judicial tribunals. This circumstance should induce the court to look well into the particular case, and see whether the decision is rendered necessary by the acts of congress.

It is admitted, that every nation must have a right to settle for itself the times within which judicial proceedings may be carried on in its own courts; and if, indeed, congress has enacted, that upon a judgment in a circuit court of the United States, where execution has once issued, a new execution may issue at any time afterwards; though we may think such an enactment unwise; it must, nevertheless, be conformed to. Has congress so enacted? We certainly can find no such enactment, in terms. If there be any such, it is not a direct provision of congress, but an indirect one. Has congress so enacted, directly or indirectly? In the act establishing the judicial courts of the United States, immediately after specifying the courts which are established, and their jurisdiction, comes the 14th section, which prescribes the means of carrying that jurisdiction into effect. It declares, that "all the before-mentioned courts of the United States shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the principles and usages of law." This act was approved the 24th of September 1789. (1 U. S. Stat. 81.) The act to regulate processes was approved a few days after, viz., on the 29th of September. It declares, that until further provision shall be made, and except where by this act, or other statutes of the United States, it is otherwise provided, the forms of writs and executions, except their style, and modes of process, in suits at common law, shall be the same, in each state respectively, as are now used or allowed in the supreme courts of the same. (Ibid. 93.) The forms of writs, executions and other processes, and the forms and modes of proceeding in suits, in those of common law, which were used in the courts, in pursuance of the process act of 1789, *were afterwards continued by the process act of 1792; subject however to such [*49 alterations and additions as the courts respectively shall, in their discretion, deem expedient, or to such regulations as the supreme court of the United States shall think proper, from time to time, by rule, to prescribe to any circuit or district court concerning the same. (Ibid. 276.) The rule which must govern the case is to be deduced from one of those provisions.

On the other side, it is contended, that the process act of 1789 prescribes the rule in such cases; and that, according to that act, after judgment has been obtained in the circuit court of the United States for the Virginia district, the mode of process is the same that was used and allowed in Virginia, in 1789. In other words, the proposition is, that according to the mode of process used and allowed in Virginia in 1789, where execution had issued within the year, though it were not returned, a new execution could issue, after the year, indefinitely as to time. Without being at all satisfied that

the rule on this subject is properly deduced from the process act, I proceed to show, that according to the mode of process used and allowed in Virginia, in 1789, where execution had issued within the year, and not returned, a new execution could not issue after the year ; but the plaintiff was driven to his *scire facias.* That this was the mode of process used and allowed in such a case, will be shown both by the common law, and by the statutes of Virginia.

It is admitted, that according to the common law, where execution was taken out within the year, and a return made, showing that it had been ineffectual, a new execution might issue, after the year, merely by entering continuances on the roll, so as to preserve the appearance of regularity. *Aires* v. *Hardress*, 1 Str. 100. And these continuances were regarded such mere matters of form, that, in many cases, they were allowed to be entered after the issuing of the second writ, if the first appeared to have been returned and filed. That, however, was indispensable. To sustain the second writ, after the year, it was always material to show, that the first had been returned and filed. The rule is so laid down by Mr. Tidd, in his Practice ; and he is sustained by all the authorities. "When," says he, "a *fieri facias* or *ca. sa.* is taken out within the year, and not executed, a new writ of execution may be sued out, at any time afterwards, without a *scire facias ;* provided, the first writ be returned and filed, and continuances entered from the time of issuing it." Tidd 1155. In another place, the rule is laid down even more emphatically. After a year and a day from the time of signing judgment, the plaintiff cannot regularly take out execution, without reviving the judgment by *scire facias ;* unless an execution was previously sued out, returned and filed." Tidd 1031–2. See also, 2 Saund. 72 *c.*

*50] A leading authority in support of the rule, as here laid down, is *the case of *Blayer* v. *Baldwin*, 2 Wils. 82 ; reported also, in Barnes 213. In *Blayer* v. *Baldwin*, execution was sued out within the year, but was not returned. It was, however, continued upon the roll down, by *vicecomes non misit breve*, and a *ca. sa.* afterwards issued, under which the defendant was taken. The objection was made, that the judgment was above a year old, and that there was no return of the execution, to warrant the entry of the continuances on the roll : *held*, that it was irregular to continue an execution on the roll, which was never returned or filed. And on this ground, the defendant was discharged out of custody. Judge Washington decided the same way, in the case of *Azcarati* v. *Fitzsimmons*, 3 W. C. C. 134.

It is plain, then, that in this case, the execution issued illegally. The plaintiff was driven to his *scire facias*, in like manner as if no execution had issued within the year. And not even the *scire facias* could have been obtained from the clerk, as the execution was here. After so great a lapse of time as existed in this case, a motion in court would have been proper, even for a *scire facias. Lowe* v. *Robins*, 1 Brod. & Bing. 381.

If the execution could not legally have issued, according to the common law, the next inquiry is, whether the common-law rule was altered by any statute of Virginia, remaining in force in 1789. It will be found, that the only statutes on the subject, which existed prior to that time, limited the creditor, even more than the common law. By the statute of March

1657 '58, no judgment, or any other engagement of debt, was of any force, or recoverable, five years after the date thereof; with this proviso only, that if the debtor absent himself and depart the country, then, during such his departure, it shall not be reckoned nor accounted any part of the five years. 1 Hen. Stat. 483–4. By the act of 1660 '61, the time was made seven years, with a similar proviso, that if the debtor should depart the country, the time of his absence should not be esteemed any part of the seven years. 2 Hen. Stat. 22. This was soon after the restoration of Charles II. In the succeeding year, there was a revisal of the laws; and it was again enacted, that no judgment should be of force, seven years after the grant thereof; with a proviso, that if the debtor depart the country, and leave no attorney to answer for him, or in any other way conceal or privily remove himself into any part of the country, such time of his absence shall not be accounted any part of the seven years. 2 Hen. Stat. 104–5.

This law, in some of its parts, being supposed to admit of doubt, in 1696, it was repealed, and a new statute passed, declaring that no judgment shall be of force, longer than seven years after the date of the judgment, or after the same has been renewed by *scire facias;* with a proviso, that if the debtor privately depart the country or the *county where he [*51
resided and dwelt, or contracted the debt, and have not a sufficient estate in the county where he resided or contracted the debt, or where the judgment was obtained, to satisfy the same, it should remain and be in force and recoverable, notwithstanding the seven years be expired and past. 3 Hen. Stat. 146. These different statutes are referred to in a note to the Code of 1819, vol. i. p. 489; in which the reviser notices, that there is no exception in favor of absent creditors, or persons under disabilities. It is highly probable, that it was the circumstance of the Virginia statutes operating against creditors residing in England more strongly than the common law did, that led to the subsequent action of the crown.

In the same volume (vol. 3, p. 377), there is a statute of 1705, similar to that of 1696; and in the margin, it is stated to have been repealed by proclamation, April 15th, 1830. I have not been able to find this proclamation. If only the statute of 1705 was repealed, and the others remained in force, they would, of course, have operated to bar this judgment, If, however, all the Virginia statutes on the subject were repealed by the crown, then the matter was left as it stood at common law; and we have seen that, according to the common law, the execution could not legally have issued.

Having shown that the execution could not legally have issued according to the mode of process allowed by the laws of Virginia in 1789, the appellee can derive no aid from the process act; except by making out that the mode of process actually used in Virginia in 1789 was different from what the law allowed; and justified the issuing the execution in this case. No one recollects that such was the case; for the recollection of neither judge nor counsel extends further back than 1792. The sole foundation for such an idea arises out of the language of the act of 1792. 1 Rev. Code of 1819, p. 489, § 5. Now, before commenting upon that act,, let us sum up, in a few words, the state of things upon which that act was designed to operate. On the 3d of July 1776, the convention of Virginia adopted as a rule of decision, not only the common law of England, but all statutes or acts of parliament made in aid of the common law, prior to the 4th year of James I.,

which were of a general nature, not local to that kingdom. 1 Rev. Code of 1819, p. 135. Of course, the statute of West. II. was adopted, which gave the writ of *scire facias*, where the judgment was more than a year old. Hence, in Virginia, from 1776 to 1792, when execution had not issued within the year, the party was not driven to the action of debt, after the year; but had a *scire facias*, in some cases, when the time was short, on application to the clerk; in others, where the time was longer, on motion.

The act of limitations of 1782 passed on the 19th of December in that year. The clause in question was not reported by the revisors, but was introduced, while the bill was in progress through the legislature. *If, therefore, it did not show an exact acquaintance with the state of the law at the time, it would not be at all remarkable; but in truth, the act is very easily explained. The rule under the statute of West. II. was, that if the judgment be under seven years, the plaintiff might sue out a *scire facias*, as a matter of course, without any rule or motion. After seven years, the writ was obtained by motion, the nature of which varied according as the time was more or less. The object of the legislature seems to have been, to adopt one uniform rule, where no execution had issued within the year; that is to say, to allow a *scire facias*, as matter of course, without motion, not only seven, but ten years; and not to allow it after ten years, either with or without motion. This is the manifest effect of the first part of the clause: "Judgments in any court of record within this commonwealth, where execution hath not issued, may be revived by *scire facias*, or an action of debt brought thereon, within ten years next after the date of such judgment, and not after." If the clause had stopped here, the case where execution hath issued and no return is made thereon, would have remained as at common law. The party could get no new execution, after the year, without a *scire facias;* but he could, by means of *scire facias*, get a new execution, after more than ten years. The object of the legislature seems, in this case also, to have been, to adopt a uniform rule, where execution had issued, and no return was made thereon, to allow other executions to issue, without a *scire facias*, for the term of ten years; but not to allow any new execution, even with a *scire facias*, after ten years. The language of the clause is, "where execution hath issued, and no return is made thereon, the party in whose favor the same was issued, shall and may obtain other executions for the term of ten years from the date of such judgment, and not after."

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The exposition given of the law and practice before the statute of 1792, is sustained in the case of *Fleming's Executor* v. *Dunlop*, 4 Leigh 338, by Judge Brooke; the oldest judge of the court, and the one most familiar with the state of things before 1792. See his opinion, p. 342. It is also sustained by the opinion of the President, p. 343–5. Judge Carr, one of the judges, thinks the legislature must have considered the law to be different. He does not himself say the law was different. And the counsel on the other side will attempt to sustain the judgment of the court below, upon these remarks of Judge Carr—remarks made in a case in which the court has decided, that the statute of 1792 had so far curtailed the common law, that where no return is made, the party cannot obtain a second execution, after ten years, even with a *scire facias*. Here are the remarks of one judge opposed to the opinion of two—and remarks of that judge, showing that

his opinion of what the law actually was before 1792, coincided with the opinions of his brethren; and that he merely supposed the legislature to have been under a mistaken impression *as to the law. But if this impression of Judge CARR could be regarded as correct, which it [*53 cannot be, it does not prove, that the second execution in this case was sanctioned by the mode of process used or allowed in Virginia in 1789. For the opinion of the legislature as to what the law was, does not prove that the law was really so. Still less does it prove, that the mode of process used was not according to law.

There can be no difficulty, then, in concluding that the mode of process used and allowed in Virginia in 1789, did not authorize the issue of the execution in this case; and the appellee, therefore, can derive no aid from the process act, if that act were applicable to the case. But does it apply? The provisions of the process act, and of the 14th section of the judiciary act were examined in the cases of *Wayman* v. *Southard*, 10 Wheat. 1; and *Bank of the United States* v. *Halstead*, Ibid. 51. The court then said, that the form of the writ of execution, and the rule for the conduct of the officer, while obeying its mandate, were regulated by the process act, but that the power to issue executions was given by the 14th section of the judiciary act. See p. 23–4. The court, then, has power to issue executions "agreeable to the principles and usages of law." These laws control the process in respect to everything that calls for consideration before it emanates. They control the time at which it may issue. If, at the time the execution is applied for, it cannot issue "agreeable to the principles and usages of law," then it must not be issued.

But what law is that, whose principles and usages are to give the rule? In the case of *Robinson* v. *Campbell*, 3 Wheat. 222, the court was called upon to interpret the meaning of the act of congress which speaks of the principles, rules and usages which belong to courts of equity, as contradistinguished from courts of common law; and the court then thought, that to effectuate the purposes of the legislature, the remedies in the courts of the United States were to be at common law or in equity; not according to the practice of state courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of those principles. So here, in determining what the legislature mean, when they say that executions are to be issued agreeable to the principles and usages of law, the court may feel bound to say that they are to be issued agreeable to the principles and usages of the common law. If so, there is an end of the matter; for it has already been shown that, agreeable to the principles and usages of the common law, the execution issued illegally in this case.

It may be said, that "agreeable to the principles and usages of law" means agreeable to the principles and usages of the law of *that state in which judgment is rendered; but that the court is confined [*54 to the law of Virginia in 1789, when the judiciary act passed. If so, the case is equally plain; for it has already been shown, that according to the law of Virginia of 1789, the execution issued illegally. But congress, after it has, in the 14th section, given writs agreeable to the principles and usages of law, goes on to declare, in the 34th section of the same statute, that "the laws of the several states, except when the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded

as rules of decision in trials at common law, in the courts of the United States, in cases where they apply; and this 34th section is unquestionably prospective as well as retrospective. It regards future as well as existing laws." In this respect, the Virginia act of 1792 would govern the case; and the terms of that act are too plain to admit of question. 1 Rev. Code of 1819, p. 489, § 5.

There is no proof that the plaintiffs were not within the commonwealth, at the time of the judgment being awarded. The allegation that they were merchants of Philadelphia, at the time of bringing the original action, or at the time of filing the declaration, if evidence of anything, is certainly not evidence that they were out of the commonwealth, when the judgment was rendered. The plaintiffs who seek benefit from the proviso, must prove such a case as is necessary to bring themselves within it. Independently of which, by the Virginia act of March 1826, the saving is repealed, after ten years from the date of that act. Sup. to Rev. Code, p. 260–1.

But neither the act of 1792, nor the subsequent act can be looked to, except under the influence of the 34th section; and that section, we are told, only furnishes a rule to guide the court in the formation of its judgment. Grant it! Do we not want a rule to guide the court in forming its judgment on the forthcoming bond; in deciding whether that bond was taken under an execution which issued legally? And is it not one thing to resort to the state laws, to ascertain whether the execution may lawfully issue, and another, to resort to the process act, to ascertain what should be the proceedings under the execution? To one, we look for a rule which is decisive of the rights of parties; to the other, we look for a rule as to remedies merely. If an action be brought upon a bond, note or account, and it would be barred by the law of the state in which the suit is brought, it will be equally barred in a federal court. Why should not the like rule prevail in regard to judgments? Why should it not be the rule, that if a judgment of the same date, upon which like proceedings had been had, would be barred in the state court, the judgment of the federal court shall be barred also? That which is evidence, under the state laws, of a particular fact, has been decided by this court to be evidence of the same fact in a suit in a federal court. If, under the state laws, the circumstances of an execution having issued, and no return made thereon, is evidence of satisfaction or release; why should it not be evidence of the same *thing
*55] in a federal court? The case of *McNeil* v. *Holbrook*, 12 Pet. 84, in which the chief justice delivered the opinion at the last term, may be cited in support of this view.

In the view which has been presented, full effect has been given to the decision in *Wayman* v. *Southard*, as to the mode of proceedings under execution. But it is proper to mention, that, since *Wayman* v. *Southard*, an act of congress has passed, by which not only writs of execution, but the proceedings thereupon, are to be the same as are used in the courts of the state. Act of May 19th, 1828, § 3. (4 U. S. Stat. 281.)

Nicholas, for the defendants in error, contended: 1. That according to the decisions of this court, the proceedings on executions in the courts of the United States, in suits at common law, are to be the same in each state, respectively, as were used in the supreme court of the same, in September

1789; subject to such alterations as the said courts of the United States may make or as the supreme court shall prescribe to the other courts. 2. That the statute of Virginia, passed in 1792, limiting to ten years the right to sue out subsequent executions, where one had issued and not been returned, has no application to executions issued from the federal courts in that state; and even though it had such application, the defendants in error are within the saving provided for persons not within the commonwealth at the time of such judgment being awarded; nor has the benefit of that saving been taken away by any subsequent statute. 3. That according to the modes of proceeding used and allowed in Virginia, in 1789, if an execution had issued within the year, though not returned, there was no limitation as to time upon the right of the party in whose favor it had issued, to obtain other executions; and there is no rule of the circuit court of the United States for the eastern district of Virginia, or of the supreme court, prescribing a different practice; that, consequently, the second execution in this case was lawfully issued; and the motion to quash the said execution and the forthcoming bond taken under it, was properly overruled.

He argued, that the case of *Wayman* v. *Southard*, in Wheaton's reports, had decided the case. There, the main question was, whether the statutes of Kentucky concerning executions, which required that the plaintiff should indorse on the execution, that the notes of particular banks of the state should be received in payment, and on his refusal, to allow the defendant to execute a replevy bond, which would stay the execution for two years, applied to executions in the courts of the United States. This court decided, that proceedings on executions, according to the forms of the state courts, were good in the federal courts, under the process acts of September 29th, 1789, and modified by the act of May 8th, 1792. The first of these acts (1 U. S. Stat. 93), provides that the forms of writs and executions in the courts of the United States, and *the modes of proceeding, in suits at common law, should be the same in each of the states, [*56 respectively, as then prevailed in the supreme court of the same. The second act, that of 1792 (Ibid. 275), subjected the process authorized by the act of 1789, to such modifications as the circuit courts of the United States might make, or the supreme court of the United States might prescribe. The supreme court of the United States, considering these two acts as regulating the process in the courts of the United States, that court held, that no statutes of the state of Kentucky, passed after the enactment of these laws, were applicable to executions issued out of the courts of the United States.

It was contended by counsel, in that case, that the whole application of the process laws of the United States was to the forms of execution and other process, and that these acts did not regulate the proceedings under them, and that the expression, "modes of proceeding," in the act of 1792. applied to proceedings in the circuit courts, in contradiction to "mesne" and "final" process. It was also contended, that the 34th section of the judiciary act of 1789, making state laws rules of decision, when they apply, furnished the rule of decision in that case. These positions were negatived by the chief justice, in the opinion of the court delivered by him. The court also decided, that the laws of the states were, by the act of 1789, to be guides for the judgment of the court in forming its opinion; but not for

carrying into effect that judgment. Proceedings after the judgment were merely ministerial. "Trials at common law," included litigation during the pendency of the controversy, and did not extend to process upon judgments. The case of *McCluny* v. *Silliman*, 3 Pet. 270, shows, that state statutes of limitation furnish rules of decision in trials at common law, but does not conflict with the principles settled in *Wayman* v. *Southard*. The case of *McNeil* v. *Hoolbrook* has reference to a rule of evidence on the trial of a cause. Cited also, *Bank of the United States* v. *Halstead*, 10 Wheat. 51; *Boyle* v. *Zacharie*, 6 Pet. 448. These cases establish the first point in the case of the defendant in error.

The second proposition follows as a corollary from the first; for if the modes of proceeding were in force in 1789, the statutes passed since have no application. The proposition of the counsel for the plaintiffs in error, going to show that the statutes of 1792 should regulate the proceedings upon execution from the courts of the United States, are founded upon principles expressly repudiated and overruled in the cases of *Wayman* v. *Southard*; *Bank of the United States* v. *Halstead*; and *Boyle* v. *Zacharie*; which decide that the 34th section of the judiciary act is a rule of decision and not of proceedings.

Another, and also a fundamental objection to the argument is submitted. In his first point, the plaintiff's counsel proceeds on the hypothesis, that the *57] 14th section of the judiciary act, upon which *the authority to issue executions rests, according to the decisions of this court, not only gives the power, but also fixes the principle; and furnishes a rule by which proceedings should be governed. Now, the whole object of the 14th section of the act was, to prescribe the nature and character of writs, and to declare that those not specially provided for, should be agreeable to the principles and usages of law. There is no reference to proceedings with respect to time, or anything else. All the deductions, therefore, that this section was intended, as is supposed and contended for by the counsel for the plaintiffs in error, to fix the rule to govern executions, must fall; and it, therefore, is unnecessary to examine the views he has taken in regard to the usages of the common law.

But even if the act of 1792 applied, the defendants in error are within the saving provisions of that law, in favor of persons out of the commonwealth of Virginia, at the time of the rendition of the judgment. The declaration shows, that the plaintiffs in the circuit court were citizens of another state; and as such only, could institute a suit in the federal court. *Primâ facie*, therefore, they were out of the state, when the judgment was obtained; and the plaintiffs in error have not shown, as they ought to have shown, that they came into the state, within five years afterwards, and before the execution issued. Nor is this saving taken away by the act of 1826.

As to the third point: What proceedings were in practice and use, and were allowed in Virginia, in 1789? The opinions of the judges of the circuit court, and of the counsel attending the court, show, that from 1792, no practice different from that claimed by the counsel for the defendants existed, after 1792: cited, on this point, *Fleming* v. *Dunlap*, 4 Leigh 338, opinion of Judge Carr; 2 Tuck. Com. 333, and a note of cases on that page; 1 Hen. Stat. 177, 179–80; Act of 1789, and 3 Hen. Stat. 377.

The process act of 1792 provides, that the modes of proceeding should be the same as were then used in the courts of the United States, in pursuance of the act of 1789. Now, suppose, the ancient law of Virginia, of 1696, applied to executions; the counsel for the plaintiffs in error should show, that the limitation of seven years existed by that law, in 1792; whereas, the opinion of the circuit court, and the act of 1792, show that no such limitations existed in practice in the state courts, even as far back as 1792; nor is there any evidence of its existence in the circuit court of the United States for the Virginia district.

McLean, Justice, delivered the opinion of the court.—This suit is brought before the court by writ of error, from the circuit court for the eastern district of Virginia. On the 7th December 1821, James S. Duval, Lewis Duval and John Reinhart obtained a judgment in the circuit court, against *William Ross. A writ of *fieri facias* issued on the judgment, the 10th January 1822, which was delivered to the attorney for [*58 the plaintiffs, and never returned. No other execution was issued until the 11th August 1836. A *capias ad satisfaciendum* was then sued out, and executed on the body of Ross; who gave up property in discharge of his body, and entered into bond, with Henry King, as surety, for the delivery of the property on the day and at the place of sale. This bond being forfeited, a motion was made upon it, under the practice established in Virginia, for an award of execution. The motion was opposed, and the lapse of time between the rendition of the judgment and the execution of August 1836, was relied on, to show that the execution had been illegally issued; and consequently, that the forthcoming-bond was unauthorized and void. But the court entered up a judgment on the bond. To revise this judgment, this writ of error is prosecuted.

In the investigation of the questions which arise in this case, it becomes necessary to refer to certain acts of congress, and also to certain statutes of Virginia. By "an act to regulate processes in the courts of the United States," passed in 1789, it is provided, that until further provision shall be made, and except where, by this act or other statutes of the United States, is otherwise provided, the forms of writs and executions, except their style, and modes of process, in the circuit and district courts, in suits at common law, shall be the same in each state, respectively, as are now used or allowed in the supreme courts of the same." And by the act of May 1792, it is declared, "that the forms of writs, executions and other processes, except their style, and the forms and modes of proceding in suits, in those of common law, shall be the same as are now used in the said courts, respectively, in pursuance of the act above recited." These acts adopt the execution laws of the states, as they stood in 1789. An act was passed in 1793, and also one in 1800, on the same subject; but as none of their provisions bear upon the present case, it is unnecessary to examine them.

In 1792, the state of Virginia passed a statute, providing that "judgments in any court of record within the commonwealth, where execution hath not issued, may be revived by *scire facias*, or an action of debt brought thereon, within ten years next after the date of such judgment, and not after; or where execution hath issued, and no return is made thereon, the party in whose favor the same was issued, shall and may obtain other execu-

tions, or move against any sheriff or other officer, &c., for the term of ten years from the date of such judgment, and not after." There is a saving in this statute in behalf of infants, &c., and persons beyond the commonwealth; giving five years, after the removal of the disability, to proceed on the judgment.

*59] In the argument of this case, in the circuit court, as appears from *the bill of exceptions, it was stated by the judges, and admitted by the counsel on both sides, that so far back as the recollection of the said judges and counsel extends, it has been the usage in the county and corporation courts, and in the superior courts of law, and in the general court of Virginia, where execution has issued upon a judgment, and no return made thereon, to allow other executions to be issued. But this recollection of the practice of the judges and counsel did not extend further back than the above-recited statute of 1792. The circuit court, however, held, that under the statutes and practice of Virginia, prior to the act of 1792, where an execution had been issued within the year, on a judgment, though not returned, the plaintiff was entitled to issue other executions, without restriction as to time. And this is the ground taken by the counsel for the defendant in error.

A reference is made to the early statutes of Virginia which regulated executions, and also to the rule of the common law. And it is contended, that the Virginia act of 1792, having passed subsequent to the taking effect of the process acts above cited, cannot affect the proceedings on the judgment of 1821. That the acts of 1789 and of 1792, which adopted the execution laws of the respective states, as they stood in 1789, regulate the proceedings on the above judgment, unaffected by any subsequent legislation, either state or federal. And the decision of this court in the case of *Wayman* v. *Southard*, 10 Wheat. 1, is referred to as fully sustaining this position. The great question in that case was, whether "the laws of Kentucky respecting executions, passed subsequent to the process act, were applicable to executions which issued on judgments rendered by the federal courts?" In the very elaborate opinion which was delivered by the late chief justice, a construction was given to the process acts, and to the various sections of the act to establish judicial courts, of 1789. And in order fully to comprehend the effect of this decision, the points adjudicated will be stated.

The court decided, that the 34th section of the judiciary act, which provides, "that the laws of the several states shall be regarded as rules of decision in trials of common law, in courts of the United States, in cases where they apply," "has no application to the practice of the court, or to the conduct of its officer, in the service of an execution." They held, that "so far as the process acts adopt the state laws, as regulating the modes of proceeding in suits at common law, including executions," &c., the adoption is confined to those laws in force in September 1789. That the system, as it then stood, was adopted; subject, however, to such alterations and additions as the said courts respectively shall, in their discretion, deem expedient; or to such regulations as the supreme court of the United States shall think proper, from time to time, by rule, to prescribe to any circuit or district

*60] court concerning the same. *The court also held, "that the 14th section of the judiciary act gave to the courts of the United States, respectively, a power to issue executions on their judgments." Other sec-

tions in the same act are referred to and construed ; but they have no direct relation to the case under consideration.

The result of this opinion was, that the execution laws of Kentucky, having passed subsequent to the process acts, did not apply to executions issued by the circuit court of the United States : and that under the judiciary and process acts, the courts had power to adopt rules to regulate proceedings on executions. The power of the court to adopt such rules, was not embraced in the point certified for the decision of the court, and was not expressly adjudged ; but it is the clear result of the argument of the court.

Having stated the points decided in this opinion, it is only necessary to apply such of them as are applicable to the case under consideration. There is no evidence in the record, that the circuit court of Virginia ever adopted any rule, which, by a fair construction, could regulate executions. In this view, then, the case must stand upon the execution law of Virginia in 1789, adopted by the process acts. And under the decision in the above case of *Wayman* v. *Southard*, it is clear, that no subsequent changes in the process law of the state of Virginia, can be obligatory on the circuit court.

And here, the question arises, whether the Virginia act of 1792, having been passed subsequent to 1789, can have any effect in the present case. So far as this act can be held to regulate executions, it is clearly inapplicable, under the process acts of 1789 and 1792, to the circuit court. But the act is substantially and technically a limitation on judgments. It is not, therefore, an act to regulate process. Executions are named in the act, and are authorized to be issued, under certain circumstances, within a limited time ; but this is only another mode of limiting the judgment ; and is, strictly and technically, as much a limitation on the judgment, as is imposed in the first part of the same section in reference to a *scire facias* or action of debt. The act provides, that after the lapse of ten years from the rendition of a judgment, where no execution has been issued, neither an action of debt nor a *scire facias* shall be brought on it. And that where an execution has been issued and not returned, other executions and proceedings may be had, within the ten years ; but not afterwards.

If this, then, be a limitation law, it is a rule of property ; and under the 34th section of the judiciary act, it is a rule of decision for the courts of the United States. As an act of limitation, it is impossible to distinguish this from other acts which limit the time of bringing certain actions, either by a designation of the ground or the form of the action. These acts are of daily cognisance in the courts of the United States ; and no one has ever
*61] doubted, that in fixing the rights of *parties, they must be regarded as well in the federal as in the state courts.

The original judgment in the case under consideration was entered in 1821 ; and although an execution was issued within the year, which was never returned, yet no other proceedings were had on the judgment, until the execution of 1836. Here was a lapse of fifteen years ; and if the statute apply, the plaintiffs were barred, unless they can bring themselves within the exception. And why does not this statute apply to the federal courts? It limits actions and executions on judgments rendered in the state courts ; and the same rule must be applicable to judgments obtained in the courts of the United States. In this view of the case, it is not necessary to look into

the Virginia execution law of 1789, to ascertain whether, if an execution was issued on a judgment, within the year, and not returned, the plaintiff might issue other executions, without limitation. It is enough, to know that the act of 1792 imposes a limitation to actions and executions on judgments, which, like all other limitation laws of the states, must be enforced by the federal courts. After the lapse of ten years, under this statute, a judgment becomes inoperative. An action of debt will not lie upon it, nor can it be revived by a *scire facias*. Much less can an execution be issued on it. Its vitality is gone, beyond the reach of legal renovation.

In giving effect to this statute, no principle is impugned, which is laid down in the case of *Wayman* v. *Southard*. The state law, which the court in that case held not to apply in the federal courts, was a law that regulated proceedings on executions. It was a process act, and not an act of limitations.

Do the plaintiffs in this case bring themselves within the saving of the statute? The rule is well settled, that to avoid the statute, a party must show himself to be within its exception. No proof is offered, to show that the plaintiffs in the circuit court were without the commonwealth of Virginia. The statement in the declaration is relied on to establish this fact. This statement does not aver, that the plaintiffs were citizens of Pennsylvania, but represents them as "merchants and partners, trading under the firm and by the name and style of Duval & Co., of Philadelphia, in Pennsylvania." This was insufficient to give jurisdiction to the court, in the original action, if the exception had been taken by plea, or by writ of error, within the limitation of such writ. In 1821, the plaintiffs represent themselves to be of Philadelphia, in Pennsylvania; but does it follow, that since that period they have not been within the commonwealth of Virginia? Does the legal inference arise, that they were not within the state when the judgment was entered? We think not. Indeed, there is no allegation of citizenship by the plaintiffs, in the declaration. For aught that appears on the face of the record, the plaintiffs might have *been citizens of Virginia, and residents, at the time of the rendition of the judgment.

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The act of limitations of 1826 has been referred to in the argument; and it is proper to give a construction to it. The first section of that act bars all actions founded upon bonds executed by executors, administrators, guardians, &c., and other persons in a fiduciary character; which shall not be commenced within ten years after the cause of action shall have accrued. The third section repeals the saving of the act of 1792; and the fourth section provides, that "in computing the time within which rights of entry and of action then existing, shall be barred by the provisions of the act of 1826, the computation shall commence from the date of the passage of that act, and not before." Now, the question arises, what actions are barred by this act? The answer is, all actions founded on bonds, given in a fiduciary character, as described in the first section. The statute does not embrace any action founded on a judgment, or on any other ground, except on a bond of the character above stated. The saving clause of the act of 1792, as to non-residents, is repealed; the only effect of which is, to bring within the limitation of the statute of 1792, those who were within its saving clause, and against whom the statute had not begun to run. Against such persons, the

statute could not begin to operate, until the repeal of the exception by the act of 1826.

If the plaintiffs in the circuit court had brought an action of debt, or issued a *scire facias* on the original judgment, or issued an execution (an execution having been issued within the year of the rendition of the judgment, but not returned), within ten years from the passage of the act of 1826, they would not have been barred, if they could have shown that up to the passage of that act, they were within the saving of the act of 1792. But failing to do this, as they have failed in the present case, the action on the judgment, and the execution, would have been barred, at the expiration of ten years from its rendition, under the act of 1792. In the repeal of the saving clause of this act, by the act of 1826, executions are not named as within the saving, but only "the right or title to any action or entry accrued;" and a doubt has been suggested, whether a person within the saving clause of the act of 1792, might not claim the right still to issue executions on a judgment on which no action of debt or *scire facias* could be sustained. We think that it was the intention of the legislature, to repeal the saving clause of the act of 1792, as to non-residents, in all its parts; although the language of the repealing clause does not include the term execution. It cannot be supposed, that the legislature would bar an action on a judgment, and still authorize an execution to be issued on it.

There is another view of this case, which, though not much considered in the argument, is deemed important by the court. And this arises under the process act of 1828. The third section *of this act provides, [*63
"that writs of execution and other final process issued on judgments and decrees, rendered in any of the courts of the United States, and the proceedings thereupon, shall be the same, except their style, in each state, respectively, as are now used in the courts of such state:" "provided, however, that it shall be in the power of the courts, if they see fit, in their discretion, by rules of court, so far to alter the final process in said courts, as to conform the same to any change which may be adopted by the legislature of the respective states for the state courts." This act adopts, in specific terms the execution laws of the state; and if the limitation law of 1792 could be considered, so far as its provisions embrace executions, a process act, this act of 1828 adopts it; and the plaintiffs in the original judgment were bound to conform to its provisions.

To this, it is objected, that the courts of Virginia have uniformly construed the act of 1792 as not affecting judgments entered before its passage; and that as the law of 1828 adopts this statute, by the same rule of construction, it cannot operate on judgments rendered prior to that time. The answer to this argument is, in the first place, if the act of 1792, or any part of it, is to be considered as a process act merely, and not an act of limitations, the act of 1828 makes it the law of congress for the state of Virginia, and gives immediate effect to it. If it be viewed as an act of limitations merely, and not for the regulation of process, it then takes effect, as before remarked, as a rule of property; and is a rule of decision in the courts of the United States, under the 34th section of the judiciary act. In either case, effect is given to the act of 1792, and it is decisive of the present controversy.

But if it be considered, as contended, an act of limitations, adopted by the act of 1828; the answer is, that the court are to give a construction to the act of 1828. If this act be clear in its provisions, we are bound to give effect to it, although it may, to some extent, vary the construction of the act of 1792. And this is no violation of the rule, that this court will regard the settled construction of a state statute as a rule of decision. For in this case, the construction of the state law, in regard to the effect it shall have, is controlled by the paramount law of congress. The words are, "that writs of execution and other final process issued on judgments and decrees rendered;" not on judgments and decrees hereafter rendered. The law provides for executions, not judgments. And it operates on all executions issued subsequent to its passage, without reference to the time when the judgment was rendered. The judgment in the circuit court was entered in 1821, so that seven years of the ten years' limitation of the act of 1792 had run, when it was adopted by the act of 1828. Now, the question is, shall no effect be given to this act of congress, in Virginia, on judgments before its passage, because of the construction by the Virginia courts of the act of 1792?

*64] *It must be recollected, that this act of 1828 is a national law, and was intended to operate in the national courts in every state. As it regards some of the states, it may, at first, have operated less beneficially in them than in others. But its provisions took immediate effect in all the states. It is a sound principle, that where a statute of limitations prescribes the time within which suit shall be brought, or an act done, and a part of the time has elapsed, effect may be given to the act; and the time yet to run, being a reasonable part of the whole time, will be considered the limitation in the mind of the legislature, in such cases. There may be some seemingly contradictory decisions on this point, in some of the states, which have been influenced by local considerations, and the peculiar language or policy of certain acts of limitations; but the rule is believed to be founded on principle and authority.

The act of 1828 was passed, shortly after the decision of the cases of *Wayman* v. *Southard*, and the *United States Bank* v. *Halstead;* and was intended as a legislative sanction to the opinions of the court in those cases.

This act is more explicit than the previous acts on the same subject, as to the power of the courts of the United States to adopt rules to regulate final process. And it is well remarked, by Mr. Justice STORY, in giving the opinion of the court, in the case of *Beers* v. *Haughton*, 9 Pet. 363, that under this law, "the circuit court had authority to make such a rule, as a regulation of the proceedings upon final process, so as to conform the same to those of the state laws on the same subject." And this power to adopt rules, so as to conform to the state laws, extends to the future legislation of the states; and as well to the modes of proceeding on executions, as to the forms of the writs.

From the above considerations, the court are of opinion, whether the proceedings in the circuit court, in issuing the execution and giving a judgment on the forthcoming bond, he considered as regulated by the process acts of 1789 and 1792, or by the process act of 1828, there is error in the judgment, and that it must be reversed.

Andrews v. Pond.

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

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*Joseph J. Andrews, Plaintiff in error, *v.* Lewis W. Pond, Thomas M. Converse and Francis L. Wadsworth, Defendants in error. [*65

Bills of exchange.—Usury.—Conflict of laws.—Bonâ fide holder.

A bill of exchange, in payment of a debt due on a protested bill, was taken, in New York, from one of the parties to the protested bill; the exchange between Mobile, on which the bill was drawn, was stated to be ten per centum, and was added to the bill, and the damages on the protested bill, with interest, at the rate of interest in New York, from the time the first bill was protested, were added to the bill; it was sent to Mobile, and was placed to the credit of the drawers, by the indorsee, who received it before it came to maturity; the bill was afterwards protested for non-payment. An action was brought in Alabama, against the indorsers of the bill, one of whom was in New York when the bill was drawn, and who, being liable to suit on the protested bill, gave the second bill to prevent suit being brought against him: the defendants alleged usury in the second bill; the rate of exchange allowed on the bill, being ten per centum, was given, and it being alleged that the highest rate of exchange on Mobile did not exceed five per centum.

Although the transaction, as exhibited, appears, on the face of the account for which the bill was drawn, to be free from the taint of usury, yet if the ten per centum charged as exchange, or any part of it, was intended as a cover for usurious interest, the form in which it was done, and the name under which it was taken, will not protect the bill from the consequences of usury; and if the fact be established, it must be dealt with in the same manner as if the usury had been expressly mentioned in the bill itself. But whether the charge of ten per centum for exchange between New York and Mobile was intended as a cover for usury or not, is a question exclusively for the jury; it is a question of intention.[1]

In order to enable the jury to decide, whether the usury was concealed under the name of exchange, evidence on both sides ought to have been admitted, which tended to show the usual rate of exchange between New York and Mobile, when the bill was negotiated.

There is no rule of law fixing the rate which may be charged for exchange; it does not depend on the cost of transporting specie from one place to another; although the price of exchange is, no doubt, influenced by it.

The general principle in relation to contracts made at one place, to be executed at another, is well settled; they are to be governed by the laws of the place of performance; and if the interest allowed by the laws of the place of performance be greater than that permitted at the place of the contract, the parties may stipulate for the higher interest, without incurring the penalties of usury.

When a contract has been made, without reference to the laws of the state where it was made, or to the laws of the place of performance, and a rate of interest was reserved forbidden by the laws of the place where the contract was made, which was concealed under the name of exchange, in order to evade the law against usury, the question is not, which law is to govern in executing the contract; unquestionably, it must be the law of the state where the agreement was entered into, and the instrument taken to secure its performance. A contract of this kind cannot stand on the same principles with a *bonâ fide* agreement made in one place to be executed in another; in the last-mentioned cases, the agreements are permitted by the *lex loci contractûs*, and will even be enforced there, if the party is found within its jurisdiction;

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[1] See Carr *v.* Lacy, 4 McLean 243; York Bank *v.* Asbury 1 Biss. 230; Buttrick *v.* Harris, Id. 442.

but the same rule cannot be applied to contracts forbidden by its laws, and designed to evade them. In such cases, the legal consequences of such an agreement must be decided by the law of the place where the contract was made; if void there, it is void everywhere.

A person who takes a bill which, on its face, was dishonored, cannot be allowed to claim the privileges which belong to a *bonâ fide* holder without notice; if he chooses to receive it, under such circumstances, he takes it with all the infirmities belonging to it; and is in no better condition than the person from whom he received it. There can be no distinction in principle between a bill transferred after it is dishonored for non-acceptance, and one transferred after it has been dishonored for non-payment.

*66] * If, in consideration of further forbearance, a creditor receives a new security from his debtor, for an existing debt, he cannot enlarge the amount due, by exacting anything, either by way of interest or exchange, for the additional risk, which he may suppose he runs by this extension of credit; nor, on the opinion he may entertain as to the punctuality of payment, or the ultimate safety of the debt.

Error to the Circuit Court for the Southern District of Alabama. The plaintiff in error instituted a suit on a bill of exchange, dated at New York, on the 11th of March 1837, drawn by D. Carpenter, on Sayre, Converse & Company, Mobile, Alabama, for 7287.78, in favor of the defendants, Pond, Converse & Company; payable and negotiable at the Bank of Mobile, sixty days after date. The plaintiff in error was a citizen of New York, and the drawers and indorsers of the bill were citizens of Alexandria, Alabama.

The evidence in the circuit court proved, that Lewis W. Pond, one of the defendants, was in New York, in March 1837, and being indebted to the plaintiff in the sum of $6000, on a bill which had been returned protested from Mobile, and on which suit was about to be brought by the plaintiff, agreed to pay ten per cent., the legal damages on the bill, and ten per cent in addition, with the legal interest of New York on the bill, from the time, of its return, being eighteen days, and the charges of protest and postage, by a bill of exchange on Mobile. The bill was drawn in New York, for the sum of $7287.78, and was indorsed by Mr. Pond, in the name of the firm, the defendants in error. The bill was indorsed by the plaintiff in error, and was remitted by the plaintiff to S. Andrews, at Mobile, and was by him placed to the credit of H. A. Andrews & Company, of New York. It was received by S. Andrews, with the indorsement of the defendants, before its maturity; and it was a cash credit in the account-current between H. M. Andrews & Company, and S. Andrews. The defendant offered in evidence, under the issue, the statute of New York against usury, and certain depositions, to prove that the bill of exchange was usurious.

One of the witnesses stated, that the consideration for this bill was made up by the following account:

E. Hendrick's draft on Daniel Carpenter, Montgomery, Alabama, protested, dated at New York, December 20th, 1836, at sixty days, for		$6000 00
Damages at 10 per cent., ...	600	
Interest 18 days, at 7 per cent., ...	21	
Protest and postage, ...	4 25	
		625 25
Exchange, 10 per cent., being difference of exchange between Mobile and New York on the 11th March 1837, ...		662 53
		$7287 78

John Delafield, president of the Phœnix Bank, examined on the part of the defendant, stated, that the exchange between New York and Mobile, on the 11th of March 1837, was from three to five per *cent. This knowledge of exchange was acquired from having dealt in exchange during the period, for the Phœnix Bank. Robert White, cashier of the Manhattan Company, stated, that, by a reference to the books of the company, the exchange between New York and Mobile was, during the month of March 1837, from five to seven per cent. And Morris Robinson, agent for the Bank of the United States, in the city of New York, said, that during the month of March 1837, he found, by a reference to the books, the dealers with the bank were charged from three to five per cent. ; three for short, and five for long paper. [*67

The plaintiff excepted to the reading of the statute and laws of New York against usury. And in order to disprove the allegation of usury in the transaction, as the contract was not made subject to the statute laws of New York, and the contract was subject only to the laws of Alabama, as to its obligatory form and solidity ; and was or was not usurious, according to these laws ; the plaintiff then offered to prove by Joseph Wood, that the banks purchased bills at a far less exchange than others ; that they never bought any other than undoubted paper ; that from the facility of collecting, remitting, &c., they had many advantages over the citizens at large ; and that the exchange of the banks was, therefore, much lower than that of the community at large ; that there was no fixed rate of exchange between Mobile and New York ; that it varied from one to twenty per cent., according to the solvency, punctuality, risk, &c , of the parties ; that exchange was ever fluctuating, and was high or low, as the risk was great or small. The court refused to admit this testimony, and the plaintiff excepted.

The plaintiffs asked the court to instruct the jury, that if they were satisfied, that the excess over legal interest retained in this bill was taken and contracted for, innocently, by the parties, without intending to violate the laws against usury ; they might find for the plaintiff. The court refused to give this instruction, and the plaintiff excepted.

The plaintiff moved the court to instruct the jury, that the contract expressed in this bill of exchange, if to be executed in Alabama, was subject alone to the laws of Alabama against usury ; and that the usury laws of New York had no force, nor anything to do with this investigation. This was refused by the court, and plaintiff excepted.

The plaintiff next requested the court to charge the jury, that if they believed S. Andrews received the bill, before maturity, for a valuable consideration, without any notice of usury, and that the plaintiff received it from S. Andrews, without notice of usury, and before maturity, the plaintiff might recover ; notwithstanding plaintiff offered no proof of the consideration he gave for it. The plaintiff excepted to this refusal of the court.

The plaintiff next moved the court to charge, that the variance between the bill declared on, and the one set up as the same bill by defendant's deposition, was fatal in a plea of usury. Which the court refused, and the plaintiff excepted.

*It appeared, that before the bill was delivered by S. Andrews to plaintiff, it had been, while in the hands of S. Andrews, protested for non-acceptance, which appeared on the face of the bill. There was no [*68

evidence of any settled account between H. M. Andrews & Co., and S. Andrews, or which was creditor or debtor upon the statement of accounts. It was also proved, that the expense of transporting specie from New York to Mobile, including insurance and interest, would not exceed one and one-half per centum on the sum transported.

Upon the whole case, and the several points stated, the court charged the jury; that if they believed from the evidence, that by the usages of trade between New York and Mobile, there was an established rate of exchange between those places, the drawers and drawees of the bill of exchange here sued on, had a right to contract for such rates of exchange; and that even a higher rate, to a small amount, if, under the circumstances, it did not appear to have been intended to evade the statute against usury, might be allowed by them; but if they believed, that no such usage existed, the parties had no right to contract for more than the actual expense of transportation of specie from one place to the other, including interest, insurance and such reasonable variations therefrom, as above stated; and further, if they believed from the evidence, that the drawers of the bill of exchange contracted with the drawees, in the state of New York, at the time the bill was drawn, for a greater rate of interest than seven per centum per annum, for the forbearance of the payment of the sum of money specified in the bill; although it may have been taken in the name of exchange; the contract was usurious: and unless they believed, from the evidence, that the plaintiff took the bill in the regular course of business, and upon a fair and valuable consideration *bonâ fide* paid by him, and without notice of the usury, they ought to find for the defendant; otherwise, for the plaintiff: to which opinion, and charge of the court, the plaintiff, by his counsel, excepted. The jury found a verdict for the defendants; and the plaintiff prosecuted this writ of error.

The case was argued by *Webster* and *D. F. Webster*, for the plaintiff in error; and by *Ogden*, for the defendants.

For the plaintiff, it was insisted, by *D. F. Webster*:—1. That the contract in all that relates to interest, was to be governed by the law of Alabama. 2. That in the court, sitting in Alabama, the defence of usury could not be set up, under the general issue. 3. That certain evidence offered by the plaintiff on the question of usury, was improperly rejected. 4. That the rulings and direction of the court on the points of law, as stated in the bill of exceptions, were erroneous.

The provisions of the laws of New York, 1 Rev. Stat. 772, on the subject of usury, declare the contract, on which usury shall be *taken or
*69] received, absolutely void: with a saving from the influence of the statute, as to bills of exchange, or promissory notes payable to order, or to bearer, in the hands of an indorsee; who shall have received the same in good faith and for a valuable consideration, and who had not, at the time of discounting the bill, actual notice that the bill had been originally given upon a usurious consideration, &c. By the laws of Alabama, the interest alone is forfeited.

1. It is contended, that the contract is to be governed by the laws of the place where it was to be executed. The contract, on the face of this bill of exchange, expresses that it was to be executed elsewhere than where it was

made. The parties entered into it with a view to its performance at another place. It is a foreign bill (2 Pet. 586), and of course, is dated in one place and in one state, and made payable in another state. The *lex loci* is to govern, unless the parties have had in view, by the contract, another place of performance; that is to say, if the parties have in view, by the terms of the contract, the city of Mobile, for its performance, it is the law of the place of performance, which is to govern and construe the terms of the agreement. 2 Burr. 1077. 8 Johns. 190. 4 Pet. 111. 7 Ibid. 586. Alabama was not only the place where the contract was to be executed, but this action was instituted in Alabama.

2. As to the second point. Under the laws of Alabama, where, on an usurious contract, the interest only is forfeited, it was not allowable, under a plea of *non assumpsit*, to put in evidence of usury; because, although by the usury, the interest is lost, yet the amount of the bill, deducting the interest, may be recovered. The *lex loci* is to be regarded, and the trial is to be conducted according to it; and what might, under the plea, be offered in evidence in New York, could not be admitted in Alabama. The plea was not sustained by the evidence, and did not suit the case. Supposing the plaintiff to have been in that situation as to the bill, as to be liable to lose the interest on it, as upon a usurious contract, yet it was not under such a plea as this, that evidence to charge him with this liability could have been admitted. Supposing that by the law of New York it was usury, yet it was to be punished by the laws of Alabama only.

But if, contrary to these views of the law, the statutes of New York on the subject of this contract are to be applied to it, yet, between the parties to this suit, the law has no force. The statute of New York declares, that its provisions shall have no application where there has been a *bonâ fide* holder of the bill, or an indorsee thereof, without actual notice that the bill has been originally given for a usurious consideration. This is an action on a bill of exchange, brought by the indorsee, and no proof was given on the trial, that he was not an innocent holder, ignorant of the consideration given for this negotiable instrument. It does not anywhere appear to the contrary, but on the contrary, the proof was clear and explicit, that the bill had been regularly transferred to him, before its maturity, *and had been placed as a credit in the accounts between him and the house in New York. Nor did it appear, that the plaintiff had any knowledge of the asserted usury of the transaction. Supposing, then, that the law of New York must regulate the contract; yet, on the proof submitted on the trial in the circuit court, the plaintiff ought to have recovered the amount of the bill. [*70

3. The plaintiff in error contends, that certain evidence was refused by the court, which ought to have been given. To prove the contract to have been usurious, certain depositions were read by the defendants; some going to show the original nature of the bill, and the circumstances under which it was made; and other witnesses were examined, to show the rate of exchange between New York and Mobile. The witnesses examined were all connected with banks; and they proved differences in the rates of exchange from three to five per cent., and even seven per cent. Those institutions had great facilities in doing business in exchange; and they took undoubted and indorsed paper, at short dates. If there was any fixed rate

of exchange between New York and Mobile, it would have been known to these witnesses; and it would have been stated. A charge beyond a fixed rate might be asserted to be usurious. But no fixed rate existed. When the circuit court allowed the defendants to give evidence as to the rates of exchange between New York and Mobile, it would seem no more than proper, that the privilege should be allowed to the plaintiff. The facts which would have been exhibited by such evidence were essential to the full exhibition of the plaintiff's case. Charges for exchange vary with the credit and position of the parties to the bills of exchange, and the length of time the bills have to run; with many other circumstances; and among them, the balances of trade, influence the amount of such charges materially. There was no unreasonable charge made upon this bill. It was taken to pay a protested draft, and from a party who had been on the dishonored bill. The credit of such a bill must have been exceedingly doubtful; and the circumstances of the dishonor of its predecessor having been known, it would not have commanded as much as was allowed on it, in the exchange market in New York, where it was received. The plaintiff contends, that the ruling and direction of the court on the law were erroneous.

The plaintiff asked the court to instruct the jury, that if they were satisfied, the excess over legal interest was taken by the parties, without intending to violate the law against usury, they should find for the plaintiff. The court refused to give the instruction. The question was one of intention. Did the parties mean to violate the law against usury? It was incumbent on the defendants to prove, that the original parties to the bill intended usury; and that it was not considered by them a regular mercantile transaction. On the bill itself, no usury appears. The parties giving the bill *71] *consented to allow a high rate of exchange for the advantages which they obtained in the exemption of one of the defendants, then in New York, from a suit, which was about to be commenced on the protested bill. The plaintiff was altogether disconnected with the circumstances under which this bill was originally given. He received it as a remittance from New York; and before it came to maturity, it was placed to the credit of the house in New York, as a cash credit. When he presented it for payment, it was refused, on the ground, of its having been made in fraud of the law of New York against usury. Thus, negotiable paper, which had passed through different hands, and which was obtained in good faith, was discredited by circumstances which could not have been known to the subsequent holders of it. A purchase of a bill of exchange may be made at any deduction from its amount; and the contract of purchase is legal.

The judge of the circuit court charged the jury, that if there was no established rate of exchange between New York and Mobile, the parties had no right to contract for more than the actual expense of transporting specie. But by the evidence given on the part of the defendants, it was fully shown, that there was no fixed rate of exchange; and yet the contract was to be made usurious, because more was taken than the cost of transporting specie from Mobile to New York. Such a position destroys all operations of exchange, and thus interrupts the great means of commercial intercourse and dealing. Rates of exchange are fixed or regulated by other rules than those which would be derived from the value of specie at the place on which the bill may be drawn, and the cost of its carriage to the place from which

the bill is sent. The experience of every commercial man, and the value of exchange in every commercial country, establish this position.

Ogden, for the defendant, contended, that the contract entered into by the bill of exchange on which the suit was brought, having been made in New York, was to be governed by the laws of New York. An indorser of a bill of exchange is liable only by the law of the place where the bill is made. 3 Mass. 77 ; 5 East 130 ; 1 Ibid. 60 ; 8 Mart. (La.) 34. The law of the contract is the law of New York, where the debt was due, and where it was settled, by the bill of exchange on which this suit was brought.

It is said, that the evidence of usury could not be given under the plea of *non assumpsit:* but this is taking for granted that the law of the case is that of Alabama, and not that of New York. Evidence to show a usurious consideration is proper evidence under the plea.

There is no evidence of *bonâ fide* ownership of this bill in the plaintiff. The bill was remitted for collection ; and the plaintiff was the agent of the drawee. The entry of the bill as a cash credit, does not affect this view of the case. It was no more than a mode of keeping the account between the drawer and the person to whom the bill had been transmitted. The bill was taken in payment of *an old debt, and that debt is yet due ; and for it the creditor has a perfect right to proceed at law. [*72

It matters not what was the intention of the parties ; and if they had no view to a usurious dealing, still the law operates on the contract, and makes it void, if there actually was usury. Where the months of a year are calculated to be thirty days, and interest for a year charged on each month, it was held to be usury.

Webster, for the plaintiff in error.—This is an action by the indorsee of a bill of exchange, residing in Alabama, and the suit is brought in that state. The bill was drawn in New York, to be paid in Alabama ; and there is nothing in the record to show that the indorsee, the plaintiff, was in New York, or had anything to do with the bill, until it came into his hands in Alabama. The defendants are described as citizens of Alabama ; and the presumption is, that it was indorsed in Alabama, and was an Alabama transaction.

The true place of the contract is the place of its performance ; and the law of Alabama operates upon this bill exclusively, as the contract made by it was to be performed there. Story's Conflict of Laws, 252. A bill drawn in New York, to pay eight per cent. interest in Alabama, where the interest is eight per cent., would not be void by the law of New York. Where there is no actual and express agreement to pay usurious interest, it is entirely a question of intention ; and the case to be made out is, that there was a design, either open or covered, to take more than the statute allows as interest.

There can be no rule of law which prohibits the purchase of a bill of exchange at any rate of discount ; or which makes such a purchase, if the discount is more than the legal interest, usury. The rates of exchange are always various, and are sometimes uncertain. To apply the law of usury to such contracts, would be productive of the greatest injustice. The law of New York protects all these instruments from the prohibitions of usury, when they get into the hands of *bonâ fide* holders, without notice of their

origin. Every one may buy a bill of exchange, in the market, at any rate; but if the purchaser sells a bill, with his name upon it, at an illegal discount, it is usury, and the bill is void. Everything in relation to this bill should have been admitted in evidence; and the jury should have been enabled to form a judgment on the intention of the parties; and should have been allowed to know everything as to the state of the exchange between New York and Mobile, and the rate, as applied to bills of all descriptions. One of the witnesses would have proved that twenty per cent. was not a greater rate of exchange than had been paid on doubtful bills.

The party taking the bill had a right to recover from his debtor, such an amount as would have paid the amount due to him on the protested bill of exchange in New York. He had a right, then, to the exchange on Mobile, and the exchange from Mobile to New *York. It is mani- *73] fest, that even on this evidence of the defendants, if this were proper and just, the sum taken as exchange was even less than it should have been.

Taney, Ch. J., delivered the opinion of the court.—This case comes before the court upon a writ of error, directed to the judges of the circuit court for the ninth circuit and southern district of Alabama. The action was brought by the plaintiff as indorsee, against the defendants as indorsers of a bill of exchange, in the following words:—

"Exchange for $7287\frac{73}{100}$. New York, March 11, 1837.

"Sixty days after date of this first of exchange, second of same tenor and date unpaid, pay to Messrs. Pond, Converse & Wadsworth, or order, seven thousand two hundred and eighty-seven $\frac{73}{100}$ dollars, negotiable and payable at the Bank of Mobile, value received, which place to the account of

Your obedient servant,

"To Messrs. Sayre, Converse & Co. D. Carpenter."
Mobile, Alabama."

The case as presented by the record, appears to be this: The defendants were merchants, residing in Mobile, in the state of Alabama. H. M. Andrews & Co. were merchants residing in New York; and before the above-mentioned bill was drawn, the defendants had become liable to H. M. Andrews & Co., as indorsers upon a former bill for $6000, drawn by E. Hendricks on Daniel Carpenter, of Montgomery, Alabama. The last-mentioned bill was dated at New York, and fell due on the 21st of February 1837, and was protested for non-payment. The defendant, Pond, it seems, was in New York, in the month of March 1837, shortly after this protest; when H. M. Andrews & Co. threatened to sue him on the protested bill; and the defendant, Pond, rather than be sued in New York, agreed to pay H. M. Andrews & Co. ten per cent. damages on the protested bill, and ten per cent. interest and exchange on a new bill to be given, besides the expenses on the protested bill.

According to this agreement, an account which is given in the record, was stated between them, on the 11th of March 1837, in which the defendants were charged with the protested bill, and ten per cent. damages, on the protest, and interest and expenses, which amounted altogether to the sum of $6625.25, and ten per cent. upon this sum was then added, as the difference of exchange between Mobile and New York, which made the sum of

$7287.78; for which the defendant Pond delivered to H. M. Andrews & Co. the bill of exchange upon which this suit is brought, indorsed by the defendants, in blank. The bill was remitted by H. M. Andrews & Co. to S. Andrews, at Mobile, for collection. The drawees refused to accept it, and it was protested for non-acceptance; and after this refusal *and protest, it was transferred by S. Andrews to J. J. Andrews, the present plaintiff. [*74 It is stated in the exception, that after this transfer, it was a cash credit in the account between H. M. Andrews & Co. and S. Andrews. The bill was not paid at maturity, and this suit is brought to recover the amount.

There is no question between the parties, as to the principal or damages of ten per cent. charged for the protested bill of $6000; nor as to the interest and expenses charged in the account hereinbefore mentioned. The defendants admit, that the principal amount of the protested bill, the damages on the protest which are given by the act of assembly of New York, and the interest and expenses, were properly charged in the account. The sum of $6625.25 was, therefore, due from them to H. M. Andrews & Co. on the day of the settlement, payable in New York. The dispute arises on the item of $662.53, charged in the account, as the difference of exchange between New York and Mobile, and which swelled the amount for which the bill was given to $7287.78. The defendants allege, that the ten per cent. charged as exchange, was far above the market price of exchange, at the time the bill was given, and that it was intended as a cover for usurious interest exacted by the said H. M. Andrews & Co. as the price of their forbearance for the sixty days given to the defendants. This was their defence in the circuit court, where a verdict was found for the defendants under the directions given by the court. Many points appear to have been raised at this trial, which are stated as follows, in the exception taken by the plaintiff. The defendant offered evidence:

1. To prove that the said bill of exchange was usurious, according to the statute and laws of the state of New York. The plaintiff objected to the reading of the statute and depositions aforesaid, because the contract was not made with a view of the statute or laws of New York. But the bill of exchange was usury, or not, by the laws and statutes of Alabama; and that the contract was subject only to the laws of the state of Alabama, as to its obligatory force and validity; and he further objected, that if this contract were to be decided by the statute of New York, that this proof could not be given under this issue; but the court overruled all these objections, and permitted the depositions and statute to be read, to show the bill of exchange to be void by the laws of New York: to all which plaintiff excepts.

2. Plaintiff then offered to prove, by Joseph Wood, that the banks purchased bills at a far less rate of exchange than others, that they never bought any other than undoubted paper; that from the facility of collecting, remitting, &c., they had many advantages over the citizens at large, and that the exchange of the bank was, therefore, much lower than the community at large; that there was no fixed rate of exchange between Mobile and New York; that it varied from one to twenty per cent. according to the solvency, punctuality, risk, &c.; that exchange was ever fluctuating, and was high or low as *the risk was great or small. The court rejected this testimony also, to which plaintiff excepts. [*75

3. Plaintiff asked the court to instruct the jury, that if they were satisfied, that the excess over legal interest retained in this bill was taken and contracted for, innocently, by the parties ; without intending to violate the laws against usury ; that they might find for plaintiff : but the court refused this also, and plaintiff excepts.

4. Plaintiff moved the court to charge the jury, that the contract expressed in this bill of exchange, if to be executed in Alabama, was subject alone to the laws of Alabama against usury ; and that the usury laws of New York had no force, or anything to do with this investigation. This was refused by the court, and plaintiff excepts.

5. Plaintiff next requested the court to charge the jury, that if they believed S. Andrews received the bill, before maturity, for a valuable consideration, without any notice of usury, and that plaintiff received it from S. Andrews, without notice of usury, and before maturity, that the plaintiff might recover ; notwithstanding plaintiff offered no proof of the consideration he gave for it. To this refusal, there was also an exception.

6. Plaintiff next moved the court to charge, that the variance between the bill declared on, and the one set up as the same bill by defendants' deposition, was fatal in a plea of usury ; to which the court refused, and plaintiff excepts.

7. It appeared, that before the bill was delivered by S. Andrews to the plaintiff, it had been, while in the hands of S. Andrews, protested for non-acceptance, which appeared on the face of the bill. There was no evidence of any settled account between H. M. Andrews & Co. and S. Andrews, nor which was creditor or debtor upon the statement of accounts. It was also proved, that the expense of transporting specie from New York to Mobile, including insurance and interest, would not exceed one and one-half per cent. on the sum transported. Upon the whole case, and the several points stated, the court charged the jury, that if they believed from the evidence, that by the usages of trade between New York and Mobile, there was an established rate of exchange between those places, the drawers and drawees of the bill of exchange here sued on, had a right to contract for such rates of exchange ; and that even a higher rate, to a small amount, if, under the circumstances, it did not appear to have been intended to evade the statute against usury, might be allowed by them.

8. But if they believed that no such usage existed, the parties had no right to contract for more than the actual expense of transportation of specie from one place to the other, including interest, insurance, and such reasonable variations therefrom, as above stated.

9. And further, if they believed from the evidence, that the drawers of the bill of exchange contracted with the drawee, in the state of New York, at the time the bill was drawn, for a greatet rate of interest than seven per centum per annum, for the forbearance *of the payment of the sum of money specified in the bill, although it may have been taken in the name of exchange, the contract was usurious ; and unless they believed from the evidence, that the plaintiff took the bill, in the regular course of business and upon a fair and valuable consideration *bonâ fide* paid by him, and without notice of the usury, they ought to find for the defendants, otherwise for the plaintiff.

*76]

From the manner in which the points are arranged in this exception, and

the similarity of the questions presented in some of them, we shall be better understood, by expressing our opinion on the whole case, as it appears before us, without regarding the order in which the questions are stated in the exception; and without examining, separately, each one of the instructions asked for by the plaintiff, and refused by the court.

The transaction, upon the face of it, does not profess to charge any interest for forbearance. It is a bill of exchange, in the usual form; and in the account stated at the time, and which formed the basis of the bill, the only item in relation to interest is the small sum charged for the eighteen days which intervened between the time when the first bill became due and the present one was given. This interest is charged at seven per cent., which is the legal rate of interest established in New York. The transaction, taken altogether, was, indeed, a ruinous one on the part of the defendants. A debt of $6000, payable at Mobile, on the 21st of February, was converted into a debt of $7287.78, payable at the same place on the 25th of April following; being an increase of $1287.78 in the short space of eighty-one days. Yet, if the defendants brought it upon themselves, by their failure to take up the first bill at maturity, and the transaction was not intended to cover usurious interest, they must meet the consequence of their own improvidence. The sum of $6625.25 was undoubtedly due from them to H. M. Andrews & Co., on the day the bill in question was drawn. They were entitled to demand that sum in New York, or a bill that was equivalent to it, at the market price of exchange; and if ten per cent. discount was the usual price at which others purchased bills of this description in the market of New York, they had a right to take the bill at that rate, in satisfaction of their debt. There is nothing, therefore, upon the face of the papers, from which the court can undertake to say, that usurious interest was exacted.

But although the transaction, as exhibited in the account, appears on the face of it to have been free from the taint of usury, yet if the ten per cent. charged as exchange, or any part of it, was intended as a cover for usurious interest, the form in which it was done, and the name under which it was taken, will not protect the bill from the consequences of usurious agreements; and if the fact be established, it must be dealt with in the same manner as if the usury was expressly contracted for in the bill itself. But whether this item was intended as a cover for usury or not, is a question exclusively for the jury. It is a question of intent. And in order to *enable the jury to decide whether usury was concealed under the name of exchange, evidence on both sides ought to have been admitted, which tended to show the usual rate of exchange between New York and Mobile, when this bill was negotiated. There is no rule of law fixing the rate which may be lawfully charged for exchange. It does not altogether depend upon the cost of transporting specie from one place to another; although the price of exchange is, no doubt, influenced by it. But it is also materially affected by the state of the trade, by the urgency of the demand for remittances, and by the quantity brought into the market for sale; and sometimes material changes take place in a single day, although no alteration has happened in the expenses of transporting specie. The court, therefore, can lay down no rule upon the subject. H. M. Andrews & Co., when about to take this bill in payment of an existing debt, had a right to include in it a fair allowance for the difference in exchange. Whether they exacted [*77

more or not, for the forbearance of their debt, is a question for the jury; to decide it correctly, they must be allowed to hear the evidence which either of the parties may offer, as to the rates of exchange for such a bill as this; which was payable in specie, and not in any depreciated currency. Taking this view of the subject, we think the court below erred in rejecting the testimony of Joseph Wood, who was offered by the plaintiff to prove the rate of exchange; and also in the direction given to the jury, that if there was no fixed rate of exchange, the creditor had a right to take no more, than the actual expense of transporting the specie, or a small amount more, where the addition was not intended to cover usury.

Another question presented by the exception, and much discussed here, is, whether the validity of this contract depends upon the laws of New York or those of Alabama. So far as the mere question of usury is concerned, this question is not very important. There is no stipulation for interest, apparent upon the paper. The ten per cent. in controversy is charged as the difference in exchange only, and not for interest and exchange. And if it were otherwise, the interest allowed in New York is seven per cent., and in Alabama eight; and this small difference of one per cent. per annum, upon a forbearance of sixty days, could not materially affect the rate of exchange, and could hardly have any influence on the inquiry to be made by the jury. But there are other considerations, which make it necessary to decide this question. The laws of New York make void the instrument, when tainted with usury; and if this bill is to be governed by the laws of New York, and if the jury should find, that it was given upon an usurious consideration, the plaintiff would not be entitled to recover; unless he was a *bonâ fide* holder, without notice, and had given for it a valuable consideration: while by the laws of Alabama, he would be entitled to recover the principal amount of the debt, without any interest.

*78] The general principle in relation to contracts made in one place, *to be executed in another, is well settled. They are to be governed by the law of the place of performance, and if the interest allowed by the laws of the place of performance, is higher than that permitted at the place of the contract, the parties may stipulate for the higher interest, without incurring the penalties of usury. And in the case before us, if the defendants had given their note to H. M. Andrews & Co., for the debt then due to them, payable at Mobile, in sixty days, with eight per cent. interest, such a contract would undoubtedly have been valid; and would have been no violation of the laws of New York, although the lawful interest in that state is only seven per cent. And if, in the account adjusted at the time this bill of exchange was given it, it had appeared, that Alabama interest of eight per cent. was taken for the forbearance of sixty days given by the contract; and the transaction was in other respects free from usury; such a reservation of interest would have been valid and obligatory upon the defendants; and would have been no violation of the laws of New York.

But that is not the question which we are now called on to decide. The defendants allege, that the contract was not made with reference to the laws of either state, and was not intended to conform to either. That a rate of interest, forbidden by the laws of New York, where the contract was made, was reserved on the debt actually due; and that it was concealed under the name of exchange, in order to evade the law. Now, if this defence is true,

and shall be so found by the jury, the question is not which law is to govern in executing the contract; but which is to decide the fate of a security taken upon an usurious agreement, which neither will execute? Unquestionably, it must be the law of the state where the agreement was made, and the instrument taken to secure its performance. A contract of this kind cannot stand on the same principles with a *bonâ fide* agreement made in one place, to be executed in another. In the last-mentioned cases, the agreements are permitted by the *lex loci contractûs;* and will even be enforced there if the party is found within its jurisdiction. But the same rule cannot be applied to contracts forbidden by its laws, and designed to evade them. In such cases, the legal consequences of such an agreement must be decided by the law of the place where the contract was made. If void there, it is void everywhere; and the cases referred to in Story's Conflict of Laws 203, fully establish this doctrine.

In the case of *De Wolf* v. *Johnson*, 10 Wheat. 383, this court held, that the *lex loci contractûs* must govern in a question of usury; although, by the terms of the agreement, the debt was to be secured by a mortgage on real property in another state. And the case of *Dewar* v. *Span*, 3 T. R. 425, shows with what strictness the English courts apply their own laws against usury to contracts made in England. In the case under consideration, the previous debt for which the bill was negotiated, was due in New York; a part of it, that is to say, the damages on the protest of the first bill, *were given by a law of that state; and the debt was then bearing the New York interest of seven per cent., as appears by the account [*79 before referred to. And if, in consideration of further indulgence in the time of payment, the parties stipulated for a higher interest, and agreed to conceal it under the name of exchange; the validity of the instrument which was executed to carry this agreement into effect, must be determined by the laws of New York, and not by the laws of Alabama.

In this aspect of the case, another question arose in the trial in the circuit court. By the laws of New York, as they then stood, usury was no defence against the holder of a note or bill who had received it in good faith, and to whom it was transferred for a valuable consideration, and without notice of the usury. The present plaintiff claims the benefit of this provision. But upon the evidence in the case, it is very clear, that he does not bring himself within it. The bill of exchange was protested for non-acceptance, while it was in the hands of S. Andrews, the agent of H. M. Andrews & Co., to whom it had been sent for collection; and this fact appeared on the face of the bill, at the time it was transferred to the plaintiff. Now, a person who takes a bill, which, upon its face, was dishonored, cannot be allowed to claim the privileges which belong to a *bonâ fide* holder without notice. If he chooses to receive it, under such circumstances, he takes it with all the infirmities belonging to it; and is in no better condition than the person from whom he received it. There can be no distinction in principle, between a bill transferred after it is dishonored for non-acceptance, and one transferred after it is dishonored for non-payment; and this is the rule in the English courts, as appears by the case of *Crossley* v. *Ham*, 13 East 498. Now, it is evident, that no consideration passed between Carpenter, the drawer of the bill, and the defendants, who are the payees and indorsers. The bill was made and indorsed by the defendants, for the pur-

pose of being delivered to H. M. Andrews & Co., in execution of the agreement for further indulgence. And if that agreement was usurious, then the bill in question was tainted in its inception; and that taint must continue upon it in the hands of the present plaintiff.

There is one other direction given by the circuit court, which remains to be considered. It is the third, as stated in the exception. The vagueness and generality of the terms in which this instruction was asked for by the counsel for the plaintiff, justified the court in refusing it. It will be seen, from what we have already said, that if the rate of exchange taken upon this bill was a fair one, and was not intended to cover usurious interest, the plaintiff is entitled to recover; and if the prayer means nothing more than this, there could be no objection to it. But, if it was intended to maintain, that although a higher rate of exchange was allowed than the fair market price, and that this was done in consideration of the forbearance of payment, under the belief that the law would not in that shape regard it as usury, the mistake of the parties in this respect, *will not alter the character of the transaction. The instruction as asked for was framed in such general terms, that it might have misled the jury; and the court, therefore, were not bound to give it.

*80]

In fine, if the parties intended to allow no more than a fair rate of exchange, testing it by the market price of good bills of this description, it was not usury; and the plaintiff is entitled to recover. If, on the contrary, more was intended to be taken, it was usury; and the plaintiff is not entitled to recover. It is true, that after this bill had been negotiated between H. M. Andrews & Co. and the defendants, other persons might have lawfully purchased it a much greater discount than the market rate of exchange; and might have considered and estimated in the price they gave for it, the known embarrassments, the want of punctuality, and the loss of credit of the defendants, whose former bill had already been protested. But as between the debtor and his creditor, no difference in the rate of exchange can be made on that account. If, in consideration of further forbearance, the creditor receives a new security from his debtor, for an existing debt, he cannot enlarge the amount due, by exacting anything either by way of interest or exchange, on account of the additional risk he may suppose he runs by this extension of credit; nor on account of any doubts he may entertain as to the punctuality of payment, or the ultimate safety of his debt.

It is hardly necessary to add, that the right of the defendant to offer in evidence, under the plea of *non assumpsit*, that the instrument was given upon an usurious contract, has been too well settled to be now disputed: and we see nothing in the record, upon which a question for the court could be raised, upon the supposed variance between the bill mentioned in the testimony produced by the defendants, and the bill declared on by the plaintiff.

Upon the whole, we dissent from the circuit court in the second and eighth points in the exception, as we have already mentioned; and we concur with them in the residue. The judgment of the circuit court must, therefore, be reversed, with costs.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the southern district of Alabama, and

was argued by counsel: On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said circuit court in this cause be and the same is hereby reversed with costs; and that this cause be and the same is hereby remanded to the said circuit court, with directions to award a *venire facias de novo.*

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*United States, Appellants, *v.* Moses E. Levy, Appellee. [*81

Florida land-claims.

A grant by Governor Coppinger, of 14,500 acres of land, in East Florida, part of 30,000 acres, granted in consideration of services to the crown of Spain, and the officers of Spain, which had been surveyed by the appointed officer, confirmed.

The court refused to allow a survey of land to be made, to make up for a deficiency in the survey of 14,500 acres, in consequence of part of the land included therein being covered with water, and being marshes. Even if a survey had not been made under the concession, it would not be competent for the superior court of East Florida, or for the supreme court, to designate a new location, varying from the original concession, as any such variation would be equivalent to a new grant.

Appeal from the Superior Court of East Florida. Moses E. Levy, a citizen of the United States, presented a petition to the judge of the superior court of East Florida, on the 18th day of May 1829, claiming title to a tract of land containing 14,500 acres, situated in East Florida, being part of 30,000 acres originally conceded to Fernando de la Maza Arredondo, in full property, by Governor Don Jose Coppinger, on the 14th day of March 1817, in consideration of services rendered by him to the government and officers of Spain; which 14,500 acres became, by sundry mesne conveyances, the property of the petitioner.

The petition stated, that there was at the place designated in the said concession for the location of the said 14,500 acres of land, a considerable portion of the land covered by water, and consisting of marshes; which, if included in the survey of the said land, would be a complete loss of so much land as was covered with water, or as consisted of marshes. The petitioner averred, that by the concession in this case, he was entitled to 14,500 acres of land, exclusive of land covered by water and of marshes; and that by the custom, practice and usage of the Spanish government in East Florida, where it happened that at the place designated for the location of the land granted, there was found to be a part of that which would necessarily fall within the survey, according to the calls of the grant, covered with water, or consisting of marshes, though included within the boundaries of the survey, it was excluded from the quantity surveyed for the party; and the whole of the land, clear of such water and marsh, called for by the grant, was surveyed and secured to the party entitled to the benefit thereof. He, therefore, prayed that such directions for the survey of the said 14,500 acres of land might be given, as he was justly entitled to, by the aforesaid concession, and the said usage, practice and custom of the Spanish government in East Florida. The petitioner stated, that since the purchase of said lands by him, he had at very great expense and trouble, made a settlement on the lands, at a place thereon called Hope Hill; and that he had erected *houses and buildings of various descriptions on the land, and had [*82

cultivated a considerable portion thereof, and made other beneficial improvements thereon.

The answer of the district-attorney of the United States denied, among other things, that it was the usage and custom in East Florida to have the quantity of land covered by water, or such as was found to be a marsh, replaced by surveys of other land ; and insisted, that the petitioner having procured and accpeted a royal grant for 14,500 acres, made according to the survey under the original concession, he was estopped from setting up such usage or custom, if the same existed. The answer also insisted, that the court had no power or authority to direct a survey of the said 14,500 acres of land, in accordance with any such supposed usage or custom ; if it could be shown that any such usage or custom ever existed.

The superior court confirmed the grant for 14,500 acres, according to the survey, and rejected the claim to have the quantity of land contained in the grant surveyed, excluding land covered with water and marshes. The United States appealed from this decree.

The case was submitted to the court, by *Grundy*, Attorney-General of the United States.

Wayne, Justice, delivered the opinion of the court.—This is an appeal from the superior court of East Florida. The appellee, after alleging that he claims title to a certain tract or parcel of land, containing 14,500 acres, situated in East Florida, being a part of a large body consisting of 30,000 acres, originally granted in full and absolute property, on the 24th day of March 1817, to Fernando de la Maza Arredondo ; that he had purchased the same after the said 14,500 acres were located and surveyed ; further alleges, that a considerable portion of the land bought by him, is covered by water, and consists of marshes, and "that by the custom, practice and usage of the Spanish government in East Florida, where it happened, that at the place designated for the location of the land granted, there was found to be a part of that which would necessarily fall within the survey, according to the calls of the grant, covered with water, or consisting of marshes, though included within the boundaries of the survey, it was excluded from the quantity surveyed for the party ; and the whole of the land, clear of such water and marsh, called for by the grant, was surveyed and secured to the party entitled to the benefit thereof." He then prays that such directions for the survey of the said 14,500 acres of land may be given by the court, as he is entitled to, by the aforesaid concession, and the said usage, practice and custom of the Spanish government in East Florida. And he concludes his petition with a prayer, that the validity of his title to the aforesaid tract of land may be inquired into and decided by the court.

*83] *The court decides his claim to be good to the 14,500 acres, according to its survey, designating particularly the identity of the land by reference to the survey of Don Andrew Burgevin, who was the surveyor appointed to survey the concession to Arredondo, and it decrees, that the prayer of appellee, to have the said 14,500 acres of land surveyed to him, excluding land covered with water and marshes, be rejected.

This court affirms the decree of the court below. It thinks that the claimant failed to establish, by any evidence in the cause, the existence of any such custom or practice in the government of East Florida, in regard

to land covered by water, and consisting of marshes; and if such a custom or practice can be proved to exist, it cannot be applied to any concession carried into an actual grant, according to a survey made and returned by the officer, or person appointed to make such survey. Such are the facts in this case. The survey was made by Burgevin, the governor having appointed and qualified him for the purpose; and the grant is made by a recital of Burgevin's survey. It is this survey also, which the court below decrees in favor of the claimant, and which it is to be particularly understood this court affirms. But this court thinks it necessary to say further, in affirming the decree of the court below; rejecting the claim of the petitioner to have 14,500 acres of land surveyed to him, excluding land covered with water and marshes; that even though the survey had not been made, it would not be competent to the court below, or to this court, to designate a new location, varying from the original concession, as any such alteration on a concession would be equivalent to a new grant. See the case of the *United States* v. *Huertas*, 9 Pet. 171. The acts of congress by which these cases are subjected to judicial investigation and judgment, give no such power to the courts.

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

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*United States, Appellants, *v.* William Drummond, Appellee. [*84

Florida land-claims.

A concession was made by the governor of Florida, before Florida was ceded to the United States, on the condition that grantee should ereet a water saw-mill, "and with the precise condition, that until he executes the said machinery, the grant to be considered void, and with out effect, until that event takes place;" the mill was never erected, and no sufficient reason shown for its non-erection. The court held, that the concession gave no title to the land.

Appeal from the Superior Court of East Florida.

Grundy, Attorney-General of the United States, submitted this case to the court, alleging, that the claimant relied on a concession made by Governor Coppinger for 16,000 acres of land, dated September 12th, 1816. The grant was upon a condition, namely, the erection of a water saw-mill; "and with the precise condition, that until he executes said machinery, this grant will be considered as null and void, and without effect or value until that event takes place," &c. The mill was never erected. No sufficient reason was shown for its non-erection.

It was insisted, that the erection of the mill was a condition precedent; and consequently, that until the claimant showed a performance of that condition, or some reason for non-performance, which would satisfy the terms of the eighth article of the treaty ceding Florida to the United States, he had no title in law or equity.

This case is believed to be fully decided against the claimants, by the decisions of this court at its last term, in the cases of the *United States* v. *Mills's Heirs*, 12 Pet. 215, and *United States* v. *Kingsley*, Ibid. 476.

WAYNE, Justice, delivered the opinion of the court.—This case, like that of the *United States* v. *Andrew Burgevin* (*post*, p. 85), is controlled by the decision of this court in the case of the *United States* v. *Kingsley*, 12 Pet. 476. The decree of the superior court of East Florida is, therefore, reversed.

THIS cause came on to be heard, on the transcript of the record from the superior court for the district of East Florida, and was argued by counsel: On consideration whereof, it is the opinion of this court, that the petitioner having failed to fulfil the condition of the grant, the said grant or concession is null and void; and that the said petitioner has no right or title to the land. Whereupon, it is now here decreed and ordered by this court, that the decree of the said superior court in this cause be and the same is hereby reversed and annulled; and that this cause be and the same is hereby remanded to the said superior court, with directions to enter a decree in conformity to the opinion of this court.

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*85] *UNITED STATES, Appellants, *v.* ANDREW BURGEVIN, Appellee.

Florida land-claims.

A grant of land in East Florida, by the Spanish governor, on the condition that a water saw-mill should be erected on the land, declared void; the condition of the grant not having been performed, according to its terms.

APPEAL from the Superior Court of East Florida. Andrew Burgevin, on the 21st day of May 1829, presented a petition to the judge of the superior court for the district of East Florida, claiming a tract of land of five miles square, or 16,000 acres, situated in the district of East Florida; under a title derived from a grant made to him by the Spanish government, on the 13th day of January 1818.

The petition addressed by Andrew Burgevin to Governor Coppinger, asked for the grant for the purpose of erecting a water saw-mill on the same; with a view not only to remedy the notable want of lumber which was felt at that place, but also to supply the export trade of that article, so much recommended to the government of Florida, by the superior authority of Havana. The grant was made to Andrew Burgevin, in consideration of the advantages and benefit which the province would receive from the proposed establishment; "with the precise condition, that until he erects said machinery, said grant will be considered as null and void, and without effect or value, until such an event takes place."

The answer of the district attorney of the United States, among other objections to the allowance of the claim, stated, that the condition of the grant had not been complied with by the grantee—"that the said Andrew Burgevin has not built, constructed or erected the said water saw-mill on the said tract of land; but that he has always hitherto wholly failed and neglected to construct or erect the same, or to comply with and perform the said conditions, in any way or manner whatever." The answer denied that the said Andrew Burgevin had been prevented from constructing and erecting said mill and proceeding in the objects of said grant, owing to the general disturbed and unsettled state of the country; and further, if any such disturbed and unsettled state of the country at any time existed, it was

merely temporary, and of very short continuance; whereas, more than eleven years had elapsed (as appeared by the showing of the said Andrew Burgevin himself) since the date of the said supposed grant; during any part of which period, he might, with due and reasonable diligence, have proceeded to erect and construct the said water saw-mill on the said tract of land, in accordance with the objects of said supposed grant.

The superior court of East Florida gave a decree in favor of the petitioner, and the United States prosecuted this appeal.

The case was argued by *Grundy*, Attorney-General of the *United States, and *Dent*, for the appellants; and by *Coxe*, for the appellee. [*86

Dent, for the United States, cited the *United States* v. *Mills's Heirs*, 12 Pet. 215; *United States* v. *Kingsley*, Ibid. 476. The question before the court in these cases was precisely the same as that in the present case; and this court refused to confirm the grant. This court has said, it will apply the most liberal rules of equity to the condition of Spanish grants; but in this case, there is no room for the application of any such rules. The grantee has not performed the condition of the grant; nor did he, during all the period which passed after the grant, make an attempt to perform it.

In the *United States* v. *Kingsley*, the same excuse for the non-performance was offered—"the disturbed state of the country;" and it was overruled. This grant was made within six months of the cession of Florida to the United States. This court has allowed six months for the performance of such conditions; and by the Spanish law, the same period was allowed.

Coxe, for the appellee, contended, that the disturbed situation of the country, by Indians, prevented the erection of the mill contemplated by the grantee. He cited *Huidekoper* v. *Douglass*, 1 W. C. C. 258.

The *Attorney-General*, in reply, stated, that if this grant should be confirmed, there would be no limitation to claims for lands in Florida. There was a proposition to erect a water saw-mill on the land; and the governor of Florida declared the grant should be void, if the mill should not be erected.

Wayne, Justice, delivered the opinion of the court.—This is an appeal from the superior court of the Eastern District of Florida, confirming the right of the appellee to a tract of land, under a concession or grant from the governor of Florida, dated before the treaty of the 22d February 1819, between the United States and Spain.

We think the concession or grant identical with that in *Kingsley's Case*, in 12 Pet. 476; and that it is controlled by the principles laid down by the court in that case. *Kingsley's Case* was well considered by this court—has been reconsidered maturely upon the argument of counsel made in the case before us—but we see no reason to modify or change, in any particular, what was then decided; nor why this case should be taken out of the application of that case. The decree of the superior court of East Florida is, therefore, reversed.

This cause came on to be heard, on the transcript of the record from the
*87] superior court for the district of East Florida, and was *argued by counsel: On consideration whereof, it is the opinion of this court, that the petitioner having failed to fulfil the condition of the grant, the said grant or concession is null and void; and that the said petitioner has no right or title to the land. Whereupon, it is now here decreed and ordered by this court, that the decree of the said superior court in this cause be and the same is hereby reversed and annulled; and that this cause be and the same is hereby remanded to the said superior court, with directions to enter a decree in conformity to the opinion of this court.

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*88] *United States, Appellants, *v.* The Heirs of Fernando de la Maza Arredondo, Appellees.

Florida land-claims.

A concession by the governor of East Florida, made before the Florida treaty, in consideration of services, confirmed.

Appeal from the Superior Court of East Florida. In the superior court of East Florida, Fernando de la Maza Arredondo filed a petition, praying a confirmation of a concession made to him, in consideration of services, by Don Jose Coppinger, on the 24th of March 1817; he being then governor of East Florida, a dependency at that time of the crown of Spain. The court confirmed the concession, and the United States prosecuted this appeal.

Wayne, Justice, delivered the opinion of the court.—This case is one of a concession and grant of land in East Florida, made by the Spanish authorities in that province, before the 24th January 1818; surveyed and granted in absolute property, in consideration of the meritorious services of Fernando de la Maza Arredondo. The survey corresponds with the concession. The decree of the court below in favor of the claimants is in every regard within the decisions of this court; and the decree is, therefore, affirmed.

This cause came on to be heard, on the transcript of the record from the superior court for the district of East Florida, and was argued by counsel: On consideration whereof, it is adjudged and decreed by this court, that the decree of the said superior court in this cause, confirming 15,000 acres of land to the petitioners, be and the same is hereby in all respects affirmed.

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

Parol evidence.

The plaintiff in error had, by an arrangement in writing, hired a steamboat, to be put "on the route" from Washington, in the district of Columbia, to Potomac creek, until another steamboat, then building, should be prepared, and be put "on the route." The plaintiff in error was the contractor for carrying the mail of the United States, which was carried in a steamboat to Potomac creek; except in winter, when the navigation of the rivor Potomac was interrupted by ice, when the mail was carried by land; the steamboat so hired was employed in carrying the mail; the ice prevented the use of the steamboat; and the owners claimed, under the contract, the hire of the boat during the time her employment was thus interrupted. The circuit court refused to allow parol evidence to be given to show the purpose for which the steamboat was employed, and to explain the meaning of the terms used in the contract, and of other matters conducing to show the meaning of the contract; the court held, that the evidence was admissible.

It is a principle recognised and acted upon as a cardinal rule by all courts of justice, in the construction of contracts, that the intention of the parties is to be inquired into; and, if not forbidden by law, is to be effectuated.

Extrinsic evidence is not admissible, to explain a patent ambiguity, that is, one apparent on the face of the instrument; but it is admissible to explain a latent ambiguity, that is, one not apparent on the face of the instrument, but arising from extrinsic evidence; that is but to remove the ambiguity by the same kind of evidence as that by which it is created.

Extrinsic parol evidence is admissible to give effect to a written instrument, by applying it to its proper subject-matter, by proving the circumstances under which it was made; whenever, without the aid of such evidence, the application could not be made in the particular case.[1]

Steam-Packet Co. *v.* Bradley, 5 Cr. C. C. 393, reversed.

Error to the Circuit Court of the District of Columbia, and county of Washington. This was an action on the case, brought in the circuit court, on the 24th December 1834, by the defendants in error. The claim of the plaintiffs was for $2765, alleged to be due on the 7th day of February 1832, for the hire of the steamboat Franklin, before that time let and delivered by the plaintiffs to the defendant, now the plaintiff in error.

The cause was tried in 1838, and the jury, under the directions of the court, found a verdict for the plaintiffs. The defendant tendered a bill of exceptions to the opinion of the court on the matters in controversy, which was duly signed and sealed. The court entered a judgment for the plaintiffs, according to the verdict; and the defendant prosecuted this writ of error.

The bill of exceptions stated, that the plaintiffs gave in evidence and read to the jury, the following paper, dated 19th November 1831, signed by William A. Bradley, as follows:

"I agree to hire the steamboat Franklin, until the Sydney is placed on the route, to commence to-morrow, 20th instant, at ($35) thirty-five

[1] Parol evidence of the surrounding circumstances is admissible, to show the subject-matter of the contract. United States *v.* Peck, 102 U. S. 64. It is admissible, of the circumstances surrounding and accompanying the transaction, tending to show the relation of the parties to each other and to the subject-matter of the contract, and the state or condition of the subject-matter, bearing on the intention of the parties. Phelps *v.* Claren, 1 Woolw. 204.

dollars per day, clear of all expenses, other than the wages of Captain Nevitt. W. A. Bradley."

"19th Nov. 1831.

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

"Washington City, Nov. 19th, 1831.

"Washington City, Dec. 5th, 1831.

"Pishey Thompson, Esq.

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

"Pishey Thompson, Esq., Present."

In reply to this letter, the president of the steam-packet company wrote to the defendants as follows:—

"Washington, Dec. 6th, 1831.

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

*91] rigid adherence is contended for on your part, notwithstanding *it had undergone a verbal modification; the board could not but recollect this, and be influenced thereby. Yours, respectfully,

"Wm. A. Bradley, Esq. W. Gunton, President."

The plaintiffs also proved, that the steamboat Sydney was in Baltimore, in November 1831, and continued there, until the 26th of January 1832; and that she left there and arrived in the Potomac, and was put "on the route" to Potomac Creek, on the 6th of February of that year. She had not been able to start from Baltimore until the 25th January 1832. The plaintiffs claimed the hire of the Franklin, from the 20th of November 1831, to the 6th day of March 1832, at $35 per day.

The defendant, to support the issue on his part, offered to prove, by competent witnesses, that for several years immediately preceding the date of the contract, he had been, and was still, contractor for the transportation of the United States mail from Washington to Fredericksburg; that the customary route of said mail was by steamboat from Washington to Potomac creek, thence by land to Fredericksburg, in which steamboat, passengers were also usually transported on said route; that during all that time, the defendant had used a steamboat belonging to himself on said route; that he also kept an establishment of horses and stages for the transportation of said mail all the way by land from Washington to Fredericksburg, at seasons when the navigation of steamboats was stopped by ice; and had been obliged for a considerable portion of every winter, during the time he had been so employed in the transportation of the mail, to use his said stages and horses for the transportation of the mails all the way by land to Fredericksburg; in the meantime laying up his steamboat. That just before the date of said contract, the defendant's own steamboat, usually employed as aforesaid on said route, had been disabled, and the defendant was at the time about completing a new boat, called the Sydney; which had been built at Washington and sent round to Baltimore for the purpose of being fitted with her engine and other equipments necessary to complete her for running on said route; and that she lay at Baltimore, in the hands of the workmen there, at the date of said contract; that on the morning of the 5th day of December 1831, Captain Nevitt, the commander of the said steamboat Franklin, refused to go on the said route of the defendants to Fredericksburg, in consequence of the ice then forming in the river, unless he was directed to do so by the plaintiffs; that application was then made to Doctor Gunton, the president of the company, and he directed the said captain to proceed as required, and obey the orders of the defendant; that the said captain did then proceed on the said route, and returned as far as Alexandria, where he stopped, and sent up the mail by land; and, although required to do so by the agent of the said defendant, he refused to come up to the city of Washington with the boat, in consequence of the ice which had formed in *the river; [*92
and that said boat lay at Alexandria, frozen up in the harbor, from that time till the 5th February 1832; that at the same time, the navigation of the Potomac river became obstructed as aforesaid, the navigation at and from Baltimore became also obstructed from the same cause, and the said steamboat Sydney was also frozen up in the basin at Baltimore, before she had been completely equipped with her engine; that at the time she was frozen up, she wanted nothing to complete her equipment, but the insertion of two pipes, a part of her engine, which pipes had been made, but not then put in place, the completing of which would not have required more than two days, and the boat would have been in complete order for being sent round to Washington, and put upon said route; but the ice having inter-

posed, it was deemed by the workmen, and those in charge of the boat, that the insertion of said pipes ought to be postponed till the navigation was clear; that in January 1832, the said pipes were inserted, and the said boat being completely equipped for her voyage, left Baltimore for Washington, as soon as the state of the ice made it practicable to attempt that voyage; was again stopped by the ice, and obliged to put in at Annapolis, whence she proceeded to Washington as soon as the ice left it practicable to recommence and accomplish the voyage, and arrived at Washington on the 6th February 1832, and was, the next day, placed by defendant on said route; that during the whole of the period from the first stopping of the navigation as aforesaid, until the said 6th February, the defendant had abandoned the said route to Potomac creek, and prosecuted the land route from Washington to Fredericksburg.

2. That it was known to and understood by plaintiffs, at the time the contract in question was made, and was a matter of notoriety, that as soon as the navigation should be closed by ice, the United States mail from Washington to Federicksburg would have to be transported all the way by land carriage, instead of being transported by steamboat to Potomac creek, and thence by land to Fredericksburg; and that the said steamboat Franklin would not be required by defendant, and could not be used under said contract, when the navigation should be closed.

3. That it was communicated to the plaintiffs by defendant, or his agent, before the time of making said contract, that the defendant intended to keep said steamboat in use under said contract, so long as the navigation remained open, and no longer.

To the admissibility of which evidence the said plaintiffs by their counse objected, and the court refused to permit the same to go to the jury; but, at the instance of plaintiffs, gave the following instruction, viz: That if the jury shall believe, from the evidence aforesaid, that the said defendant did, on the 19th day of November 1831, write to said plaintiffs the said paper of that date, bearing his signature, and that said plaintiff did accept the same, by the said paper of the same date, and that said defendant and
*93] plaintiffs did respectively *write to each other the papers bearing date the 5th and 6th of December 1831, and that the said steamboat Sydney did in fact first arrive in the Potomac river, on the 6th February 1832, and was placed on the route to Potomac creek, mentioned in the said evidence, on the 7th February 1832; that then the said plaintiffs are entitled to recover, under said contract so proved as aforesaid, at the rate of $35 per diem, from the said 20th November 1831, to the said 6th of February 1832, both inclusive. To which refusal, by the court aforesaid, to admit the evidence so offered by the said defendant, as also to the granting by the court of the said instruction aforesaid, so prayed for by the said plaintiffs, the said defendant by his counsel accepted.

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

The counsel for the *plaintiff* in error maintained, that the evidence offered on his part, and rejected by the circuit court, ought to have been admitted, and that it imported a full defence to the action; and that the terms of the instruction from the court to the jury were in other respects

erroneous and untenable, upon the data assumed in the instruction itself. The hiring of the Franklin was from day to day. The contract was made under the known circumstances of the case ; and was so understood by all the parties to it. The purpose for which the boat was hired was to convey the mail, for the conveyance of which the plaintiff in error was the contractor ; and it had reference to two circumstances, viz., one expressed, that the Sydney should be in a condition to be placed on the route, for which it was known she was preparing ; the other, equally well understood, that the interruption and prevention of the running of the steamboat, by the ice in the Potomac, would oblige the contractor to convey the mail by land ; in which case, as the boat could no longer be used, the hiring would cease.

The evidence offered by the plaintiff in error, was to explain, not to contradict, the written contract. It was to show what the route for which the boat was employed was ; and that the plaintiff could only use the boat while the river was navigable. It was to show that after the river was closed, the mail was transported by land. Such evidence is admissible by the rules of law. Cited, 1 Mason 10 ; 4 Camp. ; 8 T. R. 379, 382 ; 3 Dall. 415 ; 5 Wheat. 326 ; 8 Johns. 116 ; 19 Ibid. 313 ; 2 Barn. & Ald. 17 ; 11 East 212 ; 2 Bos. & Pul. 503 ; 10 East 555 ; 2 Camp. 627. According to reason, and analogous cases, there can be no doubt of the propriety and legality of the evidence. We are to look at the terms of the contract, and to the usage of the business in which the Franklin was to be employed. She was to be used in carrying the mail ; and it must have been known, that when she could no longer carry the mail, she would not be employed. The prevention *by causes not within the control of either party, would excuse both [*94 from the performance of the contract. He who hires, is to have the enjoyment and use of the thing hired. If the hiring is for a specific purpose, the purpose must be accomplished. In this case, the hiring was for a public, notorious purpose ; and it was well known and well understood, that on certain events occurring, the Franklin would be no longer employed.

Was it an engagement which was to depend for its determination solely on the Sydney's being placed on the route? This would have compelled the plaintiff in error to pay for the Franklin to the end of time, if the Sydney had been burned, or had not been capable of proceeding on the route. The length to which this position would extend proves its error.

Coxe, for the defendants in error, contended, that the engagement to hire the Franklin, was to continue until the happening of a particular event ; until the Sydney should be fit to take her place on the route. The suspension of the performance of the boat, could be but temporary ; and this was one of the contingencies to which the plaintiff in error had subjected himself by the contract. There is nothing to distinguish this case from the case where an embargo has interposed to suspend the voyage of a ship.

The evidence was properly excluded. The contract was express, plain and simple ; and did not require the testimony. No difficulty existed as to the meaning of the terms used in the agreement. "The route," was well understood. It was not a mail route only, but it was used by the plaintiff in error for the conveyance of passengers ; and this was one of the objects of the contract. It was on these principles the circuit court proceeded in the case.

BARBOUR, Justice, delivered the opinion of the court.—This case is brought before us by a writ of error to a judgment of the circuit court of the district of Columbia, for the county of Washington. It was an action of *assumpsit*, brought by the defendants in error, against the plaintiff in error, to recover a sum claimed for the hire of the steamboat Franklin. The claim was founded upon a written contract, concluded between the parties, by the following correspondence: On the 19th of November 1831, the plaintiff in error wrote to the defendants in error, a note, of which the following is a copy: "I agree to hire the steamboat Franklin, until the Sydney is placed on the route, to commence to-morrow, 20th instant, at ($35) thirty-five dollars per day, clear of all expenses other than the wages of Captain Nevitt. W. A. Bradley." To this note, W. Gunton, as president of the company, replied on the same day, in the following words: "On the part of the Washington, Alexandria and Georgetown Steam-Packet Company, I agree to the terms offered by William A. Bradley, Esq., for the *use of the steamboat Franklin, until the Sydney is placed on the route to Potomac creek, which is thirty-five dollars per day, clear of all expenses, other than the wages of Captain Nevitt, which are to be paid by our company." *95]

Upon the trial of the cause, on issue joined upon the plea of *non assumpsit*, a bill of exceptions was taken by the defendant; from which it appears, that the plaintiffs in the court below, having given in evidence the correspondence already stated, further gave in evidence a note, signed by William A. Bradley, dated December the 5th, 1831, addressed to Pishey Thompson, requesting him to advise the president and directors of the steam-packet company, that the navigation of the Potomac being closed by ice, they had that day commenced carrying the mail by land, under their winter arrangement, and had, therefore, no further occasion for the steamboat Franklin, which was then in Alexandria, in charge of Captain Nevitt; and offering to pay the balance due for the use of the Franklin, on the presentation of a bill, and receipt therefor; and also a letter from W. Gunton, addressed to William A. Bradley, dated the 6th December 1831, in which, after stating that the letter of the 5th, from Bradley to Thompson, had been submitted to the board of directors of the company, he informed him, that the board could not admit his right to terminate his agreement, on the grounds which he had stated in his note to Thompson; and that they regarded it as being still in full force, and the boat as being in his charge. The plaintiff also proved, that the steamboat Sydney was not placed on the route, until the 7th of February 1832; that the Sydney belonged to the defendant, and that she was not finished, so as to be able to start from Baltimore, until the 25th of January. And thereupon, the plaintiffs claimed the hire of the steamboat Franklin, from the 20th of November 1831, to the 6th of February 1832, seventy-nine days, at $35 per day; allowing credit for $350, paid by the defendant, and leaving a balance of $2415.

It appears from the bill of exceptions, that after the plaintiff had closed his evidence, the defendant, amongst other things, offered to prove, that he, for several years, had been, and then was, contractor for the transportation of the mail from Washington to Fredericksburg; that the customary route of said mail was by steamboat from Washington to the Potomac creek, thence by land to Fredericksburg, and that passengers were also transported on that route; that he kept an establishment of horses and stages,

for the transportation of the said mail all the way by land from Washington to Fredericksburg, at seasons when the navigation of steamboats was stopped by ice ; and had been obliged, for a considerable portion of every winter, during the time he had been so employed in the transportation of the mail, to use his said stages and horses, for the transportation of the mail, all the way by land to Fredericksburg, in the meantime laying up his steamboat ; that just before the date of the contract, the defendant's own steamboat, *usually employed on said route, had been disabled, and [*96
the defendant was, at the time, about completing a new boat called the Sydney, which had been built at Washington, and sent round to Baltimore for the purpose of being fitted with her engine and other equipments ; that in January 1832, the Sydney, being completely equipped, left Baltimore for Washington, as soon as the state of the ice made it practicable to attempt the voyage, was stopped by ice, and obliged to put in at Annapolis, whence she proceeded to Washington, as soon as the ice left it practicable ; arrived at Washington on the 6th of February 1832, and was on the next day placed by defendant on the route ; that on the 5th of December 1831, Captain Nevitt, the commander of the Franklin, refused to go on the said route of the defendant, in consequence of the ice then forming in the river, unless he was directed to do so by the plaintiffs ; that upon application to the president of the company, he directed the captain to proceed as required, and obey the orders of the defendant ; that the captain did then proceed on the route, and returned as far as Alexandria, where he stopped, and sent up the mail by land, and although required by defendant's agent, refused to come up to Washington with the said boat, in consequence of the ice, which had formed in the river ; and that the said boat lay at Alexandria, frozen up in the harbor, from that time to the 5th of February 1832 ; that it was matter of notoriety, and known to and understood by the plaintiffs, at the time the contract in question was made, that as soon as the navigation should be closed by the ice, the United States mail from Washington to Fredericksburg would have to be transported all the way by land carriage, instead of being transported by steamboat to Potomac creek, and thence by land to Fredericksburg ; and that the steamboat Franklin would not be required by defendant, and could not be used under said contract, when the navigation should be closed.

The court refused to permit the evidence thus offered by the defendant to go to the jury. And then, on the motion of the plaintiffs, instructed the jury, that if they believed from the evidence, that the defendant wrote to the plaintiffs the paper of the 19th November 1831, and that the plaintiff accepted the offer, by the same date, and that plaintiffs and defendant respectively wrote to each other the papers bearing date the 5th and 6th December 1831, and that the steamboat Sydney did in fact first arrive in the river Potomac, on the 6th February 1832, and was placed on the route to Potomac creek, on the 7th of February 1832, that then the plaintiffs were entitled to recover, under the contract so proved, at the rate of $35 *per diem*, from the 20th of November 1831, to the 6th of February 1832, both inclusive.

The questions then arising upon this record, are : first, whether the court erred in refusing to permit the evidence offered by the defendant to go to

the jury? And secondly, whether they erred in giving the instruction to the jury which they did give, at the instance of the plaintiffs?

*97] *As to the first question. It is a principle recognised and acted upon by all courts of justice, as a cardinal rule in the construction of all contracts, that the intention of the parties is to be inquired into; and if not forbidden by law, is to be effectuated. But the law has laid down certain rules, declaring by what kind of proof, in any given case, this intention is to be ascertained. Amongst these rules, a leading one in relation to written contracts, to which class the one in question belongs, is this: That extrinsic evidence is not admissible to explain a patent ambiguity; that is, one apparent on the face of the instrument; but that it is admissible to explain a latent ambiguity; that is, one not apparent on the face of the instrument, but one arising from extrinsic evidence; for this is but to remove the ambiguity by the same kind of evidence as that by which it is created. The rule thus stated seems to be in itself quite plain and intelligible, and yet much difficulty has arisen in its application. The illustration most usually given of the operation of this rule in the admission of extrinsic evidence, is that of a description of a devisee, or of an estate, in a will, where it turns out that there are two persons, or two estates, of the same name and description. These, however, are put, not as measuring the extent of the rule, but as exemplifying its application; and all other cases within the scope of the principle are, in like manner open to explanation, by the same kind of evidence. Accordingly, it is laid down, in a very accurate writer on the subject of evidence (3 Stark. 1021), that extrinsic parol evidence is admissible to give effect to a written instrument, by applying it to its proper subject-matter.

Let us examine some of the many cases which have been decided upon the subject of the admissibility of this evidence, in relation to written instruments. In the first place, wherever there is a doubt as to the extent of the subject devised by will, or demised, or sold, it is matter of extrinsic evidence, to show what is included under the description, as parcel of it. Accordingly, in 1 T. R. 701, Buller, Judge, said, whether parcel or not of the thing demised, is always matter of evidence.[1] So, where a grantor in a deed described the premises, as the farm on which he then dwelt, this was held to be a latent ambiguity, which might be explained by evidence *aliunde;* and evidence was admitted, that a particular piece of land, claimed under the deed, was, at the time of the grant, in a state of nature, uninclosed, and separate from the rest of the farm, and that the grantor remained in possession, and occupied it as his own till his death—to show that it was not within the grant. 4 Day 265.

In 8 Johns. 116, the case was this: A., by a written contract, agreed to receive of B. sixty shares of the Hudson Bank, on which ten dollars per share had been paid, and to deliver B. his note for $667, and pay him the balance in cash, and also to pay five per cent. advance. It was decided, that this was a case of latent ambiguity, and the nominal value of each share

*98] being fifty dollars, parol *evidence was admitted, to show whether the five per cent. advance was to be paid on the sum paid in only, or on the nominal amount. In 2 Leigh 630, the principle is laid down by

[1] See the case of Warner *v.* Brinton, *post*, p. 106 n.

the court, that parol evidence is not admissible to vary, contradict, add to, or explain a written agreement; but in cases of equivocal written agreements, the circumstances under which they were made may be given in evidence to explain their meaning.

In the case of *Birch* v. *Depeyster*, 1 Stark. 210, the charter-party stipulated that the master should receive a specific sum, in lieu of privilege and primage, and the question was, whether the terms of the contract excluded all right on the part of the master to use the cabin for the carriage of goods, on his own account. GIBBS, Chief Justice, said, "evidence may be received to show the sense in which the mercantile part of the nation use the term privilege, just as you would look into a dictionary to ascertain the meaning of a word; and it must be taken to be used by the parties in its mercantile and established sense." So, where a charter-party stipulated that a freighter should pay a certain sum per pound, &c., British weight; it was held, that as the word weight had two meanings, gross and neat, this was such a latent ambiguity as to warrant the introduction of parol testimony. 1 Nott & McCord 45. In the case of *Peisch* v. *Dickson*, 1 Mason 11, it is said by the judge, that if, by a written contract, a party were to assign his freight in a particular ship, it seemed to him, that parol evidence might be admitted, of the circumstances under which the contract was made, to ascertain whether it referred to goods on board the ship, or an interest in the earnings of the ship; or in other words, to show in what sense the parties intended to use the term.

Nor is this principle at all confined to mercantile contracts; for in *Robertson* v. *French*, 4 East 130, Lord ELLENBOROUGH, speaking on this subject, said, that the same rule which applied to all other instruments, applied also to a policy of insurance. The admission of this kind of proof has been carried to a great extent, too, with a view to a correct construction of wills. In the case of *Shelton's Executors* v. *Shelton*, 1 Wash. 56, it is said, that to discover the intention of a testator, parol evidence may be admitted of his circumstances, situation, connection with the legatees, and his transactions between the making of his will and his death. And this same doctrine is advanced by the same court, in 3 Hen. & Munf. 283. We will close this reference to cases with that of the *Mechanics' Bank* v. *Bank of Columbia*, 5 Wheat. 326. In that case, it was held by this court, that where a check was drawn by a person who was the cashier of an incorporated bank, and it appeared doubtful upon the face of the instrument, whether it was an official or a private act, parol evidence was admissible, to show that it was an official act; and, accordingly, many facts and circumstances were given in evidence, to prove in what character it was drawn.

*The cases which we have thus collected together from amongst the very many which exist, will serve to show in how many aspects [*99 the question of the admissibility of extrinsic evidence in relation to written contracts has been presented and decided; and in how many forms, according to the various circumstances of the cases, the principle which we have been considering has been applied. Sometimes, it has been applied to deeds, sometimes, to wills, and sometimes, to mercantile and other contracts. In some cases, it has been resorted to, to ascertain which of several persons was intended; in others, which of several estates; in some, to ascertain the identity of the subject; in others, its extent; in some, to ascertain the

meaning of a term, where it had acquired by use a particular meaning; in others, to ascertain in what sense it was used, where it admitted of several meanings. But in all, the purpose was the same—to ascertain by this medium of proof, the intention of the parties, where, without the aid of such evidence, that could not be done; so as to give a just interpretation to the contract.

Without attempting to do what others have said that they were unable to accomplish; that is, to reconcile all the decisions on the subject, we think that we may lay down this principle as the just result—that in giving effect to a written contract, by applying it to its proper subject-matter, extrinsic evidence may be admitted, to prove the circumstances under which it was made; whenever, without the aid of such evidence, such application could not be made in the particular case.

With this principle in view, we proceed to inquire, whether the evidence offered by the defendant, in this case, ought to have been received by the court. Now, had the evidence been received, it would have disclosed the following state of facts: That the route mentioned in the contract, was one on which the plaintiff in error transported passengers, and also the mail; that the steamboat Sydney, mentioned in the contract, was designed to perform this service; and that the Franklin was wanted for the same purpose; that the Sydney was then at Baltimore, for the purpose of being fitted with her engine and equipments; that although the transportation of passengers and the mail was carried on, by the plaintiff in error, in a steamboat, whilst the river was open; yet, when the river was closed by ice, so that navigation was obstructed, the plaintiff in error then transported passengers and the mail all the way over land to Fredericksburg; that when the river was thus obstructed, the plaintiff in error could not, and did not, use a steamboat; and that all these facts were known to the defendant in error. We think that this evidence ought to have been received, because it would have tended to show, by the circumstances under which the contract was made, what was the intention of the parties; and, in the language of the rule which we have laid down, that the contract, without its aid, could not be applied to its proper subject-matter.

*100] The terms used in the written contract are, "for the use of the *steamboat Franklin, until the Sydney is placed on the route to Potomac creek." It is contended, that this amounted to a stipulation to keep the Franklin in use, until the Sydney was placed on the route; no matter what length of time may have elapsed before that was done. Suppose, that the Sydney had been accidentally consumed by fire, the day after the hiring of the Franklin, the effect of this construction would be, to make that hiring co-extensive in point of time with the existence of the Franklin, in a condition for use; although it is obvious, that a temporary hiring only was in the contemplation of the parties. Again, suppose, the plaintiff in error had sold the Sydney, and bought another boat, and put that other on the route; the construction contended for would lead to the result, that the hire of the Franklin would still have continued to have gone on, indefinitely. If this were so, it must be upon the principle that it entered into the contemplation of the parties, as a material term of the contract, that the plaintiff in error should keep the Franklin in use, not until he ceased to want it, by having a steamboat to take its place, but until the identical steamboat

Sydney, and no other, should take its place. We think, that the evidence offered, and rejected by the court, would have shown why reference was made to the Sydney being placed on the route ; that is, because she was expected to be ready for use, in a very short time. It would have shown further, that the defendants in error knew the service for which their boat was wanted ; what was the nature of that service ; that whenever the river was obstructed by ice, the Franklin would not be wanted, because it could not be used, and because then another mode of transportation was resorted to. From all this, it would have been competent to infer, that the words, "until the Sydney is placed on the route," were not intended to fix that time as the period to which the hiring was to continue, at all events, and under all circumstances ; but as being referred to, because the Sydney was then expected to be ready for use, in a very short time ; and so soon as she could be used, the Franklin would not be wanted, even although there should be no obstruction to navigation by ice. And moreover, it would have been competent to infer, that as the defendants knew why the Franklin was wanted ; for what service she was wanted ; the character of that service, that is, that it would cease when she could not be used, by reason of the river being closed with ice ; that, therefore, the real intention of the parties, to be derived from the written contract and the parol evidence taken together, was, a hiring and letting to hire, for so long a time as the boat could be used, that is, until the navigation was obstructed ; subject to being terminated at any previous time, when the Sydney was ready to take her place. We think, that the rule of law, which admits extrinsic evidence for the purpose of applying a written contract to its subject-matter, justifies its admission, beyond the mere designation of the thing, or *corpus*, if we may so express it, on which the contract operates, and extends so far as to embrace the circumstances which accompany the transaction ; when, without the *aid of those circumstances, the written contract could not be applied to its proper subject-matter. [*101

This principle is illustrated by the cases which we have before referred to. Take, for example, the case cited from 1 Mason 11. That was *assumpsit* for a balance alleged to be due on consignments. In that case, parol evidence was received of the circumstances under which a contract was made, which contained this clause relating to the plaintiff's goods, viz : "On which goods Mr. D. (the defendant in the case) has advanced me $5833, for which amount he will hold for reimbursement, on the amount and net proceeds of the sales of said goods, which are only considered answerable, for said amount advanced, as *per* our agreement ;" for the purpose of showing, whether it was intended to waive any personal claim on the plaintiff, and to restrict the defendant's security for the repayment of the advance, to the goods only ; or was meant merely to exempt the goods of the shippers on freight, from being included as a security for the advance on the plaintiff's goods. So, we have seen, in the case from 2 Leigh 630, the proposition is stated, in terms, that in equivocal written agreements the circumstances under which they were made may be given in evidence, to explain their meaning ; and accordingly, in that case, the judges rely upon the circumstances as disclosed by the parol evidence, in connection with a written promise of indemnity, in deciding on its legal effect.

We could suggest many cases which we think would illustrate this prin-

ciple, and prove, that from the necessity of the case, and consistently with the rules of law, the circumstances under which a written contract is made, must be open to proof by extrinsic evidence, in order to ascertain the intention of the parties, and thus correctly interpret it. Suppose, that during the late war, a person had been engaged, by contract, to transport munitions of war to the army; that, for that purpose, he had hired a steamboat of another, and had signed a written agreement, by which he engaged to take good care of the boat; suppose, that whilst he was engaged in this transportation, the boat had been destroyed by the enemy, as it might rightfully have been, by reason of the hostile character impressed upon it; that, thereupon, a suit had been brought by the person who let it to hire, upon the stipulation to take good care of the boat. Can it be doubted, that it would have been competent for the defendant to have proved, that he was a contractor with the govenment to transport munitions of war; that he had hired the boat for that express purpose; and that these facts were known to the other party, so as to show the intention and understanding of the parties as to the kind of danger to which the boat would unavoidably be exposed, in performing the very service for which it was hired.

We will state only one case more, founded on the suggestion of Mr. Chief Justice Ellsworth, in a note to 3 Dall. 421. Suppose, a *man
*102] signs a written agreement in these words, viz: "I will take your ship John." May not the party, as the chief justice asked, go beyond the note, to explain, by existing circumstances, the meaning of the word take; which, accordingly, as the circumstances might be one way or another, might equally embrace a purchase or a charter-party?

All the cases which we have cited, in which extrinsic evidence has been received, and those which we have supposed, in which we think that it would be admissible, proceed on one principle only, and can only be justified upon that principle. And that is this: that the rule which admits extrinsic evidence, for the purpose of applying a written contract to its proper subject-matter, extends beyond the mere designation of the thing on which the contract operates; and embraces within its scope the circumstances under which the contract concerning that thing was made; when, without the aid of such extrinsic evidence, such application of the written contract to its proper subject-matter could not be made. Hence Mr. Starkie, in his third volume on Evidence, p. 1021, after having laid down the principle, that extrinsic parol evidence is admissible to give effect to a written instrument, by applying it to its proper subject-matter; adds, "and also as ancillary to the latter object (that is, the application to its proper subject-matter), for the purpose, in some instances, of explaining expressions used in a peculiar sense, and of annexing customary incidents," &c.

Let us take a case under each branch of this rule; and by this exemplification, we shall more clearly see the operation of the rule itself, and the very decided bearing which it has upon this case. Then, as to the first branch, as to parol evidence for the purpose of explaining expressions used in a peculiar sense. Let us take the case before cited, where the question was as to the legal effect of a written contract, to receive a stipulated sum in lieu of privilege and primage—in other words, what was the meaning of these terms? Parol evidence was received, to show the sense in which the mercantile part of the nation used the word privilege; and why? Because,

the real question was not what was the meaning of the word privilege, in general; if that had been the question, it would have been a patent ambiguity, and parol evidence would have been clearly inadmissible; but the real question was, what was the meaning of the word privilege, as used in that contract; it being a word which had acquired in the mercantile world a peculiar meaning, that meaning must be inquired into, by parol evidence, to get at the intention of the parties, as it was a mercantile contract. Thus, it will be seen, that it was necessary to go into the mercantile sense of the word, that being the sense in which it was used in the case stated, in order to apply the written contract to its proper subject-matter. Accordingly, Mr. Starkie, in his book on evidence, p. 1033, states that to be the reason why evidence is admissible to prove the special and peculiar sense in which a word is understood.

*Now, let us take a case to exemplify the second branch of the rule, as to annexing customary incidents. The case of *Senior* v. *Armitage* will illustrate the second branch of this rule, that of the admission of parol evidence, to annex customary incidents. In that case, it was held, that a custom for a way-going tenant to provide work and labor, tillage and sowing, and all materials for the same, in his way-going year, the landlord making him a reasonable compensation, is not excluded by an express written agreement between the landlord and tenant, which is consistent with such a custom. Now, here proof of the custom was considered as necessary to apply the contract to its proper subject-matter. So, in the two cases which we have supposed of the steamboat, and the ship; we think the extrinsic evidence which we have mentioned would be admissible, because the question would not have been the meaning of the stipulation to take proper care of the boat, in the one case, and to take the ship in the other, in the general sense of these expressions; but what was the meaning of *proper care*, as to that steamboat, and of the word *take*, as to that ship, under the circumstances which attended the respective contracts concerning them: neither a steamboat in the one case, nor a ship in the other, was the proper subject-matter of the contract, but each of them, in connection with its accompanying circumstances; in other words, that steamboat, under the circumstances under which it was hired; and that ship, under the circumstances under which it was taken. [*103

And so, in the case before us, upon the same principle, the subject-matter of the contract was not merely the steamboat Franklin, but the steamboat Franklin under the circumstances under which it was hired. The parol evidence, then, in this case, was admissible; because, without its aid, the written contract could not be applied to its proper subject-matter; and therefore, it was proper to prove the circumstances attending the transaction. Having thus stated our opinion to be, that evidence ought to have been received to prove the facts stated in the bill of exceptions on the part of the defendants; it follows, as a consequence, that the court below erred, in giving to the jury the instruction which they did give, at the instance of the plaintiffs in the circuit court.

We think, therefore, that the judgment is erroneous, and must be reversed, with costs; and a venire *facias de novo* is awarded; with instructions, that upon the next trial, the court shall receive parol evidence, to prove the facts stated in the bill of exceptions, to have been offered to be proved by

the defendant, at the former trial; except the fact of the communication made to the plaintiff, by the defendant, or his agent, before the time of making the contract, that the defendant intended to keep the steamboat Franklin in use, under the contract, so long as the navigation remained open, and no longer; and with the further instruction to the court, not to give the jury the instruction stated in the exception to have been given at the former trial.

*104] *Thompson, Justice. (*Dissenting.*)—I have not been able to concur in the opinion of a majority of the court in this case. I admit, in the fullest extent, the rule, that parol evidence is admissible to explain a latent ambiguity. But I cannot perceive any ambiguity in the contract in this case, requiring the application of that rule. The contract is dated the 19th of November 1831, and was for the hire of the steamboat Franklin, to be placed on the route from Washington to Potomac creek, until the Sydney should be placed on the route; and to commence on the day after the date of the contract, at the rate of $35 per day, clear of all expenses, other than the wages of the master, which were to be paid by the company. The only question in the case is, as to the admissibility of the parol evidence offered on the trial. I think it was properly rejected by the court. Whatever related to any conversations or negotiations on the subject, previous to the consummation of the contract, were merged in the final conclusion of the contract, according to the well-settled rule of law. And whatever passed between the parties, after the contract was concluded, was also inadmissible; because it tended to vary the contract, and substitute another for that which had been concluded between them. The contract was for the use of the Franklin, without any specified limitation as to time. It was to continue until the Sydney was placed on the route. The Sydney was owned by Mr. Bradley, and was, at the time the contract was entered into, at Baltimore, for the purpose of being fitted with her engine, and other equipments necessary to complete her. The time, therefore, for which the Franklin was to be employed, depended entirely upon the Sydney's being placed upon the route. And this was at the election of Mr. Bradley; the boat was his, and the repairs or equipments were under his directions, and could not be hastened by the owners of the Franklin; and they had it not in their power to put an end to the contract, but were bound to keep their boat ready for the use of Mr. Bradley, until the Sydney was placed on the route. It is not at all probable, from the date of the contract, about the middle of November, that either party anticipated the freezing of the river as early as it did; or some provision would have been made in the contract for such event. The loss resulting from such an unexpected and temporary obstruction by the ice, ought to fall on the party who is chargeable with the delay in placing the Sydney on the route—and that was Mr. Bradley. The boat was his; and the placing her on the route was at his election, and, of course, at his risk.

Catron, Justice. (*Dissenting.*)—The contract given in evidence to sustain the action below is free from any ambiguity on its face; and the question is, can oral evidence be resorted to—first, to raise an ambiguity, by showing the objects of, and circumstances that lead to, the contract; and second, to explain the ambiguity created by the oral evidence?

*105] *I think no such ambiguity, by extrinsic and inferior evidence, can

be created, thereby to open the contract to explanations and additions inconsistent with its face. Nor can oral evidence be called in, to explain the ambiguity inferred from the circumstances and unexpressed intentions, in reference to which the parties are supposed to have contracted. Their entire meaning is taken to be in the writing. 3 Stark. Evid. 999, 1000. By this means, new and independent stipulations are sought, as I apprehend, to be added, *dehors* the written agreement, varying its terms plainly expressed; so that it may be made to operate different ways, according to the explanatory evidence.

This case well illustrates the effect of the doctrine. Had the ice not closed the river, then Mr. Bradley would have had no excuse; this is matter of proof. Had the Sydney not been repaired, then he would have had no excuse; this is also matter of proof. Had the steamboat company established that they, in previous winters, took their boat, the Franklin, out of the Potomac, after the ice formed in this river, and run her in other waters, not subject to ice; and that Mr. Bradley prevented them from taking the usual course, until the boat was frozen up in the river; then all equity and justice would have been on the side of the plaintiffs below. Hence, the rights of the parties on another trial will not depend on the written contract; but it will operate according to the oral proof, and the conditions thus inserted into it. It is clear, the oral evidence, and not the writing, must produce the definite effect.

I hold, nothing can be added to a written agreement, unless there be a clear subsequent, independent agreement, varying the former; but not where it is matter passing at the same time with the written agreement. Truly, where the terms of the written instrument are clear, oral evidence is used to point the application to this or that subject-matter. It acts in aid of the written instrument, to give it the intended application; not to add to its terms, by inserting new conditions and limitations in the contemplation of the parties, and to be inferred from extrinsic circumstances, existing when the agreement was made. To control its construction, by oral proof of the objects of the contracting parties, and the purposes of the contract, would lead to the dangerous result of construing every writing, not by its face, not by the language employed; but by matters extrinsic, variant in each case, as human testimony should make it; the construction, of necessity, to be determined by the jury, and not by the court, whose usual province it is to construe written agreements.

The controlling extrinsic circumstance invoked as an element to construe the contract before the court, is, that the boat Franklin was hired to carry the mail; and that so soon as the ice prevented her from running, it must be inferred, the object of Mr. Bradley (at the date of the contract), was, to surrender the boat, and carry the mail *in stages. As to this, the agreement is wholly silent, and the oral proof may contradict the [*106 assumption; if so, no ambiguity will be raised by the proof, as a foundation for further explanation. Suppose it to be proved, that the intention of the plaintiff in error was to carry passengers; and to have the entire transportation on the Potomac, at the opening and close of the session of congress; and that he was willing to pay the price *per* day for the Franklin, for the sake of the monopoly, and the power to increase the fare; that he bought out a rival, risking the chances of the season, and the number of

passengers : or, suppose it be proved, that Mr. Bradley had (at the date of the agreement) taken his horses off of the stage line, and had no reliance to carry the mail but this boat ; and that he designed to keep her until he supplied her place, even should the river close for a time. In these events, the written contract would be construed to mean, as the oral evidence proved Mr. Bradley intended when he made it. He had the power to retain the Franklin, as long as he chose to keep the Sydney out of the river ; throughout the whole spring and summer of 1832 ; and may have so intended, had the winter been an open one, and the river not obstructed. If Mr. Bradley had the power to elect, according to a reserved intention, and put an end to the agreement ; so had the other side, on a similar reservation, not expressed, but to be inferred from circumstances existing at the time, and in reference to which the parties are supposed to have contracted.

I think no oral proof could be let in, to raise an ambiguity, and to explain it, when raised ; and that in this case, as in all others, the parties must abide by their agreement, fairly made, and plainly expressed.

Story, Justice. (*Dissenting.*)—I had not intended to express any dissent from the opinion of the court in this case. But as my silence might now, under the circumstances, lead to the conclusion that I concurred in that opinion, I wish to state, that I concur in the opinion delivered by my brothers, Catron and Thompson, and for the reasons given by them.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the county of Washington, and was argued by counsel : On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said circuit court in this cause be and the same is hereby reversed, with costs ; and that this cause be and the same is hereby remanded to the said circuit court, with directions to award a *venire facias de novo.*

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[1] In Warren *v.* Brinton, Judge Baldwin, in 1835, delivered a very learned opinion upon the question of the admissibility of parol evidence to explain an ambiguity in a will, as follows

Baldwin, Justice.—Edward Brinton, in his lifetime, was seised of a tract of land in Birmingham township, Chester county, lying on the southside of the Kennett road, on which he resided, containing by estimation eighty acres ; he died, leaving one son, the defendant, and eight daughters, of whom the wife of the lessor of the plaintiff is one. Six of the other daughters, with their husbands, have conveyed their shares to him, so that he is invested with the title to seven ninth parts of the land, if Edward Brinton had not disposed of it in his lifetime, by his will duly executed, so as to pass the land to the defendant, and will be, in such case, entitled to your verdict. On the other hand, if Edward Brinton did devise this land to his son James, your verdict must be for the defendant ; the whole case, therefore, turns on the single question of whether he made a valid testamentary disposition of this property, by which the descent to all his children, as directed by the act of assembly, in case of his dying without a will, will be interrupted in favor of his son. It is not pretended, that Edward Brinton died without any will, it is admitted, that the paper executed on the 7th August 1806, is a valid will, duly executed and proved according to law, to pass real estate, but by this will he only disposes of the property in question, during the widowhood of his wife, saying nothing to whom it should go, after her marriage or death. Unless, therefore, he has disposed of the remainder in fee, by some other paper duly authenticated to pass lands, or which can be transferred to, and be made a part of, his last will and testament, the law considers him as dying intestate as to this land, as if he had made no will at all.

The act of assembly requires that all wills concerning real estate shall be in writing, and be proved by two witnesses. You will then consider a will to be the written declaration of

a man of his intention as to what shall become of his property after his death—proved by two witnesses. The evidence in the case is before us, in the transcript of the proceedings of the register's court of Chester county (see the copy of the will and certificate of probate) and the petition to the legislature. This is legal and competent evidence to establish the paper set up as a will, in the absence of any opposing testimony. None has been offered in opposition to the executed will. You will, therefore, take that, so far as it goes, as the established will of Edward Brinton, agreed to by both parties now, and never intended to be contested by any of the family.

As to the paper of instructions, or the rough draft of the will, drawn up by Mr. Gibbons, which is copied into the certificate of probate, you will take it only as *primâ facie* or presumptive evidence of its being any part of the will of Edward Brinton, open to be contradicted or disproved by any testimony competent to show, either that he did not make it his will in fact, or that it is not in law his will. The other children are as fully at liberty to contest the paper after probate as before; the decree of the register's court concludes them in no matter either of law or fact, whether it relates to the sanity of the testator, the execution proof, or construction of the paper. 3 Rawle 20; 4 S. & R. 193; 12 Ibid. 283; 10 Ibid. 84. It is only in virtue of the act of assembly, that the proceedings of the register, or the register's court, can be admitted in evidence; neither the copy nor probate of a will are evidence of a devise of lands, at common law (5 S. & R. 213; 3 W. C. C. 582–3; 10 Wheat. 465–70, 201–4); and however regular and full the probate my be, it is only *primâ facie* evidence; its effect is destroyed if, on the face of it, the will appears to have been unduly admitted to record, or it appears by extrinsic evidence. 5 S. & R. 215; 1 W. C. C. 302, 346. This may be done, by proof of the incompetency of the witnesses, defect in their evidence to establish the necessary facts, or by showing that in point of law the proof before the register was insufficient to establish the paper admitted to probate, as the last will and testament of the testator. 1 Yeates 87, 90; 4 Ibid. 413. In order to show the legal insufficiency of the proof on which the register's court acted in the present case, the plaintiff has given in evidence the whole proceedings before the register, and in the register's court, which were the foundation of their decree, admitting the paper in question to probate as part of the will of Mr. Brinton. It was necessary for them to do this, in order to make their objections to its establishment as a will, for otherwise the certificate of probate, under the seal of the court, would have been open to the allegation that it was made on due and legal evidence; and as the copy and probate were evidence, without inquiring on what ground the court acted, the plaintiff would have been much embarrassed without resorting to the testimony referred to in their minutes. By inspecting them, it now appears, that the only proof of the devise of this land to the defendant is contained in the minutes of the evidence of James Gibbons, of William and Amos Brinton, and a deposition or statement of James Gibbons which was read in the register's court, but is now lost, and no copy or evidence of its contents produced, and the instructions themselves. These minutes are as follows: See minutes and instructions.

There is no doubt, that the plaintiff had a right to refer to these minutes, to show the foundation of the decree of the register's court, but we entertain strong doubts whether they are competent evidence, on an ejectment to try the title of the land; they relate exclusively to a matter wholly unconnected with the personal estate, or the administration of the will, and it might have been a serious question, whether the evidence was admissible, had the objection been made. See 4 W. C. C. 187; 6 Cranch 219; 7 Ibid. 270–1, 412; 6 Wheat. 113; 2 Yeates 341; 2 Binn. 511; 3 Rawle 20; 4 Yeates 413; 4 S. & R. 193; 10 Ibid. 84; 12 Ibid. 283–4; 2 Rawle 178; 4 Wheat. 220; 10 Ibid. 201–4, 465–70; 5 S. & R. 214–15; 4 W. C. C. 187–8. But as the counsel on both sides have considered it properly before as, and have rested the case of their respective clients on its legal sufficiency to establish this clause in the instructions or rough draft of the will, as a devise of the land in question, the court will consider it in this aspect alone. Taking the testimony as it is reduced to writing, with all legal inferences which a jury can legally draw from it, as true to the full extent, and connecting it with the only other evidence in the case, the petition to the legislature, we proceed to inquire, whether Edward Brinton did devise this land to the defendant.

For all the purposes of this case, the facts as stated are admitted to be proved, and the only question which remains, is their sufficiency in law to make out the issue on the part of the defendant. This is a question of law which the court must decide. 8 Co. 155 *a*. It is a universal rule of property, that it must descend and be enjoyed according to the course which the law has prescribed, unless the owner has made some other disposition of it, which the law recognises as valid and binding. 3 Rawle 20. The acts of assembly of Pennsylvania

have directed that the estate of a person, undisposed of by will, shall descend to and be enjoyed equally by all his children; of the natural justice of this provision and its perfect congeniality with the genius and spirit of all the institutions of the state and country, no man can doubt. It was a rule of the common law, founded in the wisdom of ages, and adopted by our ancestors, that the heir-at-law shall not be disinherited, unless by the plain words or necessary implication from the will of his ancestor; and this rule is assumed as a sacred landmark of property in all countries where the law of the land is respected, as the guardian of the rights of the people. It is never departed from, in that country from which we derive our best rules of jurisprudence, in which the oldest son is the sole heir to all his father's lands; surely it ought not to be less respected here, where there is no odious law of primogeniture, and equality of right between the sexes has been established, from the first settlement of the province, in conformity with the policy of its founder. This law leaves every man at liberty to do with his property as he pleases—his will is the supreme law, and when it speaks, it must be obeyed—it is only when he makes no will, or none which disposes of any particular part of his estate, that the law makes a will for him, and does that which he omits to do for himself, by declaring to whom it shall go, if he leaves behind him no directions testifying his intention in writing and so attested as to afford authentic evidence of his will, as a muniment of title to the favored object of his bounty. There is no rule more reasonable than that which imposes on those who wish to divert the property of a deceased person from the established course of succession, the necessity of doing it by legal and satisfactory proof; nor is there any subject on which a regard to the peace of society and the security of property makes it more incumbent on juries and courts to adhere to fixed and settled rules, than in cases of wills. They are the title deeds to a vast proportion of the property held by our citizens, and unless they are regulated by steady and well-established principles, we lay a train of gunpowder under the possession of purchasers. If a paper be established as a will, upon other than legal proof, with any view to avoid a supposed hardship, in a particular case, the consequences are interminable. If a paper, defective in law to pass an estate, should be permitted to disturb the succession established by the act of assembly, we must give effect to one, the object of which was to revoke a former will, and thus, in the zeal to make wills, where a deceased person had made none, we should destroy those which had been most solemnly executed. For it must not be forgotten, that the same evidence which will take an estate from an heir-at-law, will take one from a devisee under a will, which, generally speaking, is made and recorded by the same acts, and they have the same effect for both purposes. The law is very liberal in favor of last wills; it makes great allowance for infirmities of body and mind; dispenses with all forms, and requires no solemnities which are not absolutely indispensable in point of substance to show the deliberate intention of the maker to dispose of his property in some definite manner. The requisites are few and simple, every man, however unlettered, has the means of making his will, by expressing his intention in writing, and the writing proved by two witnesses; he has only to thus point out the thing he gives, the person to whom it is given, and the law effectuates his intention, by declaring such paper to be his last will and testament.

Has Edward Brinton done so, as to this tract of land? if he has, the defendant is entitled to it, if not, we cannot make a will for him; the question is, whether this paper is his will? In cases of this kind, very interesting questions often arise as to the kind of evidence, which is admissible to prove the various facts on which the validity of wills depend. Those which have been made in this case are highly so, they have been argued on both sides with great ability and learning, and deserve your and our most serious consideration. We do not know how much property may depends on the final settlement of the principles involved, and questions arising on this case, and cannot proceed with too much deliberation; we cannot settle the law; our opinion is subject to the revision of a higher tribunal, which will correct our errors, but cannot reach yours. In laying down the law to you, it is not as one may think it ought to be, but as in our consciences and on our oaths we believe it to be settled by the legislature and courts of justice, as a rule from which we cannot depart. We shall do it plainly and without reserve, so that whether our judgment is affirmed or reversed, this case will eventually place some principles beyond further discussion, and those who will read it, be able to understand what is, and what is not a will. There is but one kind of evidence on which a paper can be established as the last will and testament of any man, it must be in writing, and proved by two witnesses to be the written declaration of the maker's intention, to dispose of his property according to its directions. The disposing intention and the fact of disposition, must appear substantially on the face of the paper, there must be a devisor and a devisee, and a thing devised; when

by a fair construction of the instrument, it contains these three requisites, it is a will, however informal, if duly proved—if either is wanting, it is no will.

In the will executed by Mr. Brinton, and witnessed by the subscribing witnesses, there is no devise of the remainder of this land; if there is any, it is by the instructions or rough draft written by Gibbons, but it is admitted, that these were superseded in everything but the one paragraph, by the executed will. We must then be satisfied that this clause of the rough draft was legally intended to remain as his will, while all the rest was supplied. The law requires that the will should be in writing, and proved by two witnesses, but it need not be signed by the testator (6 S. & R. 454), or be formally declared to be his will (1 Ibid. 263–5), nor attested by subscribing witnesses, though it must be proved by two (2 Dall. 286; 6 S. & R. 47, 223, 484; 16 Ibid. 84; 1 W. C. C. 302, 346); it need not be written by the testator, if done by his desire or consent, by another, and he adopt it, and that is proved by two witnesses, it is sufficient (1 Yeates 91; 1 S. & R. 263; 6 Ibid. 454); or if a paper containing "the substance of a will, with the usual act of execution subjoined, though without subscribing witnesses or proof of publication, if found in his possession, that is *primâ facie* evidence of its adoption as a testamentary act." But if the paper is destitute of every formal act of authentication, the presumption is adverse, in the absence of proof of actual publication or any other act of recognition equally satisfactory. The omission to perfect an instrument which carries with it intrinsic evidence of a design to superadd an act of authentication which the decedent has not been prevented from executing by sudden death, is referred to a change of intention. Scraps of paper, notes or memoranda, or indorsements on bonds, though intended to denote a testamentary disposition, must contain at least the substance of a devise. 3 Rawle 20–1; 4 S. & R. 557. The testator may intend to correct the paper, he may give the rough notes or instructions to a scrivener to make a formal draft of a will, yet these will not invalidate it as a will, if he dies before the formal draft is executed or read over to him for his approbation, if the original instructions are duly proved, they will control it, when they differ (3 Yeates 511–14), and positive proof by one witness and circumstances equal to such proof by another are sufficient (16 S. & R. 84–5); but the paper must contain sufficient intrinsic evidence of a testamentary disposition, and be intended to be his last act in disposing of his property after his death.

This then is the important question in this case, was this devise in the instructions devising the homestead to James, intended by the testator to be his last will, as to this part of his estate; that it was so in fact, we have no doubt, but this does not suffice to make it operative as a will, under the act of assembly. That intention must not only have existed in fact, but be now so proved as to enable the court to carry it into effect according to the law. As at present advised, we should not doubt, that if the testator had died without an opportunity of putting the rough draft into form, by executing a will, these instructions would have been considered as his testamentary disposition of his property; but in the event which has happened a very different case is presented. He makes a formal will, executes it in all legal form and solemnity, it is attested and proved by three subscribing witnesses, and published as such in their presence, it expressly revokes all former wills by him before made, declares this and no other to be his last will and testament. Such a will would have revoked the most solemnly executed will which he had made before, and it must have the same effect as to all other papers of a testamentary nature; the important question then arises, can this clause in the rough draft be now established as his will, in relation to the property in controversy, on the evidence before us. If it has any effect in law, it must be to make another will besides the one he has thus executed, when he has solemnly declared that no other will shall be his will, though before made by him; to confirm and ratify what he has annulled, by setting up a revoked paper, and virtually expunging the revoking clause from the executed will. The evidence must go further than enabling us to get rid of the revocation, it must authorize us to add the revoked paper to the will, so as to make it a part of it, in the same manner as if it had been introduced into it by the testator himself.

On a careful examination of the evidence, we find none which goes to show any act of declaration of the testator in relation to the disposition of his property, subsequent to the execution of his will; what precedes the execution can have no bearing on the revoking clause, for a revoked will must be republished before it can have life or effect. 4 S. & R. 296–7. The testator has declared the execution to be his only and last will and testament, so we must adjudge it, unless the law will permit us to alter, explain or construe it by evidence *aliunde* as a case of ambiguity; either, 1st, an ambiguity or doubt on the fase of or in the body of the will, 2d, that which arises on matter not in the will, but out of it, when the words are

clear; 3d, that which is intermediate, partaking of the character of patent and latent ambiguity (Bacon L. Tracts, 99, 100; 3 Mason 9–12); or 4th, that which arises from a mistake of the testator, or his omission to express himself intelligibly, without explanation by averment or collateral proof. In the case of Packer *v.* Nixon, we expressed our entire concurrence with the declaration made by the present chief justice of the supreme court of this state, that "any settled rule which leads to a determinate effect (in comparison with which the fulfilment of any particular intent is of secondary value) is preferable to a process which would destroy everything like stability of decision and leave titles depending on intention to the decision of chance and the sport of opinion." 2 Rawle 32; 10 Wheat. 228. We also laid it down as a settled rule, that the intention of a testator must be collected from the words of the will; that no averment ought to be taken out of the will, which cannot be so collected from the whole will applied to the subject-matter to which it relates (3 Co. 28 *b;* 3 Atk. 258; 4 Co. 48; 5 Ibid. 68 *b;* Latch 137; Harg. L. T. 495–6; 1 Bro. C. C. 216; 3 Binn. 148, 161); and that the parol declaration of the testator as to who should be his heir, was of no effect in law.

There are, however, cases in which parol evidence will be admitted, to show or explain the written intention of a testator, in cases of what are termed latent ambiguities, or doubts, which are thus defined by Lord Bacon: "There be two sorts of ambiguities; by words *patens* is that which appears to be ambiguous on the face of the instrument; *latens* is that which seemeth certain, and without ambiguity for anything that appeareth upon the deed or instrument, but there is some collateral matter out of the deed that breedeth the ambiguity. Bacon's L. T. 99; 1 Marsh. 11; Hob. 32; 4 Dow P. C. 93. *Ambiguitas patens* is never holpen by averment, and the reason is, because the law will not couple and mingle matter of specialty, which is of the higher account, with matter of averment, which is of inferior account in law, for that were to make all deeds hollow and subject to averment, and so in effect, that to pass without deed that which the law appointeth shall not pass but by deed." Bac. Abr. 99. See 4 Cranch 224, 234; 8 Co. 155. "Ambiguity of words by matter within the deed, and not out of the deed, shall be holpen by construction, or, in some cases, by election, but never by an averment, but rather make the deed void for uncertainty." 8 Co. 155 *a.* "As, if a man give land to J. D. and J. S. and heirs, and do not limit to whether of their heirs; or give land in tail, the remainder in tail, with a proviso, that if he or they, or any of them, do any, &c., it cannot be averred on this clause, that the restraint was only on him in the remainder, and the heirs of his body, and that the tenant in tail in possession was meant to be at large." Bac. Abr. 99. "When the uncertainty cannot be helped by construction or intention, it shall be holpen by election," as if I grant ten acres of wood in sale, where I have an hundred acres; whether I say in my deed or not, that I grant out of my hundred acres, yet here shall be an election in the grantee which ten he will take, and the reason is plain, for where the thing is only nominated by quantity, the presumption of the law is, that the parties had indifferent intention which should be taken. Bac. Abr. 100; 2 Eng. C. L. 290; 8 Co. 155; Hob. 32. But if the ambiguity is latent, as if I grant my manor of S. to I. F., and I have two manors, North S. and South S., this ambiguity is matter of fact, and shall be holpen by averment, whether of them it was that the party intended should pass. But if the deed recites, whereas I am seised of the manor of North S. and South S., and I lease you one manor of S., there is clearly an election; so if the recital is of two tenements in D., and one is leased; these cases are where one name and appellation denominates diverse things.

There is another class of cases where the same thing is called by divers names, which shall be holpen by averment, because there is no ambiguity in the words, the variance is matter of fact, but the averment shall not be of intention, because it doth stand with the words, for in the case of equivocation, the general intent includes both the special, and therefore, stands with the record. Bac. Abr. 101; S. P. 1 Mason 11–12; 5 Wheat. 336–7. "As, if I give lands to Christ's Church in Oxford, and the name of the corporation is C. C. in the university of O., this shall be holpen by averment, because there is no ambiguity in the words." Bac. Abr. 101; Hob. 32.

These are the illustrations of the maxim, "*ambiguitas verborum verificatione suppletur, nam quod ex facto oritur ambiguam verificatione facti tollitur*, by a great jurist in ancient times, conformable to which are those which have since received the highest judicial sanction. When a latent ambiguity is produced in the only way in which it can be produced, that is, by parol evidence, it must be dissolved in the same way; and there is no case for admitting it to show the intention, upon a patent ambiguity on the face of the will. They are all cases of latent ambiguity, and the objection to supply the imperfections of a will, are founded on the soundest rules of policy and law.

2 Cranch 29. It would be full of great inconvenience, that none should know by the written words of a will, what construction to make or advice to give, but that it should be controlled by collateral averments out of the will; and if they are admitted, how can there be any certainty, a will may be anything, everything, nothing. 1 Johns. Cas. 234; 6 Conn. 273. The statute appointed the will to be in writing, to make a certainty, and should we admit collateral averments and proofs, and make it utterly uncertain, the witnesses and not the testator would make the will. 1 Mod. 210; 3 P. Wms. 354. "If the effect of the introduction of the evidence would be, to add new mattter to the will, either the subject of the devise, or the name of a devisee, it would also authorize the striking out of what was contained in an executed will, and thus, though the will was made in form by the testator in his lifetime, it would be really made by the attorney, after his death, and all the guards of the law be utterly swept away." 21 Eng. C. L. 288, 292.

The established rules of law are safer guides in the administration of justice, than any considerations as to their bearing on any particular case of supposed hardship; and it is more wholesome to struggle not to let little circumstances take a case out of a general rule, than to struggle by them, to prevent its application. 6 Ves. 641.

As to instructions for making a will, the established rules are: That where they are subscribed as preparatory to a will, the execution of the will supersedes them, and where they differ, the presumption is, that the testator adopted the alteration. 21 Eng. C. L. 292. To establish any paper as a testamentary one, the court must be satisfied, that the testator intended it to be a part of his will, it must be shown that they were intended to be cumulative. 1 Cond. Eng. Eccl. 452; Ibid. 30, 63. If an unfinished draft is propounded as a will, it must appear that the deceased was prevented from executing it by invincible necessity or the act of God. Ibid. 30–1, 63; s. p. 3 Rawle 20–1. If he omits to transfer a provision from the draft to the will, it cannot be supplied by parol evidence, in connection with the draft, whatever may be the opinion of the court as to the actual intention or hardship of the case, though when the mistake was pointed out to the testator, he proposed to insert the omitted legacies in the formal will, but as he did not do it, the court could not supply the defect. 1 Cond. Eng. Eccl. 63–4. When an instrument is executed by a competent person, he is presumed to know its contents and effect, and intend to give it the effect which follows from its contents and construction. 3 Ibid. 290; 4 Ibid. 209. Subsequent instructions, intended for a new will, duly proved, may be a codicillary paper, and operate as a revocation *pro tanto* of a former executed will. 1 Ibid. 267, 269–70; 3 Rawle 20.

In some cases, instructions may be given in evidence, when the executed will is ambiguous on the face of it, as to the person devisee—as a bequest to "her." The question was, to whom the reference was—the instructions were admitted to show that the testator had directed the legacy to be given to his wife, and that her name was omitted by mistake of the scrivener. 1 Cond. Eng. Eccl. 444, 455. Here, the will pointed out the ambiguity, and on its face, necessarily referred to an explanation of the intention as to the meaning of the word "her," it was a case of an ambiguity helped by the reference in the will itself. So, where the executed will was, "I give 60,000*l.* in legacies," which were enumerated to the amount of 51,000, it then gave "the residue, 4000"—making only 55,000, the draft of the will, in testator's handwriting, at the bottom of which he had inserted the date of the will and the names of the witnesses, was admitted, to show the mistaken omission. 2 Ibid. 509, 512. Here, the mistake appeared on the face of the will, and was helped by reference. So, when the twentieth sheet of a will was missing, and it appeared from the nineteenth and twenty-first pages, that the missing sheet was necessary to connect them as a component part of the will, that its omission was unintentional, and that it had been detached by accident—it was supplied by proof of instructions and other evidence. Ibid. 506; s. c. 21 Eng. C. L. 294. So where a paper was executed in 1802, declared to be a codicil to the will of 1798, which had been destroyed, and a new one executed in 1800; these facts were admitted to show that the testator intended to refer to an existing will of 1800, and had by mistake referred to the cancelled one of 1798. 1 Cond. Eng. Eccl. 445, 452. So, where a will was indorsed "plan of a will," and so headed, but was otherwise perfect and complete, evidence was admitted to show whether it was intended to be a will, or was only authenticated as instructions (Ibid. 452), being consistent with the words of the will. So, where a will in trust for A. and B. was indefinite as to the parts they should take, a deed from the trustee, defining their shares, and other evidence, was admitted to show, that it was according to the intention of the parties, who intended that both instruments should operate as one deed (17 S. & R. 110), both being executed at the same time.

In this respect, there is no distinction between devises of real and personal property.

In a leading case, the testator devised his estate to his executors, one of whom owed him by bond 3000*l.*; evidence was offered, to show that he instructed the scrivener in writing to give the money to the executor, but he refused to insert it in the will, insisting that making him executor, would release the debt; that the testator took counsel on it, who gave the same opinion, in confidence of which the testator executed the will without the devise; the evidence was not received, and the debtor executor was decreed to pay his co-executor one-half of the bond. Cas. temp. Talb. 1. On an appeal to the house of lords, they refused to hear the evidence read, and affirmed the decree. 4 Bro. P. C. 180–4. The authority of this case remains unquestioned, and it has been expressly adopted in this state. 2 Yeates 304; 7 S. & R. 114; 1 Johns. Ch. 235.

It matters not how clear and full the instructions may be, or that they are signed by the testator, and in the body of them declared to be a will, if the executed will contains no reference to them and is on its face clear of ambiguity as to the other subject-matter. 3 Cond. Eng. Eccl. 290; 4 Ibid. 209; 2 Ves. & B. 318; 6 Conn. 276; 4 Desauss. 215. Instructions to a scrivener cannot be given in evidence, 2 Vern. 98. He cannot be allowed to prove that he used a word with a meaning different from its import, of the true meaning of which he was ignorant. 7 S. & R. 113–14. A mistake in drafting a will does not make it void. 8 Conn. 265. And when a testator declares a paper to be his will, the court must take it as it is written. 1 Cond. Eng. Eccl. 452–6; 6 Conn. 274–5. Mistakes are not to be supposed, if any construction that is agreeable to reason can be found out—the will that is in writing must pass the land, and must be decided by what is contained in it. 1 Atk. 415. The written declarations of a testator, made after the will, are not evidence (5 Bing. 435; 8 Conn. 264), unless the paper may be proved as a codicillary (1 Cond. Eng. Eccl. 267, 270), or a testamentary one. 6 Ves. 397; 4 Dow P. C. 89. A paper may be a will as to personal, though not as to real property, here and in England; the statute of wills of 34 & 35 Hen. VIII., requires only that wills should be in writing, and the statute of frauds and perjuries requires subscribing witnesses only to wills devising real estate. Instructions may be read, to prove that testator knew he had particular relations, but not further, to prove what he ment by the words "poor relations." 1 Ves. 231–2. On the question, whether the devise to the wife was in lieu of dower, a rough draft of the will in testator's handwriting, containing the devise and the words "in lieu of dower," which was omitted by the mistake of the scrivener, was not admitted. 2 Yeates 304.

The rule deducible from these cases is, that inetructions are in no case admissible to control or contradict the plain words of a will, or to supply an omission, unless there is something on the face of the executed will, which shows a mistake or omission, by pointing or referring to something which the instructions will explain. When there is such a reference, whether the ambiguity is latent or patent, it may be removed by the instructions or other matter referred to, or pointed out; the thing referred to being considered as connected with the will by the reference, so as to bring the case within the rule, "*id certum est quod certum reddi potest.*" But when the will is ambiguous in its words, and contains no reference to anything which can make it certain, or on its face admits of no construction, it is void. 1 Johns. Ch. 255–5, 286; 3 Atk. 258; 3 S. & R. 607; 7 Ibid. 114; 8 Co. 155.

As to parol or extrinsic evidence, the rules are well settled. It is not admissible to fill up a blank (2 Atk. 239; 3. Bro. C. C. 311, 313; 21 Eng. C. L. 291–3), or the omission of a devisee (3 Atk. 257), nor to supply the written words of a will, it must be construed *ex visceribus suis* (1 Yeates 432; 2 Ibid. 304), nor to explain it, unless it refers to something *dehors*, of so ambiguous a nature as to require explanation. not of a doubt in the will, but a doubt on a matter out of the will (7 S. & R. 113–14; 1 Johns. Ch. 234); not in its construction but its *factum*. 3 Cond. Eng. Eccl. 290; 4 Ibid. 209; 21 Eng. C. L. 291. When there is no description of the devisee or thing devised, it is not admissible, nor where the thing devised is well described or defined in terms or by reference, in order to embrace what is not so described. As, a devise of "my money," evidence will not be admitted to show that the testator intended to give bonds, notes and mortgages (1 Johns. Ch. 231–4; 14 Johns 9, 14); so, of a devise of my farm in the occupation of A., an averment that he intended to pass land in the occupation of B. cannot be admitted. 11 Johns. 212, 220; 14 Eng. C. L. 291; Godb. 16. If the devise has a certain effect and operation to pass lands at the place described, it shall not be extended by intrinsic evidence, to embrace lands elsewhere, unless the intention can be collected from the will itself. 21 Eng. C. L. 290. A new description cannot be introduced into the body of the will, and no estate can pass that does not answer the description it contains, nor can evidence be received which amounts to a new devise, which the testator is supposed to have omitted, or to add words which he has not used (Ibid. 291; 3 T. R. 87); or where the

will is silent, to apply it to a new subject-matter of devise, or a new devisee, as to prove that the word "Gloucester" was omitted by mistake, so as to make the lands in that county pass by the will, though not referred to (21 Eng. C. L. 292–4, citing Newburg *v.* Newburg, 3 Bro. P. C. 553); but is admissible where a description of the subject-matter is imperfect; so of the devisee—or where the description is true in part but not in every part, if there be a sufficient indication on the face of the will to justify the application of the evidence. 21 Eng. C. L. 294.

If there be in any part of the will a sufficient description, it shall not be vitiated by any mistaken description or circumstance, for, "*utile per inutile non vitiatur.*" 7 Johns. 217; 1 M. & S. 301. See Bac. L. T. 102, &c., Reg. 25. Or, if it can be collected from the words of the will, that the description of the two estates has been transposed by mistake—the local description may be rejected as surplusage for "*falsa demonstratio non nocet,*" where enough appears after the false description is rejected. 21 Eng. C. L. 281–4. An averment to take away surplusage is good, but not to increase that which is defective in the will of the testator. Godb. 131; Hob. 32. In deciding on the admission of evidence, and the construction of wills, the court will look to the situation of the testator's family when it was made (3 Dow P. C. 68; 2 Ves. 217; 1 Wash. (Va.) 55–6), and of the property he owned, in order to ascertain to whom he intended to give it, and what he intended to give, by construing the words consistently with the state of his property and family, but not to introduce new words into the will. 21 Eng. C. L. 288, 294. Or to strike out those it contains, as a devise of all my lands in the parish of C., called Hoplands, to my son J.; if he dies without issue, Hoplands shall remain to B. Hoplands was an entire farm, extending into two parishes, but that part only passed which was in C. Cro. Jac. 223. So, a devise of my lands of Ashton, or at Ashton (which mean the same thing), other lands not situate there will not pass by any evidence *aliunde.* 3 Dow P. C. 65, 87, 91. The same rule was adopted on a devise of "his freehold and real estates, in the city of Limerick and county of Limerick." The testator had a small estate in the city, but none in the county of L., but had estates in the county of Clare, yet evidence of his intentions was not admissible, to show that he intended to give the estates in the county of C. 21 Eng. C. L. 28–9; 8 Bing. 244. "The court cannot do for a testator what he has not done for himself." 1 Mason 11–12. Or make a will for him while he sleeps in his grave (6 Conn. 174), and they cannot receive evidence of his declarations before or after the making of the will. 2 Vern. 98; 8 Conn. 264; 4 W. C. C. 265; 4 Desauss. 215, &c.; 1 Gallis. 170: Pet. C. C. 87; 8 Wheat. 211.

Courts of law have always been jealous of admitting extrinsic evidence to explain the intention of the testator, and it is admitted only where an ambiguity is introduced by extrinsic circumstances (4 Dow P. C. 93), or in that class of intermediate cases referred to by Lord Bacon and Judge Story, which partake both of the character of latent and patent ambiguity; as where the words are clear, but admit of two constructions consistently with the meaning. Bac. L. T. 100; S. P. 1 Mason 12; 5 Wheat. 336–7; 2 Ves. 217. The admission of the evidence, in such cases, is to give effect to the will, by removing the ambiguity (4 Dow P. C. 93), and is of such a nature as stands well with the words of the will. 8 Co. 155 *a.* It is admitted, where there are two persons of the same name, to show which was intended. 2 Atk. 373–5, 686; 2 Dall. 70, 72; 8 Co. 155; 1 Wash. (Va.) 55. Where there is a mistake in the christian or surname of the devisee (2 Ves. 218; 2 Atk. 373; Godb. 17; Co. Litt. 3 *a*), if there is a certainty of the person meant. Swinb. 480. In cases of resulting trusts. 2 Atk. 573; 1 Vern. 31 *a.* Or, where the testator used to call James, "Jackey" and gave a legacy to "John." Ambl. 175; 2 Dall. 70; 1 Ves. 231. So, where he had a niece named "Gertrude Yardley," whom he used to call "Gatty," and often declared he would do well for her; she took a legacy given to "Catherine Evanley," there being no such person as C. E. 2 P. Wms. 141–3. If the testator errs in the name, and not in the person, the devise is not hurt by the error. Swinb. 480–81. If a devise is made to the church, it shall go the parish church of the testator; or, if he names a church, and there are divers of the same name, it shall go to the one where he usually resorted; so, if to "the poor," it shall go to the poor of his parish. Swinb. 489. Or, if he was a refugee, and devises to the poor generally, it shall be intended to mean poor refugees of the same nation with himself (Ambl. 422; 2 Roper on Leg. 147), or to the charity school, and if there were two in the place, the legacy went to one, of the children of which the testator was fond, and to whom he had declared he would leave something at his death. 1 P. Wms. 674–5.

The court will look to the situation and circumstances of the testator, to ascertain his intentions (2 Eq. Cas. Abr. 366; 2 Ves. 213), the use to which the thing devised had been applied (3 P. Wms. 145), and the association of the testator with one of the persons of the

same name to whom he had given a legacy. 2 Dall. 70–2; 2 Vern. 593; 1 Ibid. 31. On the same principle, the court will look to the testator's property, in order to ascertain what he intended to devise. 1 Wash. (Va.) 55, &c. As, where he had no real estate of his own, but had a power of appointment over real estate, and devised "all his real estate," it will pass the latter, otherwise the will would be inoperative. Hob. 160–6, 176; 3 S. & R. 111, 115; 1 Rawle 249; Seaton *v.* Kuhen, 2 Ves. jr. 589; 21 Eng. C. L. 292. So, where one devised all his freehold houses in a street, but had no freehold houses there, though he had leased houses there, the latter passed by the will. 1 P. Wms. 386; 21 Eng. C. L. 292; 2 Leon.; Cas. temp. Talb. 153; 3 P. Wms. 386. It is sufficient, if the devise shows the intention of the testator in substance, though it is defective in circumstances, or they fail. Hob. 32. As, a devise of "my T. farm, in the occupation of A." it appeared, that only part was in his occupation, yet, as the T. farm was a sufficient description, the whole passed. 1 M. & S. 301. So, where he owned a house in Fourth street, occupied by A., and devised his house in Third street, occupied by A., the house in Fourth street passed. 2 Wash. (Va.) 475–6. For these purposes, extrinsic evidence is admissible, to correct mistakes or remove ambiguities, by referring to the facts and circumstances on which the will is predicated, to apply the words and written intention of the testator to the devisee and thing devised, and thus to effectuate the declared objects of the testator consistently with his will. But when the evidence offered does not remove the doubt completely, then it is inadmissible (3 Cond. Eng. Eccl. 290; 4 Ibid. 209); for if, admitting its truth, there is a doubt on the words of the will, it is void for uncertainty, by the judgment of the law, and no averment *dehors* can make that good which, upon consideration of the deed, is apparent to be void. If the averment which is out of the will stands well with its words, it shall be tried by the country, if otherwise, it is matter of law. 8 Co. 155 *a*.

On a subject which has so often arisen in courts of law and equity as this has, there is a multitude of cases in which general principles have been settled or recognised, from the passage of the statutes of wills, that have never been departed from; we have noticed a sufficient number of the leading ones, to enable us to come to a conclusion entirely satisfactory in their application to this case. Here is a perfect will, duly and fully proved, which wholly omits any disposition of the land in question; there is no ambiguity on its face, which can make it void; the revoking clause is absolute, unqualified and without exception; we can, therefore, establish no other paper or part of a paper, as the will of the testator, without directly expunging the clause of revocation. There is no latent ambiguity which arises from the application of the words of the will to the subject-matter of the devise, or the person to whom it is devised; the evidence relied on does not "stand well with the words of the will," it is wholly extrinsic and *dehors* the will, which as to the remainder of the estate in the homestead, contains neither a devisor, devisee, nor anything devised. To make out the existence of either, we must introduce into the body of the will, a clause from the instructions, to which no reference is made, which cannot be connected with it by any construction, but is a new subject-matter of devise, wholly foreign from the will. This is a fatal objection to the title of the defendant, which cannot be removed by the court, without overruling the best established rules and principles of law in the con- of the statutes of wills, in England, adopted in this country in their application to our own acts of assembly. See 1 Rawle 120–1.

If, in the adjudged cases, we had found any judicial precedent to authorize us to add this clause to the executed will, we should have felt at liberty to have followed it, as it would have accorded with what we are satisfied was the actual intention of the testator, as proved by the witnesses to the instructions or rough draft, as well as the general understanding of the family, appearing by their assent to the decree of the register's court, and their petition to the legislature to supply the omission, to insert the devise in the will.

But in every view which we can take of the case, there are difficulties which cannot be overcome. There is not a particle of evidence to justify us in striking out the revoking clause of the executed will, it must remain as an operative clause; and while it remains, we can adjudge no other paper to be his will; if however this objection to the defendant's title could be removed, the others are insuperable. The evidence removes no doubt or ambiguity which existed without it; the only defect which it could cure is, the want of a clause devising the homestead; but as the will is wholly silent on this subject, the effect of the evidence is to make a new devise, not to explain a doubtful phrase or word in the will. 1 Rawle 120–1. This would be more than filling a blank by extrinsic averments, for it would be to supply the three indispensable requisites of a will, by collateral proof out of the will, when the law directs that they shall appear in writing in the body of the will.

That which is executed contains no dispo-

sition which affects the case: there is no devisor, devisee, or thing devised, without declaring the law to be, that instructions or the rough draft of a will are not superseded by a perfect executed instrument, and that the latter shall not be inferred to a change of intention when they differ, but shall be controlled by the former. Admitting, that the omission to transfer the devise from the draft to the will, was a mistake in the scrivener, or of the testator, it is a case which has often occurred, and repeatedly decided to be incurable, unless there is some allegation of fraud or imposition practised on the testator, neither of which is alleged in this case. The consequences of an omission to make a will at all, or to dispose of any particular part of a man's estate, is not to authorize a court and jury to make such an one as they may think he intended to make, but omitted to do it by mistake—that would be a repeal of the statutes of wills and introducing the very ills against which they were intended to guard, produce the most utter confusion in titles depending on dispositions of property which were to operate after the death of the owner. There may be cases of hardship growing out of the application of the law to special cases of individuals, they, however, are of trifling consideration, when contrasted with the general mischiefs which would pervade society, if there was no certainty in the law.

If men intend to dispose of their property by will, in a particular way, and do not do it in the manner pointed out by law, they die intestate; the fault is not in the law, it is in the testator; the hardship which it may cause to the intended object of his bounty, is not visitable on the administrators of the law, who must act within the line defined by the legislature. If the law is unjust, it must be amended by the legislative department of the government; you and we have only to ascertain what the law is; they must declare what it ought to be. In the decision of causes, we have our appropriate duties; it is yours to declare what facts are proved by the evidence before you; it is ours to declare what the law is upon the evidence offered or the facts found. In this case, there is no question of fact; the truth of all the evidence is admitted; it is upon paper, showing for itself; it admits of no doubt. You can find nothing more than that Edward Brinton intended to devise his homestead to James; that he put that intention into writing, by instructions or rough draft, and intended to insert it in the will, but that by mistake, or some other cause, it was not done. Yet you cannot find that he did not make the executed will; that he did not revoke all former wills, or that the last one contains every clause which disposes of the remainder to James, or shows any mistake in its body. The facts which you can find are out of the will; they cannot be introduced into it by any power save that of the testator; they cannot be deemed a new will, as they existed before the execution of the authenticated one; they cannot amount to a will by themselves, because the paper is revoked, nor be connected with the existing will, which contains not the least reference to the matter. The law, therefore, adjudges the evidence to be entirely insufficient to establish as the will of Edward Brinton any other paper than the one he executed.

The counsel of the defendant has endeavored to take his case out of the general rules of law, by the introductory clause, "as to what worldly estate God has been pleased to bless me with, I give and dispose of in the following manner," which he considers as indicating an intention to dispose of the whole estate by that will, and that the omission to do it is an ambiguity which can be explained and cured by averment of extrinsic matter. There is no authority for giving such operation to this clause, as to let in evidence of a devise not referred to in the will; the law is well settled, that an introductory clause will not, by its own force, enlarge an estate given in the body of the will, nor for such purpose be attached to a subsequent devising clause, so as to give it a wider range. 1 Rawle 415. The most that can be said is, that where the words of the devise admit of passing a greater interest than for life, courts will lay hold of the introductory clause to assist them in ascertaining the intention. 10 Wheat. 228–9; 4 W. C. C. 195. It is carried down to the devising clause, in order to show the intention, but will not of itself give a fee. 8 S. & R. 289. Nor carry an estate that is clearly omitted; but if it be dubious whether it be omitted or not, it will help the interpretation. 1 Dall. 226. See 1 Rawle 415.

In this case, there is no devising clause to which the introductory words can be carried; if we give them any effect, it will be to make them the will itself, by republishing and establishing a revoked paper; this would be to overrule all authority, and to reverse every settled principle which governs the construction of wills. A clause which cannot connect a devise for life with one in fee, cannot, by its own force, create a fee, where no devise is made. Besides, if we consider it evidence of the intention of the testator to dispose of his whole estate, it will not answer the purpose of the defendant, for the declared intention is to dispose of it by that will, and not a former one; it contains no reference to any other paper, and declares that

he disposes of his estate in the following manner—that is, as the will directs, and none other. The utmost meaning, therefore, of which it is susceptible, is to show that, as to the land in question, he had not fully executed his first intention declared in the beginning of the will; in other words, he has not devised the fee-simple, and has left it to be distributed according to law. It is lastly contended, that connecting the other evidence with the executed will, such a case is presented, as will authorize the court to make it conform to the evident intention of the testator. As a court of law, we have no power to reform any instruments; we must decide upon them according to their legal construction, effect and operation, apparent on their face, or with the aid of such evidence as is admissible, by the rules of law, to explain them. Courts of equity will reform instruments made to carry into effect the contracts and agreements of parties, according to their original intention; the agreement, being the standard of right and equity between the parties, will be carried into effect, notwithstanding any defect in the instrument adopted as its execution. Yet where an instrument has been deliberately executed by the parties, under a mistaken opinion of both as to its legal effect, a court of equity will not reform it, though it fails to effectuate their intention. 1 Pet. 1, 17. But there is no analogy between these and cases of wills; there is no antecedent or existing standard by which to reform the instrument made to carry into effect the final and last will of a testator; unlike a contract or agreement, which requires the meeting of two minds to give it efficacy; a will is the written declaration of the party, proved by two witnesses to be a testamentary disposition of the testator's property. It then becomes its own standard; the only evidence of the will and volition of the testator which a court of law or equity can notice. The intention must be found in its body, and when once ascertained, cannot be altered by any other power than that which formed and expressed it in writing.

In cases of contracts, courts of equity act upon the conscience of a party, by compelling him to execute it in good faith, according to the intention with which it is made, but they do not assume the power of altering or reforming original agreements differently from the intention of the parties, the extent of their power is to correct any instrument, reducing it to writing or executed to carry it into effect, contrary to the true meaning and intention of the contracting parties. In cases on wills, the executed declaration of intention, made according to the forms and solemnities enjoined by law, is the standard of right, by all the rules of law as well as equity, between the heir-at-law and the devisee, which no court can alter, modify, construe or reform, on any other evidence of intention than can be collected from its words, as the testator has made and declared it. So all courts and juries are bound to take and respect it, as his last will and testament, revoking all others, and passing only such estate as it professes to dispose of, or such as by construction can be brought within its provisions. We must take this will as we find it, and notwithstanding any evidence, which has been received, feel bound to declare, that it does not devise the property in question to the defendant.

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*107] *The Bank of the United States, Appellants, *v.* Elizabeth Lee, Edmund J. Lee and Richard Smith, Appellees.

Deed of trust.—Statute of frauds.

R. B. L., in 1809, then residing in Virginia, for a valuable consideration, made a conveyance, in trust for the benefit of his wife, of certain personal property and slaves, which deed was duly recorded according to the provisions of the act of the legislature of Virginia; the property thus conveyed remained in the possession of the husband and wife, while they resided in Virginia; and in 1814, R. B. L. removed to the district of Columbia, with his wife and family, and brought with him the slaves and property so conveyed in trust. In 1817, R. B. L. borrowed a sum of money of the Bank of the United States, on his promissory note, indorsed by one of the trustees named in the deed of trust of 1809; at the time the loan was made, R. B. L. executed a deed of trust of eleven slaves, and among them were the slaves, and the household furniture, conveyed by the deed of 1809, to secure the bank for the amount of the loan. In 1827, R. B. L. died, entirely insolvent; during his residence in Washington, being in reduced circumstances, he sold some of the slaves conveyed by the deed of 1809, for the support of his family; without objection by his wife or her trustees. In 1834, the debt to the bank being unpaid, a bill was filed against Mrs. E. L., the wife of R. B. L., and the trustees,

in order to compel the surrender of the remaining slaves, and the household furniture, to the trustees for the bank, for the sale of the same, to satisfy the debt due to the bank: *Held*, that the deed of 1809, vesting the property in Mrs. L.'s trustees, was effectual, according to the laws of Virginia, to protect the title thereto, against the subsequent creditors, or purchasers from R. B. Lee; and that the removal of R. B. L. and his wife into the district of Columbia, with the property conveyed to the trustees for the use of Mrs. L., did not affect or impair the validity of the deed of trust.[1]

A liberal construction should be given to the clause of the Virginia statute, for the suppression of fraud; this is the well-established rule in the construction of the statute of Elizabeth, which the first section of the Virginia statute substantially adopts.

If A. sells or conveys his lands or slaves to B., and then produces to another his previous paper title, and obtains credit on the goods or lands, by pledging them for money loaned, he is guilty of fraud; and if the true owner stands by, and does not make his title known, he will be bound to make good the contract, on the principle, that he who holds his peace when he ought to have spoken, shall not be heard now that he should be silent; he is deemed, in equity, a party to the fraud.

United States Bank *v.* Lee, 5 Cr. C. C. 319, affirmed.

APPEAL from the Circuit Court of the district of Columbia and county of Washington. The appellant filed a bill in the circuit court, stating, that in 1817, Richard Bland Lee represented himself to be the owner of certain after-mentioned property, then in his possession; that he applied to the bank for a loan of $6000, and offered to convey the said property in trust, to secure the repayment of said sum of money; that the loan was made, and a deed of trust executed and delivered, on the 11th June 1817, to Richard Smith, as trustee; that the said Lee died in 1827, intestate and insolvent, leaving said debt unpaid; that no administration was taken on his estate; that his widow, Elizabeth Lee, the defendant, had taken possession of said property, and withheld it from said trustee, alleging that it had been previously conveyed by her said husband, in January 1809, to trustees, for her use.

The bill charged, that the said deed of the 9th January 1809, if ever made, was a voluntary and fraudulent deed; and therefore, void against the complainants, who were *bonâ fide* purchasers, for a *valuable consideration, without notice; that the considerations expressed in [*108
the said deed were false, or, if true, insufficient to give it solidity; that at the date of the said deed, Richard Bland Lee was largely indebted, and incompetent at law to make the same; that if the said deed had every legal requisite, it was executed in Virginia, and never was recorded in Washington county, in the district of Columbia, to which place the said Lee and his wife removed, bringing with them the said property, nor was other notice given to the public there of its existence; that E. J. Lee, the surviving trustee in the deed of the 9th January 1809, and Mrs. Lee herself, knew that the complainant had loaned the $6000 to Richard Bland Lee, upon his representations that he was the owner of the said property, and that Richard Bland Lee had conveyed the same to Richard Smith, to secure the payment of the said sum of money; and never communicated to the complainants, or to Smith, until several years after the death of Richard Bland Lee, the existence of the deed of the 9th January 1809. The bill prayed that the deed of the 9th January might be produced, the execution thereof and the recitals

[1] S. P. Speed *v.* May, 17 Penn. St. 91; Reid *v.* Gray, 37 Id. 508; Ockerman *v.* Cross, 54 N. Y. 20; De Lane *v.* Moore, 14 How. 253.

therein fully proved; and that it might be declared fraudulent and void against the complainants.

Elizabeth Lee, in her answer, admitted the loan, and the execution of the deed to Richard Smith, but averred, she was ignorant of its execution, until long after it had been delivered, and never consented thereto; she denied any knowledge of the representations made by Richard Bland Lee, respecting the ownership of said property, when he applied for the loan. She said, that on the 9th January 1809, she and her husband, then living, and having a long time before dwelt, in Fairfax county, Virginia, and the property in the deed mentioned therein being in the said county, she agreed with her husband to relinquish her right of dower in certain lands in Spotsylvania county, Virginia, in which her husband held five-eighths of 8000 acres; and also to convey her right in certain Fairfax land, containing 2100 acres, her separate property, to trustees, to secure a debt of $10,034.28, due from her husband to Judge Washington; in consideration of which, and of her execution of the conveyances and relinquishment of her dower, her husband agreed to convey to E. J. Lee, William Maffit and R. Coleman, certain slaves, &c., of which those mentioned in the bill of complaint were part, for her use; that it was agreed, that her said husband should be authorized to sell any part of the said property, with consent of a majority of the said trustees, provided he should convey to the said trustees other property, to the full value of that sold. She averred, that in execution of this agreement, and in consideration of the deed of the slaves, &c., of the 9th January 1809, she executed the deed of the Spotsylvania land, and relinquished her dower therein; that on the 9th January 1809, she conveyed the land in Fairfax, to secure Judge Washington's debt; and on the same
*109] day, *her husband, in fulfilment of his part of the agreement, made and executed the deed of the 9th January 1809, to E. J. Lee, Maffit and Coleman, of the slaves, &c.; which deed was duly proved and recorded in Fairfax county court, within eight months from its date; in which said county, she still continued for some time to reside with her husband, and where she continued to hold the said property. [The deeds were exhibited with the answer.] She declared the agreement to have been *bonâ fide*, and without fraud, and claimed to be the owner of said property. She admitted, her husband sold part of the property, with the consent of her trustees, and other part, under the pressure of great distress, without their consent, after they removed to Washington; that her husband died in 1827; that they lived together until his death; and that her possession of the property, being domestic servants and household furniture, could not be separated from his, and was consistent with the deed.

The case is stated more at large in the opinion of the court. The circuit court decreed that the bill should be dismissed; and the complainants prosecuted this appeal.

For the appellant, *Coxe* and *Sergeant* contended:—

I. That the deed of 9th January 1809, was, from the beginning, fraudulent and void. 1. Because on the face of said deed, no valid consideration appears; but the same is voluntary, by a person largely indebted, in favor of his wife and children. 2. Because no such agreement as is set forth in defendant Elizabeth Lee's answer, is proved; although put in issue by the

pleadings, and strict proof is required by the complainants. 3. Because it is admitted, that the property recited in said deed to have been conveyed to Turner and others, was merely conveyed, by way of mortgage, to secure a debt due to Judge Washington; which debt has been paid from other sources, and the said property so mortgaged has been exonerated from said incumbrance. 4. Because no such deed as is recited in the deed of 9th January 1809, as having been then made to Ludwell Lee, appears ever to have been executed. 5. Because the deed of 16th July, 1809, from R. B. Lee, and Elizabeth his wife, to Ludwell Lee, does not correspond with the description in the recital of the deed of 9th January 1809.

II. Because the continued possession, use and enjoyment by said R. B. Lee, of the said property, purported to be conveyed by the deed of 9th January 1809, was evidence of a continued ownership; and avoids said deed as against subsequent *bonâ fide* purchasers and creditors, without notice.

III. That said deed, so executed in Virginia, will not validate the possession, use and enjoyment of said property in the city of Washington.

IV. Because the whole case exhibits a case of gross and palpable fraud which ought not to stand in a court of equity.

*For the appellees, *Marbury* and *Cooke* insisted, that the deed of January 9th, 1809, is valid against the complainants. That, considered as a voluntary settlement, it is good against the complainants, they being subsequent creditors. That the said deed was made for good and valuable considerations between the parties. That there is no evidence to charge Mrs. Lee, or her trustee, with any fraudulent practice on the complainants, in the concealment of their title to the property, at any time. That the possession of Richard Bland Lee, after his removal to the district of Columbia, was consistent with the deed, and the necessary consequence of his relation to Mrs. Lee. That it was not necessary to record the deed in the district of Columbia, on the removal of the parties and of the property to Washington city. That the power reserved to Mr. Lee, to dispose of the property with the consent of the trustees, is not a badge of fraud; and does not affect the validity of the deed in which that power is reserved. That the sale by Richard Bland Lee of portions of the said trust property, without the assent of the trustees, cannot affect the title of Mrs. Lee to that part which he did not sell. [*110

Catron, Justice, delivered the opinion of the court.—The bill alleges, as a principal ground of relief, fraud in fact, in the inception of the conveyance sought to be set aside; this being denied by the answers, it is incumbent that fraud in fact should be proved by the complainants; and which, they insist, is established by the proofs. As the pleadings and exhibits furnish almost the entire evidence, it becomes material to set them out to a considerable extent. And in extracting the facts, from which it is supposed we are authorized to infer fraud, it must be done with reference to the bearing of the local and peculiar laws of Virginia on the transaction.

It appears, that in 1817, Richard Bland Lee, the husband of Elizabeth Lee, the respondent, borrowed from the Bank of the United States, at their office of discount at Washington, $6000 on his note at sixty days (renewable at the pleasure of the bank), and indorsed by Edmund J. Lee and Walter Jones; and further to secure the repayment of the money, executed a deed of trust for eleven slaves, and sundry household goods, valued at $7200, tc

Richard Smith, the cashier of office of discount, with power to the trustee to sell, in default of payment, after giving thirty days' notice. The deed also pledged some outstanding claims, not necessary to be noticed, as they proved to be of no material value. The debt not having been paid, after long indulgence, suit was brought, and a recovery had, against Richard Bland Lee, and Walter Jones, one of the indorsers; but no part of the judgment has been satisfied.

In 1834, the president, directors and company of the bank filed their bill against Edmund J. Lee, Elizabeth Lee and Richard Smith, the *trustee; alleging that Richard Bland Lee died in 1827 intestate; that no one had administered on his estate, and that Elizabeth Lee had converted the slaves and household goods to her own use, after the death of her husband; that she was executrix in her own wrong, and bound to pay the debt; but refused to do so, asserting the property pledged to pay the bank debt by her late husband, had been conveyed by him, as early as 1809, to Edmund J. Lee, William Maffit and Richard Coleman, in trust for the sole and separate use of the said Elizabeth; that she had exhibited the deed to the complainants, but which they aver was voluntary, fraudulent and void, as against them, because they were purchasers for a valuable consideration, without notice of such deed; as also creditors of Richard Bland Lee, the grantor. That the considerations set forth in the deed are not truly stated; but, if truly stated, they are wholly insufficient to give validity to the same. That Richard Bland Lee, at the date of the deed in 1809, was largely indebted, and incompetent in law to make such deed for the benefit of his wife and family. That if the deed was duly executed, and upon legal and adequate considerations, when made, yet the same was executed in the commonwealth of Virginia; that the trustees had never acted under it, or taken possession of the property embraced in it; but had suffered Richard Bland Lee, the grantor, at all times, and without interruption, from the date of the deed to the time of his death, to retain possession of the property, and to use, enjoy and dispose of the same, and hold himself out to the world as the true and absolute owner; and especially, that the trustees had permitted the grantor to bring the slaves and furniture from Virginia to the district of Columbia and county of Washington, about the year 1814, and there to continue his use and enjoyment of the same, as if he were the absolute, entire and unqualified owner thereof. That the deed was never recorded in the county of Washington, nor notice given to the public, or the complainants, of its existence, during the lifetime of Richard Bland Lee, nor for some years after his death; but he was permitted to obtain credit and contract debts upon the faith of his being the sole and absolute owner of the slaves and goods described in the deed; and permitted to sell and dispose of parts of the same, without any assertion of right or title on the part of the trustees or said Elizabeth; and that Edmund J. Lee, the only surviving trustee, and the said Elizabeth, knew that the complainants had made the loan of the $6000 to Richard Bland Lee, in the full faith that he was the real and unqualified owner of the property; and knew he had made and executed the deed of trust to Richard Smith, to secure the repayment of the money; yet they did not communicate to the complainants the existence of the deed made for the benefit of the said Elizabeth, during the lifetime of Richard Bland Lee, nor until several years after his death; nor did said Edmund J.

*111]

Lee, or Elizabeth, intimate in any manner, or give the complainants, or their trustee, reason to suspect, that there was any defect in the title derived under the deed to Richard Smith ; nor that Edmund J. *Lee, or Elizabeth, had any title or claim, or pretended to have, to the slaves and furniture. [*112

The foregoing allegations present two aspects: 1st, That the deed of 1809 was fraudulent and void in its inception; and 2d, That if valid in Virginia, it not having been recorded in the county of Washington (formerly a part of Maryland), and the continued possession of the property covered by it having remained with the grantor, both in Virginia and here, up to the time of his death ; was such a fraud upon creditors of, and purchasers from, Richard Bland Lee, as to destroy the effect of the conveyance.

The deed of 1809, amongst other things, sets forth that Richard Bland Lee owed Judge Washington $10,034.28 ; and as a part of the consideration, Mrs. Lee had joined her husband in a mortgage to trustees for Judge Washington's use, pledging her separate estate to secure the debt. These specific facts the bill does not set forth ; but, by way of interrogatory, asks the defendants to answer, whether the debt mentioned in said deed, as being due to Judge Washington, had ever been paid ; by whom, and from what funds ; and the respondents are required to produce the deed. It also appears, that the complainants commenced an action of replevin against Mrs. Lee for the slaves and household goods ; and which was, by an agreement of the parties, suspended until the termination of this suit.

Edmund J. Lee answers, that the deed of 1809 was executed by Richard Bland Lee, to himself and others, as trustees for Elizabeth Lee, the wife of said Richard Bland Lee ; that it sets forth the true consideration for the same ; that the respondent is the only surviving trustee ; that he never did give notice to the complainants of the existence of the deed ; but that he did not know, until shortly before Richard Bland Lee's death, that he had made the deed of trust to Richard Smith; which never received respondent's assent. That he cannot state, from general recollection, how the debt due to Judge Washington was paid ; but it is his impression, it was paid either by stock in the Bank of Alexandria, which belonged to Elizabeth Lee, and was held in trust for her, by her brother, Zaccheus Collins, deceased ; or by a sale of part of the farm called Langley.

Elizabeth Lee answers, that the loan of $6000 was made by the bank as charged ; but that she was ignorant of the execution of the deed of trust to Richard Smith, to secure the repayment of the money, until long after the deed had been delivered and the loan made ; denies she ever assented thereto, or waived her rights to the slaves, or any part of the property purporting to have been conveyed by the deed. Admits the recovery of the judgment as alleged ; and that Richard Bland Lee died in 1827, intestate and insolvent ; and that no one has administered on his estate. And, further answering, says, that on the 9th day of January, in the year 1809, the said Richard B. Lee and this respondent, then dwelling, and having for a long time before dwelt, in the county of Fairfax, in the state of Virginia, and the slaves and other personal *property hereinafter mentioned, then being in the said county, she agreed with the said Richard to relinquish her right of dower in a certain tract of land, in the county of Spotsylvania, in the commonwealth of Virginia, on the Rappahannock river, containing 8000 [*113

acres, more or less, of five undivided eighth parts, of which the said Richard Bland Lee was seised in fee-simple, and to join the said Richard in a conveyance thereof to Ludwell Lee. She also, on the same day, agreed to join her said husband in the execution of a deed of trust to Henry Smith Turner, Thomas Blackburn and Bushrod Washington, jun., conveying to them two tracts of land in the said county of Fairfax, one situated on the river Potomac, near the Little Falls thereof, containing 1600 acres, more or less; the other being the estate on which the said Richard and this respondent then resided, containing 530 acres, more or less; which tracts of land were then held in trust for this respondent; which last-mentioned conveyance was to be made to the said Turner and others, in trust to secure the payment of the sum of $10,034.28, due from the said Richard to the Honorable Bushrod Washington. And in consideration of the execution of the said conveyance by this respondent, and of her thereby relinquishing her dower in the said Spotsylvania lands, and her right to the said lands in Fairfax, the said Richard, on his part, agreed to convey to Edmund J. Lee, William Maffit and Richard Coleman, all the household and kitchen furniture, carpeting, beds, bedsteads, bed furniture, plate, chinaware, glass, tables, chairs, table linen, carpets, sideboards, bureaus, wardrobes, and all kinds of furniture, then in their said dwelling-house and kitchen; estimated to be worth $1600; and the following slaves, that is to say, John, and his wife Alice, and their children Patty, Betty, Henry, Charles, Johnny, Margaret, Milly and Frank; Ludwell, and his wife Nancy, and their children Caroline, Harriet, Frederick, Ludwell and Barbara; Henny, and her child Eleanor; Rachel, and her child Rachel; two sisters, Kitty and Letty, and their brothers, Alexander and Alfred; George (a blacksmith), Harry (a carpenter), Harry (a wagoner), Tom (a carter), Thornton (a cook), Samuel (a smith), and John (a ploughboy); to be held by the said E. J. Lee, William Maffit and Richard Coleman, and the survivors and survivor of them, and the executors and administrators of such survivor, in trust, for the use of this respondent, during her life; and after her death, to pass to her heirs-at-law, provided she died intestate, or to such persons as she might bequeath the same to, by her last will and testament, so as she should make the same pass fully and completely, and without limitation or condition, to her heirs or legatees: It was further agreed by the said Richard and this respondent, that the said Richard should be authorized, at any time during his life, to sell or otherwise dispose of any part of the said slaves and furniture, with the consent of a majority of the said trustees, or of the survivors or survivor of them, or of the executors or administrators of the last *survivor, provided the said
*114] Richard should convey to the said trustees, or to the survivors or survivor, or the executors or administrators of the last survivor, other property, real or personal, to the full value of the said furniture or slaves so sold or disposed of. And it was further agreed, that if the said Richard should fully pay the said debt to the Honorable Bushrod Washington, without selling any part of the lands to be conveyed to the said Henry S. Turner and others, in trust, as aforesaid, and then held in trust for the said Elizabeth, then that the conveyance to be made as aforesaid, to the said E. J. Lee, William Maffit and Richard Coleman, should become null and void, as to the slaves Ludwell, Thornton, Henry, Butler, Tom, Samuel, Jack and Eleanor.

And the said Elizabeth avers, that in execution of the said agreement, and in consideration of the conveyance, by the terms thereof to be made to the said E. J. Lee, William Maffit and Richard Coleman for her use, in manner and on the terms aforesaid, she did, on the 16th day of July 1809, in due form of law, with the said R. B. Lee, execute and deliver to the said Ludwell, a conveyance in fee of the said lands in Spotsylvania, thereby relinquishing her claim of dower therein. And did, with the said Richard, in due form of law, on the 9th day of January 1809, execute and deliver to the said Henry S. Turner, Thomas Blackburn and Bushrod Washington, jun., a deed for the said lands in Fairfax county, whereby she conveyed her right to the said lands last mentioned, to the said Turner and others, in trust, to secure the payment of the said debt, due from the said Richard B. Lee to the Honorable Bushrod Washington, in the manner provided by the said agreement. And that the said Richard did, on the same day, in execution of the said agreement on his part, execute and deliver to the said E. J. Lee, William Maffit and Richard Coleman, a conveyance, whereby he transferred and conveyed to them the said slaves and furniture before mentioned, to be held in trust for this respondent, in the manner and on the terms before stated, which said deed was duly proved and recorded, within eight months from the date thereof, in the county court of the county of Fairfax, in which the said Richard and this respondent continued still to reside, and in which the said slaves and furniture still remained. And this defendant herewith exhibits the said three deeds severally, marked, Exhibits, No. 1, No. 2, and No. 3. This respondent avers, that the said agreement before mentioned, was made between the said Richard and her; and the said deeds executed in pursuance thereof, fairly and *bonâ fide*, without any intention to defeat, defraud, hinder or delay any creditor of the said Richard. She is advised and insists, that they were duly proved and recorded, according to the laws of the state of Virginia, and that, under the same, she is a *bonâ fide* purchaser of the said slaves and furniture, according to the terms of the said deed to E. J. Lee and others; and that the said deed fully protects her in the right to the said property conveyed, according to the terms thereof, against all creditors of the said Richard, and all purchasers *subsequently to the date thereof. And this respondent has before herewith [*115
exhibited, as part of her answer to said deed, with the certificate of proof and record thereof, by the clerk of the county court of Fairfax county, marked Exhibit No. 3. This respondent admits, that no sale of the Fairfax lands was made under the said deed to Henry S. Turner and others; she, therefore, makes no claim to the slaves, Ludwell, Thornton, Henry, Butler, Tom, Samuel, Jack and Eleanor; that none of the said last-mentioned slaves are in her possession or subject to her control, nor were they so, when the complainants issued out their writ of replevin in their bill mentioned, nor at the time they instituted this suit.

In this case, it is agreed, that the following facts be and they are hereby admitted as true, reserving all objections to the admissibility of the facts as competent testimony in the case, viz: That Richard Bland Lee and his wife Elizabeth, one of the defendants, resided at Fairfax county, in the state of Virginia, on the 9th January, in the year 1809, and said Richard B. Lee then held the negroes and other personal property, mentioned in the deed of that date, from said Richard B. Lee, to Lee, Maffit and Coleman, filed with

defendant Elizabeth's answer, and marked Exhibit No. 3. That the said R. B. Lee and his wife Elizabeth were housekeepers, and resided together, in Fairfax county, at the date aforesaid; that the said negroes and other personal property continued in their possession, after the deed of the 9th January 1809, had been made, in like manner as such possession had been held before said deed was made, and so continued until they removed to Washington City, in the year 1814 or 1815, when they brought said negroes and other property, from Fairfax county with them to the city of Washington. That from the period of said removal to Washington, said personal property, as distinguished from the negroes, was assessed by the officer of the corporation as the property of the said Richard B. Lee. That four of the said negroes were, for the first time, in the year 1818, assessed to said Richard B. Lee. That prior to the 9th day of January, in the year 1809, the said Richard B. Lee was seised in fee of five undivided eighth parts of 8000 acres of land in Spotsylvania county, in the state of Virginia, which was conveyed by said Richard B. Lee and said Elizabeth his wife, to Ludwell Lee in fee-simple. The execution, due acknowledgment, and recording of the deed and bills of sale, exhibited with the defendant Elizabeth Lee's answer, is admitted. The execution and service of the notices exhibited with the answer of the defendant, Edmund J. Lee, is admitted. It is admitted, that the deed of the 9th January 1809, was delivered to the trustees therein named, and that they agreed to act, but never took possession of the property therein mentioned, or of any part of it. It is also agreed, that the
*116] deeds referred to in E. J. Lee's, Elizabeth *Lee's, and Richard Smith's answers, severally, were duly executed, acknowledged and recorded, and are to be received and treated as parts of the record in this case.

On these pleadings, exhibits and admissions, various positions are assumed as grounds of relief.

The deed of January 9th, 1809, recites, that Mrs. Lee had executed a deed to Ludwell Lee, relinquishing her right of dower to the 5000 acres of land in Spotsylvania; whereas, the deed to Ludwell Lee, relinquishing the dower interest, bears date subsequently, in July 1809. It is insisted for complainants, that the recital was false, and that this part of the consideration had must be rejected. We do not think so. The transaction is of nearly thirty years' standing, and not so open to explanation as a more recent one; it may be, that a deed had been executed by Mrs. Lee, as recited to Ludwell Lee, and that it was afterwards superseded by another: be this as it may, Richard Bland Lee was estopped by the recital in his own deed; and Mrs. Lee's trustees, bound to performance on her part, supposing the recital to have been untrue. The substance of the contract was, that she should relinquish her dower interest to Ludwell Lee; and she did relinquish it, obviously in compliance with the agreement; and that it was done in July, instead of the preceding January, is an immaterial circumstance. The husband's alienee acquired the disincumbered estate, in consideration of the deed sought to be impeached; and in a court of equity, cannot deprive the wife of the slaves, without doing equity to her, by restoring the lands now beyond our reach; provided the transaction was *bonâ fide*. The other part of the consideration was the deed of trust (of January 9th, 1809), by which the Fairfax estates of Sully and Langley were pledged for the payment of the debt due to Judge Washington. These estates were the separate and

sole property of Mrs. Lee; and not being subject to execution by the laws of Virginia, the creditor had not the slightest claim upon them, and it would have been most unwise for Mrs. Lee to have onerated them without ample indemnity.

Judging of the probabilities, in 1809, from future results, between that time and the death of Richard Bland Lee, in 1827, and we are inclined to conclude, that Mrs. Lee, with the ardor common to her sex, mistook her true interest in making the exchange of her lands for the slaves and household goods; that she has been greatly the sufferer, is free from doubt. The Virginia estates have passed into other hands, to satisfy her husband's creditors; most of the slaves have been sold to supply his improvidence and necessities; and the little that is left of the property secured to Mrs. Lee (down to the humblest utensil) is now sought to be appropriated to the satisfaction of the judgment on which the bill is founded.

That the deed of trust to Henry S. Turner and others, to secure Judge Washington's debt, was executed in good faith, is not controverted; the objection is, that the debt was paid by means independent of the [*117 lands mortgaged, and the mortgage discharged. The consideration, therefore, given by Mrs. Lee for the slaves and other property secured to her separate use, is fully proved; and was ample when the contract was made; and this is all that rested upon the respondents to establish, to resist the claim of the complainants, on the first aspect of the bill; that which alleges the deed to have been fraudulent in its inception.

But an after-circumstance is invoked, as furnishing evidence favorable to the complainants. In the interrogating part of the bill, the respondents are required to answer, whether the debt mentioned in the deed of 1809, as due to Judge Washington, had ever been paid; by whom, and from what funds? Edmund J. Lee responds, that he had no distinct recollection on the subject; Mrs. Lee admits that no sale of the Fairfax lands was made under the deed to Henry S. Turner and others, but that the eight slaves, who in such event were to be returned to her husband, had been disposed of by him, &c. If Mrs. Lee meant to say, that the trustees had not sold by virtue of the deed of trust for Judge Washington's benefit, then she answered truly; if, however, she is to be understood as answering, that the estates pledged were not applied, in part, to the extinguishment of the debt, then she was mistaken. Sully, the homestead, was sold to Francis Lightfoot Lee, in February 1811, for $18,000; embracing the 500 acres which was Mrs. Lee's individual property, and including 217 acres in addition; out of which sum Judge Washington was paid $7450. The estate was not conveyed by the trustees, but by Richard Bland Lee, the respondent Elizabeth, and Bushrod Washington, with covenants of title and warranty. The conveyance, upon its face, recites in the fullest manner, that $7450 of the purchase-money had been paid by Francis Lightfoot Lee, to Judge Washington, in discharge of the balance of debt due to him. There can be little doubt, Mrs. Lee, in her answer, was mistaken, in admitting to her prejudice, that the Fairfax lands had not been appropriated to the payment of Judge Washington's debt. Her principal object seems to have been to disavow all claim of title to the eight slaves.

Suppose, however, that Judge Washington's debt had been paid by other means, and the Fairfax lands disincumbered of it; could the fact

influence this cause? That it could not, is manifest. The complainants, by their bill, do not seek to come in under the deed to Turner and others; nor under that to Edmund J. Lee and others; if they had, and if the fact had been established, that Mrs. Lee, by the payment of the debts, from independent means, retained her lands and the slaves also, then a court of equity would treat her as a trustee for Richard Brand Lee, and let in the complainants, as his assignees, to subject the slaves, &c., to the payment of the bank debt. But the bill charges, that the deed to Edmund J. Lee,
*118] *and others, was fraudulent and void in its inception; presenting no case, founded on the subsequent transaction alluded to; and the court cannot notice it, other than as evidence to fix fraud on the respondents in executing the deed sought to be set aside; which if valid then, must be deemed so now. The capacity of the husband to contract, through the intervention of trustees, with the wife, and to make a valid conveyance, founded on a *bonâ fide* consideration paid out of the wife's seperate estate, has not been questioned; nor is the doctrine open to controversy.

That a liberal construction should be given to the clause in the Virginia statute, for the suppression of fraud, we admit; this is the well-established rule in construing the statutes of Elizabeth; which the first section of the Virginia statute substantially adopts. (*Heyden's Case*, 3 Co. 7; 1 Bl. Com. 88.) *Fitzhugh* v. *Anderson*, 2 Hen. & Munf. 304.

On the second ground on which relief is sought, it is insisted, the complainants are entitled to have satisfaction out of the property claimed by Mrs. Lee. 1. Because the continued possession, use and enjoyment by said Richard Bland Lee, of the said property, purported to be conveyed by the deed of 9th January 1809, was evidence of a continued ownership, and avoids said deed as against subsequent *bonâ fide* purchasers and creditors, without notice. 2. That said deed, so executed in Virginia, will not validate the possession, use and enjoyment of said property in the city of Washington.

The investigation of this assumed ground of relief, involves considerations affecting the nuptial relation. We are asked to deal with the conduct of a wife, living in harmony with her husband, as if she was a third person; and to decree against her, because she did not expose her husband to the community in which they lived, and especially to the complainants, when within the wife's knowledge he was holding out her property as his own; and using it as his own, and obtaining credit upon the faith that he was the true and absolute owner. That Richard Bland Lee did deal with and use the property in controversy, as if it had been his own, whilst he resided in this city; and that the community did believe him the true owner, and give him credit on the faith of the property, is, no doubt, true; and it is very probable, that Mrs. Lee knew the fact, but continued passive and silent on the subject. She denies, however, that she had any knowledge of the execution of the deed of trust to Richard Smith, until long after it had been made; and the answer, being responsive to the allegations in the bill, is conclusive of the fact denied; there being no proof to the contrary.

Was it a duty incumbent on Mrs. Lee to advertise the community in which she lived, that her husband had no title to the property on the faith
*119] of which he was obtaining credit; but that it was hers? This would have been charging the husband with fraudulent conduct; *for it

cannot be denied, that if A. sells and conveys his slaves or lands, and then produces to another his previous paper title, and obtains credit upon the goods or lands, by pledging them for money loaned, he is guilty of a fraud; and if the true owner stands by, and does not make his title known, he will be bound to make good the contract; on the principle, that he who holds his peace when he ought to have spoken, shall not be heard, now that he should be silent. He is deemed in equity a party to the fraud. How far the principle applies in a case of the wife of a fraudulent vendor standing by, we are not called on to decide; and wish to be understood as not deciding. Mrs. Lee's is not that case; to say the most, she was only passive and silent, in regard to her rights generally; although she may have had knowledge that Mr. Lee was obtaining credit on the faith of her property; and the question is, was it her duty to have acted otherwise? All we need say is, that a court of chancery cannot hold Mrs. Lee responsible, because of her silence.

Then, as to the question of possession continuing with the grantor. Leave the relation of man and wife between Richard Bland Lee and Elizabeth Lee, out of view, and it would be impossible, that any one could have been misled by Mrs. Lee having the possession; she having the sole and exclusive beneficial interest and right of possession. The difficulty arises from a circumstance, the existence of which the statutes of Virginia contemplated and provided for. By the act of 1785, it is declared, that where any reservation or limitation shall be made of a use or property, by way of condition, reversion, remainder or otherwise, in goods and chattels, the possession whereof shall remain in another, the same shall be taken, as to creditors and purchasers of the persons remaining in possession, to be fraudulent, within the first section of the act; and that the absolute property is with the possession; unless such reservation or limitation of a use or property, is declared by will or by deed, proved by two witnesses in the general court, or the court of the county wherein one of the parties lives, within eight months after the execution thereof.

The statute of Virginia has been adopted in Tennessee; where it has been holden, that a deed like the present, founded on a good consideration, and separating the title from the possession, was within the statute, and must be recorded; but when recorded, creditors and purchasers of him who retains the possession must take notice of it; and that the recording exempts the property from liability to execution. *Crenshaw* v. *Anthony*, Mart. & Yerg. 110. The great object of the act was, to secure the settlement of slaves, by the intervention of executors and trustees, so as to retain them in the family; and this could be done by a *bonâ fide* gift of a husband (not materially indebted at the time) to a wife or children; if the deed was duly recorded, to the exclusion not only of subsequent creditors, but subsequent purchasers also, contrary to the 27th of Elizabeth; whereby (in the language of the supreme court of Tennessee, in *Marshall* v. *Booker*, 1 Yerg. 15), "an extravagant, *spendthrift husband, may provide for his wife and children, before they are overtaken by ruin." But we can say [*120 with Lord HARDWICKE, in *Russell and Hayward* v. *Hammond*, 1 Atk. 13, "that we have hardly known one case, where a person conveying was deeply indebted at the time of such gift, that it has not been deemed fraudulent." In Virginia, therefore, the possession of Mrs. Lee was in

accordance with the established practice, and is in no degree subject to imputation.

It is insisted, however, that when Richard Bland Lee removed into Washington City, the statute of Maryland operated on the Virginia title of Mrs. Lee, and defeated it for the benefit of purchasers from her husband. The statute declares, that no goods or chattels, whereof the vendor shall remain in possession, shall pass, alter or change, or any property thereof be transferred to any purchaser, &c., unless the same be by writing, and acknowledged before one provincial justice, or one justice of the county where such seller shall reside, and be within twenty days recorded in the records of the same county. 1729, ch. 8, § 5. The statute has no reference to a case where the title has been vested by the laws of another state; but operates only on sales, mortgages and gifts, made in Maryland. The writing is to be recorded in the same county where the seller shall reside, when it is executed. The seller, Richard Bland Lee, residing in Virginia, it was impossible for Mrs. Lee to comply with the act. That the Virginia deed secured to Mrs. Lee the same rights here that it did in Virginia, we apprehend to be, to some extent, an adjudged question. It has frequently arisen in the state courts. The case of *Bruce* v. *Smith*, 3 Har. & Johns. 499, was this: In 1804, Brodhag owed Jones, and gave a deed of trust on slaves to secure the debt ($3000), executed to Smith, as trustee. The parties resided in Georgetown, where the act of Maryland of 1729 continued in force, after this district was separated from Maryland. The deed of trust was duly proved, and recorded in the district of Columbia; Brodhag retaining the possession of the slaves. In 1805, Brodhag removed to Allegheny county, Maryland, and continued in possession of the slaves, as apparent owner, until August 1809, when the sheriff of Allegheny seized on them by virtue of an execution against Brodhag, in favor of Deakin's executors; and Smith, the trustee, sued Bruce, the sheriff, in trespass. In that case (as in this), Brodhag had given in the slaves to the assessor of taxes; and had sold part of them, between 1804 and 1809. The court of appeals of Maryland, in substance, held, that the act of 1729 did not affect the case; and the only proof required to sustain the plaintiff's title, was the bill of sale (as it is denominated), and that it lay on the defendant to prove fraud in fact, in order to avoid it. In 1804, the jurisdiction exercised in the district of Columbia, and the state of Maryland, were as distinct as those of Virginia and the *district; so that the case of *Bruce* v. *Smith* was
*121] similar in respect to conflict of jurisdiction with the one before the court.

The same point came up in Tennessee, and met the decision of the supreme court of that state. The following are the material facts in the Tennessee case: In 1812, in Lunenburg county, Virginia, Daniel Crenshaw sold and conveyed certain slaves to Richard Herring, who, soon after, contracted for the purchase of a tract of land from Daniel Crenshaw, lying in the same county; but Nancy Crenshaw, the wife of Daniel, refused to relinquish her right of dower; and to induce her to do so, Herring agreed with her and her son, Cornelius Crenshaw, to convey to the latter, in trust for his mother, and for her separate use, two of the slaves previously purchased from Daniel Crenshaw. The deed was duly executed and recorded in Lunenburg. In 1814, Daniel Crenshaw and his wife removed to Ten-

nessee, carrying the slaves with them; Cornelius the trustee continuing to reside in Virginia. In Tennessee, to all appearance, Daniel Crenshaw was the true owner of the slaves, and acquired credit on the faith of the property. He was improvident, for which reason, manifestly, the wife caused the slaves to be secured to herself; and it may be remarked, that similar motives have led to many, not to say most, of this description of conveyances, in the states where the provisions of the act of 1785 of Virginia prevail. In 1821, Stacy recovered a judgment against Daniel Crenshaw, in the county of his residence in Tennessee, by virtue of an execution, founded on which, Anthony, the sheriff, seized upon the slaves; and Cornelius Crenshaw, as his mother's trustee, sued the sheriff in detinue. The circuit court held the deed of trust void, by force of the statute of Tennessee (which is very nearly a transcript of that of Virginia), because the deed had not been recorded in Tennessee; a verdict was rendered for the defendant; and the plaintiff prosecuted his writ of error to the supreme court, where the judgment was reversed. The court held, that the deed made in Virginia, separating the title and possession, was of a character to be operated upon by the act of 1785 of Virginia; and had the deed not been recorded there, as to creditors and purchasers, the title would have been deemed to be with the possession; but having been recorded there, a title, fair and unimpeachable, vested in the trustee and *cestui que trust*, Nancy; that being valid in Virginia, the statute of Tennessee could not affect it. Furthermore, the court refused to hold the wife responsible, because she had continued passive and silent in regard to her separate right to he slaves; by which individuals might have been, and in all probability were, induced to believe her husband the true owner, and to give him credit on the faith of the property. In that case, as in this, the wife had done no affirmative act, designedly to draw in the creditor to trust her husband; and the court believed, by remaining silent, *she had violated no duty; nor been guilty of any deceit on which a forfeiture of her right could be pronounced. [*122

The deed in controversy is also embraced by the 4th section of the statute of Virginia, which, amongst other things, provides for the recording of all deeds of trust and mortgages, upon acknowledgment or proof according to the directions of the act, it having been holden by the courts of Virginia and this court (3 Hen. & Munf. 232; 3 Cranch 150), that deeds conveying chattels are included within the section referred to. And the deed vesting the property in Mrs. Lee's trustees having been duly recorded in the manner required by the statute, it was effectual, according to the laws of Virginia, to protect the title against subsequent creditors of, or purchasers from, Richard Bland Lee.

Upon the whole, we are of opinion, the decree below dismissing the bill, should be affirmed.

Baldwin, Justice, dissented.

Thompson, Justice, did not sit in this cause.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the county of Washington, and was argued by counsel: On

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

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*123] *The Bank of the United States, Appellants, *v.* George W. Peter and others, Appellees.

Subrogation.

It is a well-settled principle in equity, that a judgment-creditor, when he is compelled to pay off prior incumbrances on land, to obtain the benefit of his judgment, may, by assignment, secure to himself the rights of the incumbrancers; and the same rule applies, where a junior mortgagee is obliged to satisfy prior mortgages; he stands as the assignee of such mortgages, and may claim all the benefits under the lien that could have been claimed by his assignor.[1] But the effect of this principle may be controlled by acts of the parties.

Appeal from the Circuit Court of the District of Columbia, and county of Washington.

This case was argued by *Sergeant* and *Coxe*, for the appellants; and by *Key*, for the appellees.

McLean, Justice, delivered the opinion of the court.—This is an appeal from the decree of the circuit court for the district of Columbia. The facts out of which the controversy arises are substantially as follows:

At April term 1822, the Union Bank of Georgetown recovered two judgments against George Peter, amounting, exclusive of costs, to the sum of $7934. On the 9th April 1824, George Peter executed a deed of trust to Thomas Peter and Robert P. Dunlop, which was supposed, at the time, to include all the real property owned by George Peter within the district of Columbia. The conveyance was made in trust to indemnify Thomas Peter, who had become the indorser of George to a large amount. A great number of debts were enumerated in the deed, and among others, one to the Bank of the United States of $12,000, which were designed to be paid, in whole or in part, by the sale of the property included in the deed of trust. The judgments of the Union Bank, above stated, were not embraced by the deed of trust. Before any act was done under this deed, Dunlop relinquished the trust to Thomas Peter, his co-trustee. On the 19th of May 1824, the Bank of the United States recovered a judgment of $5000 against George Peter, as indorser or drawer with John Peter. In September 1829, the property conveyed in trust was sold, by Richard Smith, cashier of the branch Bank of the United States, who had been appointed by Thomas Peter, with the consent of the creditors, to act as agent in the premises. The net proceeds of the sale, deducting certain charges, were $37,285.90, an amount insufficient to discharge all the debts.

*124] The judgments of the Union Bank, though not included in the *deed of trust, constituted a lien on all the real property of George Peter

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[1] The doctrine of subrogation applies, when a party is compelled to pay the debt of a third person to protect his own rights, or to save his own propeaty. Cole *v.* Malcolm, 66 N. Y. 363. Thus, an insurance company that has paid a loss is entitled to be subrogated to the rights of the assured, against a common carrier, who was primarily liable. Hall *v.* Nashville and Chattanooga Railroad Co., 13 Wall. 367; The Ocean Wave, 5 Chicago Leg. News 565. And see Sun Mutual Ins. Co. *v.* Mississippi Valley Transportation Co., 17 Fed. Rep. 919.

in the district; and in order to give unincumbered titles to purchasers at the above sale, Richard Smith, with the consent of the creditors, and Thomas Peter, paid those judgments out of the proceeds of the sale; but satisfaction was not entered upon the record. The payment was stated to be for the use of the Bank of the United States; and writs of *scire facias* have been brought to revive the judgments.

It having been discovered, that the trust deed of the 9th April 1824 did not include all the property of George Peter within the district; on the 1st October 1829, he executed another deed of trust to Thomas Peter, for ten lots in the city of Washington, which were required to be sold, and the proceeds applied in paying certain judgments against George Peter, as drawer, and Thomas Peter, as indorser. One of the judgments specified was obtained by the Bank of the United States. And on the 7th May 1830, another deed of trust was executed by George Peter to Thomas Peter, including the above ten lots and one other lot in the city of Washington. This deed was designed to remedy some defect or informality in the first deed for the ten lots, and to convey one other lot; the same judgments are recited as in the first deed, and the same trust declared. These eleven lots were sold by Richard Smith, in October 1829, and May 1830, for $5280.70.

In 1834, Thomas Peter died, and this proceeding is carried on by his executors; who, with George Peter, filed their bill, stating the above facts, and praying that Richard Smith and the Bank of the United States be decreed to pay over the proceeds of the sale of the eleven lots, in their possession, to the creditors named in the trust deed of 9th April 1824. This application is made on the ground, that as the judgments of the Union Bank were a lien upon the eleven lots, and were paid out of the trust funds, the trustee, in behalf of the creditors and himself, has a right, in equity, to the proceeds of the sale of these lots, under the lien of the judgments.

This claim is resisted by the Bank of the United States, on the ground, that the judgment obtained by the bank for $5000, in May 1824, long before the execution of the deed of trust for these lots, constituted a lien upon them, after the discharge of the judgments of the Union Bank. There were other judgments against George Peter, rendered in May 1824, which were not provided for in the trust deed of April 1824, and which claim a proportionate interest with the Bank of the United States in the lien on the eleven lots. This claim is not resisted by the Bank of the United States, which claims out of the proceeds of the sale of the eleven lots, as its dividend, the sum of $2428.62. And the question in this controversy is, whether the proceeds of the sale of the eleven lots shall be paid to the creditors named in the deed of trust of the 9th April 1824; to the Bank of the United *States, on their judgment, and on the other judgments of May 1824, under which the lien is set up; or to the creditors named in the [*125
trust deeds of these lots, of 1829 and 1830.

Although the bill in this case, in its specific prayer, does not extend beyond an application of this fund under the first deed of trust; yet there are certain agreements and admissions on the record, which authorize the court to make a final decision in the case. It seems, that satisfaction has not been entered on the judgments of the Union Bank, although they have been paid in full. The entry that this payment was made for the use of

the Bank of the United States, can have no effect, favorable to the bank, on the present question. Under the trust deed, the Bank of the United States had but a common interest with the other creditors named, in discharging or controlling the lien of these judgments. And it is on the discharge of this incumbrance by the trustee, out of the trust fund, that he sets up the right in equity, in behalf of himself and the creditors named in the deed, to be subrogated to all the rights of the Union Bank, as plaintiffs in the judgments.

It is a well-settled principle in equity, that a judgment-creditor, who is compelled to pay off prior incumbrances on land, to obtain the benefit of his judgment, may, by assignment, secure to himself the rights of the incumbrancers. And the same rule applies, where a junior mortgagee, to save his lien, is obliged to satisfy prior mortgages on the same estate; he stands as the assignee of such mortgages, and may claim all the benefits under the lien that could have been claimed by his assignor.

But the effect of this principle is controlled in the present case, by the subsequent acts of the parties. If the lien of the judgments of the Union Bank had been unconditionally extinguished, the lien of the judgment of the Bank of the United States, and the other judgments of the same date, would have attached to the eleven lots; but this effect has also been controlled by the acts of the parties. The judgments of the Union Bank were not paid until January 1830. So that prior to this time, on no principle, could the lien of these judgments be held to be extinguished. And before this time, the trust deed was executed.

This deed was executed on the 1st October 1829, and it contains the following recital: "Whereas, the said George Peter is indebted to the president, directors and company of the Bank of the United States; to the president and directors of the Union bank of Georgetown; and to the president and directors of the Farmers' and Mechanics' Bank of Georgetown, in divers large sums of money, for which the said George Peter gave his several promissory notes, payable to the said Thomas Peter, and by him indorsed to the said banks, upon which notes, judgments have been obtained," &c. And the lots are conveyed to Thomas Peter in trust for the payment of the above judgments; and were sold in October 1829, and May 1830, by Richard Smith, agent for the trustee and creditors named in
*126] the *deed. He was cashier of the branch Bank of the United States, at Washington, and represented the interests of the bank in the proceeding.

From these facts, it appears, that before the judgments of the Union Bank were satisfied, and consequently, before there was any pretence that the lien of these judgments on these lots was extinguished, with the consent and approbation of all the parties interested, the deed of the 1st October 1829 was executed. That this arrangement was made with the approbation of the Bank of the United States, is clear, from the face of the deed, and the agency of Smith in selling the property. Except by virtue of the trust deed, Smith had no right to sell the property; and acting as he did for the creditors named in the deed, among which the Bank of the United States was prominent, it is too late for the bank, after the sale, to disavow his agency.

The contingent lien of the bank on the eleven lots, by virtue of its judg-

ment, in May 1824, does not seem to have been considered by the bank or the trustee, when the trust deed was executed, as of any value. It depended entirely on the unconditional extinguishment of the lien under the judgments of the Union Bank.

It is contended, that as the judgments of the Union Bank were a lien upon all the real estate of George Peter in the district, the court would have directed executions on these judgments to be levied on the property of Peter, other than the eleven lots; so as to have left them to be sold under the judgment of the Bank of the United States. And that the same rule should now prevail. The answer to this is, that before the judgment of the Bank of the United States was rendered, the first deed of trust was executed, which embraced all the property of Peter in the district, except the eleven lots. That this deed was valid, and that the rule would have been applied as between the lien of the Union Bank and the grantee of the first deed of trust, but not as to subsequent liens.

Here are the judgment lien and the trust deed, covering the same property, except the eleven lots, which are covered by the judgments, but not by the deed. The judgment of the Bank of the United States created no lien. Under such circumstances, the court could not have postponed either the lien of the Union Bank or the rights under the deed of trust, in behalf of the judgment of the Bank of the United States; but would have directed that the eleven lots should be sold, under the judgments of the Union Bank. This would have been the correct rule under these conflicting rights; but the case turns on the deeds of trust of 1829 and 1830, which conveyed the title, subject only to the prior lien of the judgments of the Union Bank. And this was done, with the consent of the agent of the Bank of the United States. We think, this consent, as shown in the deeds, and the sale of the eleven lots, connected with the facts of the case, goes to establish the trust deeds; and that the proceeds of the sale of these lots must be paid over on the judgments specified in the deeds, according to their respective priorities. *As the decree of the circuit court is not in accordance with this view of the case, it must be reversed; and the case sent down for further proceedings. [*127

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the county of Washington, and was argued by counsel: On consideration whereof, it is adjudged and decreed by this court, that the decree of the said circuit court in this cause be and the same is hereby reversed; and this cause be remanded to the said circuit court for further proceedings to be had therein, in conformity to the opinion of this court.

*Charles King, Appellant, *v.* Josiah Thompson and others, Heirs-at-law of George King, deceased, Appellees.

Decedents' estates.

A bill was filed claiming specific performance of an alleged contract to convey a house and lot in Georgetown, for the benefit of the wife of the complainant, the latter having expended a large sum of money in improving the property, in the expectation that it would be conveyed as required by the bill. The court not considering that sufficient evidence of an agreement to convey the property was given, ordered that it should be sold, and out of the proceeds, that the advances made by the complainant should be repaid; the property sold for a sum far less than the amount expended: *Held*, that the balance unpaid, after the sale, was not a debt due by the estate of the father of the wife, and could not be claimed of his representatives.

Appeal from the Circuit Court of the District of Columbia, for the county of Washington. In December 1822, the appellant filed in the circuit court, a creditor's bill, in the usual form, against the appellees, praying for the sale of the real estate of George King, deceased, in aid of his personal estate. It appeared, that George King had died intestate and insolvent, in 1820; and with the assent of the defendants, a decree of sale of his real estate was made, in January 1823. Under this decree, sales were made, reported and confirmed; and in March 1831, a final sale of all the real estate was made, except a house and lot on Civil alley, in Georgetown, which sale, on the claim of Josiah Thompson and wife, was set aside in April 1831. As the sales were made, audits of the accounts of the estate and the claims were made, from March 1827 to March 1836. On the last report of the auditor coming before the court, Alexandria Caldwell, administrator of Josiah Thompson, then deceased, exhibited to the circuit court a claim against George King for a dividend out of the assets of his estate; and on his motion, the auditor's report was recommitted.

The record made the case of George King's heirs and others, appellants, v. Josiah Thompson and wife (9 Pet. 204), a part of this case. Josiah Thompson and wife, in the case referred to, had claimed of the heirs of George King, that the house and lot on Civil alley, in Georgetown, should be conveyed to them, alleging that an agreement to that effect had been made with them, in his lifetime, by George King—Josiah Thompson having married the daughter of George King; and in consideration of this agreement, Josiah Thompson had laid out $4000 in buildings and improvements on the lot. The court not being satisfied, upon the evidence, that a decree for the conveyance of the property should be directed, ordered that a sale thereof should be made, and that the proceeds should be first applied to repay to Josiah Thompson the sum of $4000 laid out on the same, and that the balance should be paid over for the benefit of the creditors of George King.

*129] Under this decree, the property was sold, and it produced the sum *of $827, leaving of the sum expended by Josiah Thompson $3173, unpaid.

In April 1837, the administrator of Josiah Thompson claimed from the estate of George King a dividend on the sum of $4000, the amount laid out on the house and lot, being $2626, less the sum of $827, the proceeds of the house and lot. This claim was made on the allegation that Josiah Thompson was a creditor of George King to the amount of $4000, by the expendi-

ture of that sum on the house and lot; and that he was entitled to come in and have, on that amount, an equal dividend with the other creditors of the estate of George King, deducting the proceeds of the property in Georgetown.

The circuit court made a decree allowing to the administrator of Josiah Thompson the amount claimed by him; and the defendants prosecuted this appeal.

The case was argued by *Clement Cox*, for the appellant; and by *Coxe*, for the appellees.

Cox, for the appellant, insisted: 1. That the decree in 9 Pet. 204, does not operate as an estoppel of the exceptions, the issues in this case being different. 1 Stark. on Evid. 202; *Collinson* v. *Ownes*, 6 Gill & Johns. 4, 11. 2. That otherwise, the exceptions in the circuit court were well taken, and ought to have been allowed. He cited, in support of the 1st exception taken below, 9 Pet. 204; *Briscoe* v. *King*, Cro. Jac. 281: and in support of 2d exception, *Strike* v. *McDonald*, 2 Har. & Gill 181; *Harwood* v. *Rawling's Heirs*, 4 Har. & Johns. 126; *Duvall* v. *Green*, Ibid. 270.

As to the first point. The parties in this case are different from those before this court in the case in 9 Peters. These are creditors of George King; and as that was a proceeding for a specific performance of an alleged contract with George King, to which these creditors could not be parties, the decree of the court could not be an estoppel. In that case, no claim of indebtedness was raised or presented against the estate of George King. It was commenced and prosecuted, on the allegation, that the property on which the money had been expended, had been promised to the wife of Josiah Thompson, the daughter of George King; and its sole purpose was to obtain a conveyance of the property. There was no contract made with George King, upon which the money was expended by Josiah Thompson, for the benefit of George King; and this court will not see in the case any thing to found a contract of this nature. The whole object of the proceeding in the case in 9 Peters has been obtained. The complainant in that case *has drained the whole of the proceeds of the sale of the house and lot. [*130

The claim of Josiah Thompson was complete, such as it was, at the death of George King in 1820; and until 1837, no assertion is made by Josiah Thompson, or by any one for him, that the estate of George King was indebted to him. In his lifetime, Josiah Thompson made no claim; it was left to his administrator to present and assert it. It is at an end, by force of the statute of limitations.

A mortgage does not imply a personal obligation for the payment of any portion of the debt which the property mortgaged may not produce by a sale. The saving in a mortgage is for the benefit of the mortgagor. *Briscoe* v. *King*, Cro. Jac. 281.

Coxe, for the appellees, contended, that the decree of the circuit court was right. It was founded on the report of the auditor, who is to be presumed had full evidence of the facts on which the report is founded. The lien on the house and lot for advances made by Josiah Thompson, was established by the decree of the court in the case in 9 Peters. The balance,

beyond what the house and lot would produce by a sale, was a debt due by the estate of George King. The claim of the administrator of Josiah Thompson is in full accordance with the principles established by this court, in its decision in 9 Peters.

Catron, Justice, delivered the opinion of the court.—In 1812, Thompson married the daughter of King, who, being a man of considerable estate, offered to give Thompson a house and lot in Georgetown, then in a dilapidated state, if Thompson would repair the premises, so as to make them a comfortable residence; King saying, he intended the property for his daughter, the wife of Thompson. Thompson accepted the offer, went into possession, and expended in repairs and improvements, $4000.

About 1816, Thompson claimed to have the property conveyed to him by King, who refused; but offered to vest the title in trust for Thompson's wife. Thompson made several alternative propositions; one amongst others, that the house and lot should be valued as of the date when it was put into his possession; and that he would pay the amount over to King, and take a title; which proposition the latter accepted: or, offered to convey a part of the lot, including the house, to Thompson, and another part to Thompson's wife. Under these circumstances, Thompson continued to occupy the premises for a time, and afterwards removed from, and rented them—King setting up no claim to have the property returned to him. In 1820, he died, and the title descended on his heirs. King, at his death, was largely indebted, say $36,000, and much over the means of payment; his creditors filed a bill to have satisfaction *of their demands out of the real as well as personal estate; and the trustee appointed by the circuit court to sell the property, amongst other lands, sold that claimed by Thompson. The latter filed his bill to avoid the sale, and for a specific performance, against King's heirs, the trustees of the creditors, &c.; the record in which cause, as reported in 9 Peters reports, is, by the exceptions and an agreement, made a part of this proceeding.

*131]

The creditors denied the existence of the title set up by Thompson; claiming the house and lot as subject to King's debts, and went to issue. The court below decreed specific performance, from which the defendants appealed to this court, where the decree below was reversed. But Thompson having an alternative prayer in his bill, claiming priority of the general creditors of King, in the form of a lien on the property, to the value of the improvements he had put upon it; this court held, that although there was not sufficient evidence to authorize a decree for title, still Thompson had, by the rules of a court of equity, a lien for the money expended on the improvements; and the cause was remanded, with a mandate that the property should be advertised and sold, and the proceeds of the sale be applied: first, to the satisfaction of the money expended by Thompson in making the improvements; "and the balance, if any, to be paid over for the benefit of the creditors of King." The property was accordingly sold, and brought little more than $800, leaving upwards of $3000 unsatisfied.

The trustee of the creditors of King's estate, from time to time, made various sales and reports; and at April term 1837, reported, that Alexander Caldwell, the administrator of Thompson (then deceased), had presented as a debt due from the estate, the balance not refunded to Thompson by the

sale of the house and lot. The other creditors resisted the claim, as forming no demand on the estate; and insisted, Thompson's remedy extended only to the property improved and fixed with the lien, by the decree of the supreme court. But the circuit court overruled the exception, and adjudged that Thompson's administrator should come in for an equal dividend with the general creditors. From this order, the creditors appealed.

Thompson, by his bill to subject the house and lot, claimed a priority of lien, and had it allowed to him, in exclusion of the general creditors; he proceeded against the thing, and did not set up any personal demand extending beyond the lien, against the other estate of the King; and we are clearly of opinion, none exists. And therefore order, that so much of the proceeding in the circuit court, as allowed the administrator of Thompson to come in with the general creditors of King, to receive a dividend founded on said claim, be reversed; and that the cause be remanded for further proceedings.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Columbia, *holden [*132
in and for the county of Washington, and was argued by counsel: On consideration whereof, it is adjudged and decreed by this court, that so much of the decree of the said circuit court in this cause, as allowed the administrator of Thompson to come in with the general creditors of King, to receive a dividend, founded on his claim, be and the same is hereby reversed, with costs; and that this cause be and the same is hereby remanded to the said circuit court, for further proceedings to be had therein, in conformity to the opinion of this court.

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*United States, Appellants, *v.* The Heirs of F. M. Arredondo, [*133
and others, Appellees.

Florida land-claims.

A concession of 38,000 acres of land was made in 1817, by the governor of East Florida, to F. M. Arredondo, in consideration of services to the crown of Spain; the petition to the governor, asking for the grant, described the situation of the land; and asked, as the survey could not be made, for want of surveyors, and the surveyor appointed by the government, having other occupations, could not attend, that the issuing of the title should be suspended, until the plot of the land could be obtained; but that in the meantime, the decree of the governor on the petition should serve the petitioner as the title; to this application, the assent of the governor was given, by a decree ordering a concession in conformity with the petition. No survey was made under the concession, while Florida remained under the dominion of Spain, nor at any time after the cession of the territory to the United States. The court held, that want of a survey does not interfere with the title of a grantee; the land granted must be taken, as near as may be, in the place described in the petition, and cannot be taken elsewhere; and if it cannot be found there, the grantee has no claim to an equivalent; if it shall be found to interfere with previous grants to third persons, the concession will be lessened in quantity, according to the extent of the rights of third persons; and an equivalent for such diminution cannot be surveyed elsewhere.

The acts of congress for ascertaining claims and titles to lands in Florida, whilst they recognise patents, grants, concessions, or orders of survey, as evidence of title, when lawfully made, do not permit, in case of a deficiency in the quantity, from any cause whatever, the survey to be extended on other land.

Appeal from the Superior Court of East Florida.

This case was submitted to the court by *Grundy*, the Attorney-General of the United States.

Wayne, Justice, delivered the opinion of the court.—This is an appeal from the superior court of East Florida, which confirmed the claim of the appellees to a cession or grant of land, made by the governor of Florida to Fernando de la Maza Arredondo. The concession was made on the 24th March 1817, for 38,000 acres of land, in absolute property, without prejudice to a third party, situated on the two banks of a stream which enters the Suwanee river, called Alligator creek, beginning at about seven miles west of an Indian town, called Alligatortown, situated north-westwardly about forty miles distant from Payrestown, and about eighty miles from Buena Vesta, which parts of the country are known under the name of Alachua.

In the petition for this concession, the petitioner, in consideration that the situation and then state of the province did not permit the survey and demarcation of the tract to be made, and also the survey could not be made for want of a surveyor (the surveyor appointed by the government having other occupations, which prevent him from repairing to that part of the province), asks the governor to suspend the issuing of the title to the property, until the plot of the said tract could be obtained; but in the mean-
*134] time, that the grant which the governor might be pleased *to give him, by his decree, should serve him as the title thereto; to which the governor responds, by declaring, that the titles corresponding to the concession, will be issued to the petitioner, as soon as he shall present the plot made by the surveyor; and in the meantime, that his decree shall be "an equivalent thereof in all its parts; of which a certificate shall be given to the petitioners, authenticated in due form, in order that the petitioner may prove said grant, and enjoy the said lands, and dispose of them as he sees fit." The authenticity of the petition and concession, is proved by such testimony as this court has always deemed sufficient for such purpose.

It appears also, by documents in the record, which are mentioned in the appellee's petition to the court for the confirmation of this concession or grant, that after the concession was made, the grantee, for a full and valuable consideration, sold and conveyed this tract of land, and the title in fee to the same was vested in Moses E. Levy, one of the appellees in this cause; and that the said Levy did afterwards, by indenture, grant, bargain and sell, by way of exchange for other lands, the one undivided moiety or half part of said land, and its appurtenances, in fee-simple, to Fernando and Joseph de la Maza Arredondo. It does not appear by the record, that a survey was made of this concession, whilst Florida continued a province of Spain; or that it has been since surveyed. Nor does it appear by any evidence in the cause, that the locality of the concession has been definitely ascertained.

We do not consider the want of a survey as interfering with the right of the party to the land granted; but it must be taken as near as may be, as described in the petition—where it was asked for, and as it was granted, and cannot be taken elsewhere. If it cannot be found there, the appellees have no claim to an equivalent. Or if, upon the survey, it shall be found to

interfere with previous grants to third parties, the concession will be lessened in quantity, according to the extent of the rights of third parties, and an equivalent for such diminution cannot be surveyed elsewhere. Such are the terms of the concession, that the land is to be surveyed "in the place where the petitioner designates, without prejudice to a third party." It gives no right to an equivalent or another location, if it cannot be found at or near the place designated. An equivalent is not secured by the concession, in terms; nor is it by the customs or usages of Spain; nor by any law or ordinance of Spain. And it is proper here to remark, that the acts of congress for ascertaining claims and titles to land in Florida, whilst they recognise patents, grants, concessions, or orders of survey, as evidence of title, when lawfully made; do not permit, in case of a deficiency in the quantity, from any cause whatever, the survey to be extended on other lands. But this concession calls for a natural object, a creek, and is designated as beginning on the creek, about seven miles west of an Indian town, called Alligatortown. A survey may then be made so as to give the appellees the benefit of the concession, according to the description in the petition, supposing that Alligator *creek exists, and that Alligatortown can be found; for, by running a line due west from the centre of the town, [*135 until it strikes the creek, then extending that line west for a base line of the survey, making the centre of the creek equidistant from its extremities, and then running down the creek, on both sides of it, towards the Suwanee, without regard to the windings of the creek, being cut by the downward lines; the concession may be described by survey, so as to answer the description of being on the two banks of the stream or creek. Or, in the event of no such creek existing within or at the distance of seven miles from Alligatortown, or at a reasonable distance over seven miles to the west of it; then, by beginning the survey seven miles west of the town, making a line due west, the base of the survey, and running from its extremities towards the Suwanee, or in any other direction; if it shall be found, by running them towards the Suwanee, the rights of third parties would be interfered with, then the survey of 38,000 acres could be made, so as to give the appellees the benefit of the concession, in accordance with those liberal and equitable principles uniformly applied by this court in the construction of claims to land in Florida, granted before the treaty with Spain transferring Florida to the United States. If, however, neither Alligator creek can be found, nor any creek to the west of Alligatortown, entering into the Suwanee, within or at seven miles distance from the town, or a reasonable distance therefrom, and if Alligatortown cannot be found; then it is the opinion of this court, that the remaining description in the petition, of the locality of the concession, is too indefinite to enable a survey to be made, and that the appellees can take nothing under the concession. We have been the more particular upon this point, that the mandate which this court shall give, to have a survey made, may not be misunderstood by the officers whose duty it will be to have the survey executed. The decree of the superior court of East Florida is affirmed.

This cause came on to be heard, on the transcript of the record from the superior court for the district of East Florida, and was argued by counsel: On consideration whereof, it is adjudged and decreed by this court, that the

decree of the said superior court, in this cause, so far as it declares the claim of the petitioners to be valid, be and the same is hereby affirmed in all respects; and that a survey be made of the lands contained in the said concession, according to the terms thereof, for the number of acres, and at the places therein designated; provided it does not interfere with the rights of third parties. And it is further ordered by the court, that a mandate be issued to the surveyor of public lands, directing him to do and cause to be done, all the acts and things enjoined on him by law, and as required by the opinion and decree of this court in this case; and that this case be remanded to the said superior court for further proceedings to be had therein, in conformity to this decree, and the opinion of this court, which must be annexed to the mandate.

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*136] *William Wallace, Plaintiff in error, *v.* Corry McConnell, Defendant in error.

Promissory notes.—Attachment.—Plea puis darrien continuance.

An action was instituted on a promissory note against the maker, by which the latter promised to pay, at the office of discount and deposit of the Bank of the United States, at Nashville, three years after date, $4080. In the declaration, which set out the note according to its terms, and alleged the promise to pay, according to the tenor of the note, there was no averment that the note was presented at the bank, or demand of payment made there; the defendant pleaded payment and satisfaction of the note, and issue was joined thereon. Afterwards, at the succeeding term, the defendant interposed a plea of *puis darrien continuance*, stating, that $4204, part of the amount of the note, had been attached by B. & W. in a state court of Alabama, under the attachment law of the state, and a judgment had been obtained against him for $4204, and costs, with a stay of proceedings until the further proceedings in the case, which remained undetermined. The plaintiff demurred to this plea, and the circuit court sustained the demurrer; and judgment was given for the plaintiff for $679, the residue of the note beyond the amount attached, and a final judgment for the whole amount of the note: *Held*, that there was no error in the judgment of the circuit court.

The acceptor of a bill of exchange stands in the same relation to the drawee, as the maker of a note does to the payee; the acceptor is the principal debtor, in the case of a bill, precisely like the maker of a note. The liability of the acceptor grows out of and is to be governed by the terms of his acceptance; and the liability of the maker of a note grows out of, and is to be governed by, the terms of his note; the place of payment can be of no more importance in the one case than in the other.

It is of the utmost importance, that all rules relating to commercial law should be stable and uniform; they are adopted for practical purposes, to regulate the course of commercial transactions. When a note or bill is made payable at a particular bank, as is generally the case, it is well known, that according to the usual course of business, the note or bill is lodged at the bank for collection; and if the maker or acceptor calls to take it up, when it falls due, it will be delivered to him, and the business is closed; but should he not find the note or bill at the bank, he can deposit his money to meet the note, when presented; and should he be afterwards prosecuted, he will be exonerated from all costs and damages, upon proving such tender and deposit. Or, should the note or bill be made payable at some place other than a bank, and no deposit could be made, or he should choose to retain his money in his own possession, an offer to pay the money, at the time and place, would protect him against interest and costs, on bringing the money into court.

In actions on promissory notes against the maker, or on bills of exchange, where the suit is against the maker, in the one case, and the acceptor in the other, and the note or bill is made payable at a specified time and place; it is not necessary to aver in the declaration, or prove on the trial, that a demand of payment was made, in order to maintain the action; but if the

maker or acceptor was at the place at the time designated, and was ready and offered to pay the money, it is matter of defence, to be pleaded and proved on his part.[1]

The jurisdiction of the district court of the United States for the district of Alabama, and the right of a plaintiff to prosecute his suit, having attached by the commencement of the suit in the district court, that right cannot be taken away or arrested by any proceedings in another court. An attachment of the debt by the process of a state court, after the commencement of the suit in a court of the United States, cannot affect the right of the plaintiff to recover in the suit.

An attachment commenced, and conducted to a conclusion, before the institution of a suit against the debtor in a court of the United States, may be set up as a defence to the suit; and the defendant will be protected *pro tanto*, under a recovery had by virtue of the attachment; and may plead such recovery in bar. So, too, an attachment pending in a state court, prior to the commencement of a suit in the court of the United States, may be pleaded in abatement; the attachment of the debt, in such case, in the hands of the defendant, would fix it there in favor of the attaching-creditors, and the defendant cannot afterwards pay it over to the plaintiff. The attaching-creditor, in such a case, *acquires a lien on the debt, binding on the defendant, which the courts of all other governments, if they recognise such [*137 proceedings at all, will not fail to regard. The rule must be reciprocal; and when the suit in one court is commenced prior to proceedings under attachment in another court, such proceedings cannot arrest the suit.[2]

It seems, that a plea of *puis darrien continuance*, is considered as a waiver of all previous pleas; and the cause of action is admitted, to the same extent as if no other defence had been urged than that contained in the plea.

Error to the District Court for the Southern District of Alabama. The plaintiff in error, William Wallace, was sued in the district court of Alabama, exercising the powers of a circuit court of the United States, on the second day of April 1836, by a *capias* issued out of that court, and returnable on the first Monday of May following. The action was brought on a promissory note, under the seal of the defendant, for $4880, dated May 10th, 1832, and payable to the plaintiff, or to his order, at the office of discount and deposit of the Bank of the United States, at Nashville, three years and two months after date.

At the May term 1836 of the district court, the plaintiff filed a declaration on the note, in debt, alleging the non-payment of the note, although frequent demands had been made of the maker. No demand was alleged to have been made at the office of discount and deposit of the Bank of the United States, at Nashville. The defendant pleaded payment, on which issue was joined, and the case was continued.

At the succeeding term of the district court, the defendant filed the following plea: That as to the sum of $4204, part and parcel of the sum by the said plaintiff in said declaration demanded, he, the said plaintiff, ought not further to have and maintain his aforesaid action therefor against him; because he saith, that after the said last continuance of this cause, that is to say, after the term of this court held on the first Monday of May last,

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[1] Covington *v.* Comstock, 14 Pet. 43; Brabston *v.* Gibson, 9 How. 263; State Bank *v.* Fox, 3 Bl. C. C. 431; Thompson *v.* Cook, 2 McLean 122; Silver *v.* Henderson, 3 Id. 165; Kendall *v.* Badger, 1 McAllister 523; Brown *v.* Pratt, 2 Cr. C. C. 253; Beverly *v.* Beverly, Id. 470; Smith *v.* Johnson, Id. 645; United States Bank *v.* Bussard, 3 Id. 173.

[2] See Campbell *v.* Emerson, 2 McLean 80; Greenwood *v.* Rector, Hempst. 708; Mattingly *v.* Boyd, 20 How. 128. In Pennsylvania, it is held, that the pendency of a foreign attachment does not prevent the recovery of a judgment against the garnishee. Hampton *v.* Laverty, 1 W. N. C. 49; Shiedt *v.* Laverty, Id. 62; Bank *v.* Marquis, 2 Id. 439; Burkhart *v.* Haviland, 7 Id. 521. It only suspends execution. Hepburn *v.* Maus, 31 Leg. Int. 356.

and before the December term aforesaid, to wit, on the eighth day of June, in the year 1836, at Mobile, to wit, in the district aforesaid, one William J. Blocker, John R. Blocker and Benjamin Horner, merchants, trading under the name of Horner, Blocker & Co., by William J. Blocker, one of the said firm, in behalf of himself and his copartner, caused to be sued out a certain writ of original attachment against the said Corry McConnell, for the sum $4204 ; and which said writ was issued by Benjamin Wilkins, a justice of the peace of Mobile county, on the said eighth day of June, in the year 1836, and was directed to the sheriff of Mobile county, and was made returnable to the county court of Mobile county, which was held on the second Monday in June 1836. And the said defendant further avers, that the said plaintiffs in the said attachment, were, at the time of suing out the same, residents of the state of Alabama ; that the said Corry McConnell was a non-resident, and citizen of the state of New York, and that the said plaintiffs did comply with the requisites of the statute, in such cases made
*138] *and provided, by giving bond and security, and filed affidavit, whereby it is shown that the said justice and the said county court had jurisdiction of the said attachment, and that the said county court could lawfully hear and determine the same. And the said defendant further saith, that in said original attachment, such proceedings were had, that he, the said William Wallace was, on the said eighth day of June 1836, summoned as a garnishee, by the sheriff of Mobile county, and required to appear before the said county court, and answer, on oath, what he was indebted to said Corry McConnell. And the said William Wallace, defendant, further saith that, in obedience to the said summons of garnishment, he, the said William, did appear before the said county court of Mobile, at the said term of the said county court, held on the second Monday in June 1836, before the judge of said court then sitting, and was in said suit of attachment between the said Horner, Blocker & Co., plaintiffs, and Corry McConnell, defendant, examined on oath, touching in his indebtedness to the said Corry McConnell ; whereupon, he did declare on oath, that he did execute to the said McConnell, the note for the sum of $4880, on which the said plaintiff in this suit hath declared, that he did pay, on the said note to said McConnell, on the 24th day of September 1833, the sum of $372.34, and that the remainder of said note was due by said Wallace to said McConnell, &c. And the said defendant further saith, that in the said attachment, by said court, at the said June term thereof, it was ordered, that the proceedings against said McConnell be stayed for six months, and that notice be given to the said McConnell, of the pendency of said attachment, by letter, directed to New York ; the said McConnell being shown to be a resident of the state of New York. And the said defendant, Wallace, further saith, that in the said attachment, and upon the said writ of garnishment, the said court, at the said June term, then sitting, did make the further order following, to wit : It appearing, to the satisfaction of the court, that William Wallace has been duly summoned as a garnishee, and and he having admitted an indebtedness to said defendant, to an amount greater than the amount sued for in the above-entitled cause, it is considered by the court, that said plaintiffs do recover from said garnishee, the sum of $4204, the amount sued for in said case, together with the cost thereof, and that all proceedings against said garnishee be stayed until the

final disposition of said case. Wherefore, the said cause was, in said county court, at said June term, continued by said court, as well against the said McConnell as against the said Wallace, till the next term thereof, to be held in due course of law, that is to say, on the second Monday of February, in the year 1837. All which said proceedings in the said county court, in which the said plea still remains pending and undetermined, are still in full force, and not reversed, vacated or otherwise set aside, as by the record and proceedings in said court, still remaining of record, *will more fully and at large appear; and that he, the said defendant, is ready to [*139 verify: wherefore, he prays judgment, if the said plaintiffs ought further to have or maintain his said action therefor, against him, this defendant, as to the sum of $4204, parcel of the sum by the said plaintiffs above demanded, &c.

The plaintiff, at the same term, entered a demurrer to this plea of *puis darrien continuance*, and prayed the court to render judgment against the defendant for $676.30 parcel of the debt of $4880, the amount of the note, which by the plea was wholly undefended; and as to the said plea of *puis darrien continuance*, the plaintiff says, that the plea of the defendant is not sufficient to bar him from maintaining his action on the said note, &c.

The court, on the pleadings, gave judgment as follows: "As to the said sum of $4205; being argued by counsel, it seems to the court, that said plea, as to the said sum of $4205, and the allegations therein contained, are not sufficient in law to bar the said plaintiff from having and maintaining his aforesaid action therefor against the said defendant; whereupon, it is ordered by the court, that the said demurrer be sustained; but as to the sum of $675.39, the residue of said plaintiff's debt, in his declaration mentioned, this day, came the plaintiff, by his attorney, and the said defendant, being solemnly called, came not, but wholly made default, as to the said last-mentioned sum, whereby the said plaintiff therein against him remains altogether undefended. It is, therefore, considered by the court, that the said Corry McConnell, plaintiff, do recover against the said William Wallace, defendant, the said sum of $4880.39, his debt aforesaid, and also the further sum of $394, the interest thereon, assessed by the clerk of this court by way of damages, for the detention of the same, together with his cost in this cause; the plaintiff remits to the defendant the sum of $351.28."

The record of the district court stated: "In this cause, the court decided, that the plea *puis darrien continuance* was a waiver of the previous plea pleaded by the defendant; there was no default of the defendant, further than his abandonment, under the decision of the court, of his first plea. In this cause, the defendant moved the court to stay proceedings in the said cause, until the final decision of the county court of Mobile county, upon the attachment of Horner & Co.; which motion was overruled." The defendant prosecuted this appeal.

The case was argued by *Key*, for the plaintiff in error; and by *Crittenden*, for the defendant.

*For the *plaintiff*, it was contended.—1. That the demurrer should [*140 have been overruled, the matters pleaded being sufficient under the attachment laws of Alabama. 2. That the judgment by *nil dicit*, as to the residue of the debt, viz., the $675.39, not attached, was erroneous; inasmuch

as it was covered and defended by the first plea of payment to the whole debt, which plea was not waived by the subsequent plea, which only went to part of the debt claimed in the action; parties being allowed by the law and practice in Alabama to plead any number of pleas to the same cause of action. 3. That the declaration on the note does not aver that payment of the note was demanded at the office of discount and deposit of the Bank of the United States, at Nashville, where the same was payable.

Upon the first point, Mr. Key contended, that the attachment in the state court of Alabama was a bar to the further proceeding in the district court. If this be not so, the plaintiff in the court below will twice recover the amount of his debt from the defendant; once in the district court, and again in the state court; as his debt to the attaching-creditor will be paid under the judgment of that court. The plaintiff in error had answered to the attachment, that he owed to McConnell, the defendant in error, the amount of the debt claimed by the plaintiff in the attachment; and this, by the attachment law of Alabama, fixed his responsibility. But as to the residue of the note, he continued liable to the plaintiff in the district court, if liable at all. The district court decided, that the plea of the attachment was a waiver of the first plea. This was not so; it could operate only, if it had any operation, as to part of it.

The case of the defendant in error is put on the ground, that the attachment was no bar to the suit in the district court of Alabama. This would be so, if, in the attachment case, the garnishee could plead the existing action in the district court. This he could not do. It was not a plea to the attachment, that a suit was pending for the debt attached; and this is the law of Alabama, as it is in all the states in which attachment laws exist. By the custom of London, such a plea would be good; but not so here. By the attachment laws of Alabama, everything in the shape of goods or credits, whether sued for or not, even judgments and money in the hands of the sheriff, may be attached; and the garnishee can only defend himself, by showing that he had nothing in his hands, and owed nothing to the defendant in the attachment. No matter how he owed it, whether sued for or not. Aiken's Digest 37, § 15, 16, 19. Nor can the defendant in the attachment suit complain. He has full notice of this proceeding, and may appear and dissolve the attachment; and he has security for the restoration of the property in a year and a day, should the plaintiff in the attachment have recovered improperly.

*141] In the case before the court, the plea *puis darrien continuance* *is said to have overruled the plea of payment, entered to the plaintiff's declaration, and thus makes it apply to the whole of the claim of the plaintiff; when, in fact, its application was for a sum less than the amount of the note, leaving the balance, $675.39, undefended. This is founded upon the supposition, that such a plea withdraws the whole defence originally pleaded. But this is not so; the plea has no operation but to the sum stated in it; and in this case, the attachment had seized upon $4205, leaving the residue of the note sued upon protected from a judgment of the court, on the original plea of payment. The case in 2 Wend. 300, fully sustains this position.

2. Do not the attachment laws of the states interpose a bar to a suit commenced before the attachment? It is important, that this question should

be considered, and the principle settled; and that the property of absent debtors shall be liable to pay their creditors. Much of the credit which an individual, who is a non-resident, obtains, is often derived from the debts due to him at the place or in the country in which the credit is given; as they are considered liable, under the attachment laws of the states, to the payment of his debts. Thus, the credit operations of the country are made safer, and commercial transactions are beneficially extended.

It seems to be considered by the district court of Alabama, that the attachment in the state court could not operate, after the commencement of the suit on the suit on the note. But the only question to the original debtor under the attachment was, do you owe the money? And no state of things, such as a suit, or surety for the defendant in the attachment, could exempt him from liability for the amount in his hands. It is said, it is different in England; this is so to some extent. By the attachment law, under the custom of London, a debt in suit cannot be attached. But this is not the law in the states of the United States. The attachment law of England, under the custom of London, is peculiar in many of its features; although in some respects our laws are the same. Customs of London 265–8. By that law, debts in suit, debts on judgments, cannot be attached; our laws give no such exemptions. It is a settled principle, that the property of absent debtors is liable, by legislation, to the payment of their debts. This is a rule in almost all the states of the Union; and it will not be disturbed by the courts of the United States. Cited, Aiken's Digest 37; Serg. on Att. 161; 2 Dall. 279; 2 Yeates 192; 9 Johns. 221; 20 Ibid. 229–31, 239, 268; 4 Cow. 521; Pet. C. C. 245; 8 Cow. 311, 315; 1 Har. & McHen. 236; 2 Ibid. 466; 1 Ala. 129; 12 Mart. 68. Upon these authorities, it is immaterial, whether the attachment was commenced before or after the suit was instituted.

*3. It is contended, that the plea *puis darrien continuance* is a waiver of all preceding pleas. This may be admitted, so far as the [*142 plea goes, but it does not extend beyond the matter of the plea; nor is it an abandonment of a defence which is not affected by the plea. Where it is pleaded to a part of the bill sued on, and not to the whole amount of it, the original plea stands for the residue, unaffected by the special plea. This must be so, or the grossest injustice might arise; as the defendant, who should desire to avail himself of a just defence to a part of a debt claimed from him, must give up a defence which would be equally available against another part of it. The authorities do not sustain the position upon which the decision of the district court was made. When the plea *puis darrien continuance* goes to a part only of the claim, it has no extent to any other or further part. 1 Ala. 129; 2 Wend. 300.

The last objection is, that there is no averment of a demand at the bank of deposit, at Nashville; and no demand is stated to have been made there. Can an action be maintained, without proving that the money was not at the bank of deposit, in Nashville, to pay; and that a demand was made there, in conformity with the note? It has been decided, that as to the indorser on a note of this description, it is necessary to prove such a demand *Bank of the United States* v. *Smith*, 11 Wheat. 171. The same principle should apply in an action against the maker.

Crittenden, for the defendant, said, there were but two questions in the case. 1. Whether the plea *puis darrien continuance* is a good bar to the action? 2. Whether that plea was a waiver of the first plea of payment? As to the first question, it is insisted, on the part of McConnell, that neither the pendency of an attachment, nor condemnation under it, if the attachment be issued after the commencement of his suit, can form any legal defence or bar to that suit. And for authority on this point, reference is made to 3 Wils. 297, 304; *Brook* v. *Smith*, 1 Salk. 280; *Savage's Case*, Ibid. 291; 5 Johns. 101; 5 Taunt. 558; 4 T. R. 312; 16 Eng. Com. Law 78–9. As McConnell's suit was brought long before the attachment pleaded in bar of it, it follows, therefore, that the decision of the court upon the demurrer to that plea was correct. If the matter of the plea was available at all, it could only have been pleaded in abatement. 1 Chitty 697.

As to the second question, we refer to 1 Chitty's Plead. 697, &c., and the cases cited in the note thereto; and also to the case of *Renner* v. *Marshall*, 1 Wheat. 215. In the case referred to in Chitty, he says: "A plea *puis darrien continuance*, is not a departure from, but is a waiver of the first plea, and no advantage *can afterwards be taken of it; nor can even the plaintiff afterwards proceed thereon." Upon the whole matter, therefore, it is contended that the judgment ought to be affirmed.

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Thompson, Justice, delivered the opinion of the court.—This case comes up on a writ of error from the district court of the United States for the southern district of Alabama. The action in the court below was founded upon a note, which, although under seal, is considered in Tennessee a promissory note; and is in the words following:

"Three years and two months after date, I promise to pay Corry McConnel, or order, at the office of discount and deposit of the Bank of the United States, at Nashville, four thousand, eight hundred and eighty dollars, ninety-nine cents, value received."

The declaration sets out this note according to its terms, and alleges the promise to pay at the office of discount and deposit of the Bank of the United States, at Nashville; without averring that the note was presented at the bank, or demand of payment made there. The defendant pleaded payment and satisfaction of the note; and issue being joined thereupon, the cause was continued until the next term thereafter. At which time, the defendant interposed a plea *puis darrien continuance*, alleging that the plaintiff, as to the sum of $4204, part and parcel of the sum demanded in the declaration, ought not further to have and maintain his action therefor against him, because that sum had been attached by Blocker & Co., by proceedings commenced by them against the plaintiff in this cause, under the attachment law of Alabama, in which he was summoned as garnishee. And setting out the proceedings against him, according to the requirements of that law, and under which he was examined on oath; and did declare, that he executed the note to the said McConnell, the plaintiff in this cause, as set out in the declaration; that he had paid on the note $372.34, and that the remainder of the said note was due by him to said McConnell. And the plea further sets out, that under the proceedings on the attachment, the court had given judgment against him for $4204 and costs; but with a stay

of all further proceedings until the further disposition of the case, and which remains yet undetermined.

To this plea, the plaintiff demurred; and the court sustained the demurrer, and gave judgment for the plaintiff for $675.39, the residue of the plaintiff's debt in his declaration mentioned, by default; and thereupon, gave a final judgment for the plaintiff for the full amount of the note, $4880, the debt aforesaid, and $394, the interest assessed by the clerk, together with his cost; and the plaintiff remits upon the record the sum of $351.28. *And the questions arising upon this record have been made and argued [*144
under the following objections: 1. That the declaration is bad for want of an averment that the note was presented, and payment demanded at the office of discount and deposit of the Bank of the United States, at Nashville. 2. That the matters pleaded of the proceedings under the attachment laws of Alabama, were sufficient to bar the action, as to the amount of the sum so attached; and that the demurrer ought therefore to have been overruled. 3. That the judgment by *nil dicit*, for the $675.39, was erroneous.

The question raised as to the sufficiency of the declaration, in a case where the suit is by the payee against the maker of a promissory note, never has received the direct decision of this court. In the case of the *Bank of the United States* v. *Smith*, 11 Wheat. 172, the note upon which the action was founded was made payable at the office of discount and deposit of the Bank of the United States, in the city of Washington; and the suit was against the indorser, and the question turned upon the sufficiency of the averment in the declaration, of a demand of payment of the maker. And the court said, when in the body of a note, the place of payment is designated, the indorser has a right to presume that the maker has provided funds at such place to pay the note; and has a right to require the holder to apply at such place for payment. In the opinion delivered in that case, the question now presented in the case before us is stated; and it said, whether where the suit is against the maker of a promissory note, or the acceptor of a bill of exchange, payable at a particular place, it is necessary to aver a demand of payment at such place, and upon the trial to prove such demand, is a question upon which conflicting opinions have been entertained in the courts in Westminster Hall. But that the question in such case may, perhaps, be considered at rest in England, by the decision of the late case of *Rowe* v. *Young*, 2 Brod. & Bing. 165, in the House of Lords; where it was held, that if a bill of exchange be accepted, payable at a particular place, the declaration on such bill, against the acceptor, must aver presentment at that place, and the averment must be proved. But it is there said, a contrary opinion has been entertained by courts in this country; that a demand on the maker of a note, or the acceptor of a bill, payable at a specified place, need not be averred in the declaration or proved on the trial; that it is not a condition precedent to the plaintiff's right of recovery. As matter of practice, application will generally be made at the place appointed, if it is believed, that funds have been there placed to meet the note or bill. But if the maker or acceptor has sustained any loss by the omission of the holder to make such application for payment, at the place appointed, it is matter of defence, to set up by plea and proof. But it is added, as this question does not necessarily arise in this case, we do not mean to be understood as expressing any decided opinion upon it, although we are strongly *inclined [*145

to think, that as against the maker of a note, or the acceptor of a bill, no averment or proof of a demand of payment at the place designated would be necessary. The question now before the court cannot, certainly, be considered as decided by the case of the *Bank of the United States* v. *Smith*. But it cannot be viewed as the mere *obiter* opinion of the judge who delivered the judgment of the court. The attention of the court was drawn to the question now before the court; and the remarks made upon it, and the authorities referred to, show that this court was fully apprised of the conflicting opinions of the English courts on the question; and that opinions, contrary to that of the House of Lords in the case of *Rowe* v. *Young*, had been entertained by some of the courts in this country: and under this view of the question, the court say, they are strongly inclined to adopt the American decisions. As the precise question is now presented by this record, it becomes necessary to dispose of it.

It is not deemed necessary to go into a critical examination of the English authorities upon this point; a reference to the case in the House of Lords, which was decided in the year 1820, shows the great diversity of opinion entertained by the English judges upon this question. It was, however, decided, that if a bill of exchange is accepted, payable at a particular place, the declaration in an action on such bill, against the acceptor, must aver presentment at that place, and the averment must be proved. The lord chancellor, in stating the question, said this was a very fit question to be brought before the House of Lords, because the state of the law, as actually administered in the courts, is such, that it would be infinitely better to settle it in any way, than to permit so controversial a state to exist any longer. That the court of king's bench has been, of late years, in the habit of holding, that such an acceptance as this, is a general acceptance; and that it is not necessary to notice it as such in the declaration, or to prove presentment, but that it must be considered as matter of defence; and that the defendant must state himself ready to pay at the place, and bring the money into court, and so bar the action by proving the truth of that defence. On the contrary, the court of common pleas was in the habit of holding, that an acceptance like this was a qualified acceptance, and that the contract of the acceptor was to pay at the place; and that as matter of pleading, a presentment at the place stipulated must be averred, and that evidence must be given to sustain that averment; and that the holder of the bill has no cause of action, unless such demand has been made. In that case, the opinion of the twelve judges was taken and laid before the House of Lords, and will be found reported in an appendix to the report of the case of *Rowe* v. *Young*, 2 Brod. & Bing. 180. In which opinions, all the cases are referred to, in which the question had been drawn into discussion; and the result appears to have been, that eight judges out of the twelve sustained the doctrine of the king's bench on this question; notwithstanding which, the judgment was reversed.

*146] It is fairly to be inferred, from an act of parliament passed immediately thereafter, 1 & 2 Geo. IV., c. 78, that this decision was not satisfactory. By that act, it is declared, that "after the 1st of August 1821, if any person shall accept a bill of exchange, payable at the house of a banker, or other place, without further expression in his acceptance, such acceptance shall be deemed and taken to be, to all intents and purposes, a

general acceptance of such bill. But if the acceptor shall, in his acceptance, express, that he accepts the bill, payable at a banker's house or other place only, and not otherwise or elsewhere; such acceptance shall be a qualified acceptance of such bill; and the acceptor shall not be liable to pay the bill, except in default of payment, when such payment shall have been first duly demanded at such banker's house or other place." Bayley on Bills 200, note.

In most of the cases which have arisen in the English courts, the suit has been against the acceptor of the bill; and in some cases, a distinction would seem to be made between such a case, and that of a note, when the action is against the maker, and the designated place is in the body of the note. But there can be no solid grounds upon which such a distinction can rest. The acceptor of a bill stands in the same relation to the drawee, as the maker of a note does to the payee; and the acceptor is the principal debtor, in the case of a bill, precisely like the maker of a note. The liability of the acceptor grows out of, and is to be governed by, the terms of his acceptance, and the liability of the maker of a note grows out of, and is to be governed by, the terms of his note; and the place of payment can be of no more importance in the one case than in the other. And in some of the cases where the point was made, the action was against the maker of a promissory note. The case of *Nichols* v. *Bowes*, 2 Camp. 498, was one of that description, decided in the year 1810; and it was contended on the trial, that the plaintiff was bound to show that the note was presented at the banking-house where it was made payable. But Lord Ellenborough, before whom the cause was tried, not only decided that no such proof was necessary, but would not suffer such evidence to be given; although the counsel for the plaintiff said, he had a witness in court to prove the note was presented at the banker's, the day it became due: his lordship alleging that he was afraid to admit such evidence, lest doubts should arise as to its necessity. And in the case of *Wild* v. *Rewards*, 1 Camp. 425, note, Mr. Justice Bayley, in the year 1809, ruled, that if a promissory note is made payable at a particular place, in an action against the maker, there is no necessity for proving that it was presented there for payment.

The case of *Sanderson* v. *Bowes*, 14 East 500, decided in the king's bench, in the year 1811, is sometimes referred to as containing a different rule of construction of the same words, when used in the body of a promissory note, from that which is given to them when used in the acceptance of a bill of exchange. But it may be *well questioned, whether this case [*147
warrants any such conclusion. That was an action on a promissory note, by the bearer, against the maker. The note, as set out in the declaration, was a promise to pay on demand, at a specified place, and there was no averment that a demand of payment had been made at the place designated. To which declaration, the defendant demurred; and the counsel, in support of the demurrer, referred to cases where the rule had been applied to acceptances on bills of exchange; but contended, that the rule did not apply to a promissory note, when the place is designated in the body of the note. Lord Ellenborough, in the course of the argument, in answer to some cases referred to by counsel, observed; those are cases where money is to be paid, or something to be done, at a particular time as well as place, therefore, the party (defendant) may readily make an averment, that he

was ready at the time and place to pay, and that the other party was not ready to receive it; but here, the time of payment depends entirely on the pleasure of the holder of the note. It is true, Lord ELLENBOROUGH did not seem to place his opinion, in the ultimate decision of the cause, upon this ground. But the other judges did not allude to the distinction taken at the bar between that case and the acceptance of a bill in like terms; but placed their opinions upon the terms of the note itself, being a promise to pay on demand, at a particular place. And there is certainly a manifest distinction between a promise to pay on demand, at a given place, and a promise to pay at a fixed time, at such place. And it is hardly to be presumed, that Lord ELLENBOROUGH intended to rest his judgment upon a distinction between a promissory note and a bill of exchange, as both he and Mr. Justice BAYLEY had, a very short time before, in the cases of *Nichols* v. *Bowes*, and *Wild* v. *Renwards*, above referred to, applied the same rule of construction to promissory notes, where the promise was contained in the body of the note. Where the promise is to pay on demand, at a particular place, there is no cause of action, until the demand is made; and the maker of the note cannot discharge himself, by an offer of payment, the note not being due until demanded.

Thus we see, that until the late decision in the House of Lords in the case of *Rowe* v. *Young*, and the act of parliament passed soon thereafter, this question was in a very unsettled state in the English courts; and without undertaking to decide between those conflicting opinions, it may be well to look at the light in which this question has been viewed in the courts in this country.

This question came before the supreme court of the state of New York, in the year 1809, in the case of *Foden* v. *Sharp*, 4 Johns. 183; and the court said, the holder of a bill of exchange need not show a demand of payment of the acceptor, any more than of the maker of a note. It is the business of the acceptor to show that he was ready at the day and place appointed, but that no one came to receive the money; and that he was always ready afterwards to pay. This case shows, that the acceptor of a bill, and the maker of a note, were considered as standing on the same footing with respect *to a demand of payment at the place designated. And in the case of *Wolcott* v. *Van Santvoord*, 17 Johns. 248, which came before the same court, in the year 1819, the same question arose. The action was against the acceptor of a bill, payable five months after date, at the Bank of Utica, and the declaration contained no averment of a demand at the Bank of Utica; and upon a demurrer to the declaration, the court gave judgment for the plaintiff. Chief Justice SPENCER, in delivering the opinion of the court, observed, that the question had been already decided in the case of *Foden* v. *Sharp*; but considering the great diversity of opinion among the judges in the English courts on the question, he took occasion critically to review the cases which had come before those courts, and shows very satisfactorily, that the weight of authority is in conformity to that decision, and the demurrer was accordingly overruled; and the law in that state for the last thirty years, has been considered as settled upon this point. And although the action was against the acceptor of a bill of exchange, it is very evident, that this circumstance had no influence upon the decision; for the court say, that in this respect the acceptor stands in the

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same relation to the payee, as the maker of a note does to the indorsee. He is the principal, and not a collateral debtor.

And in the case of *Caldwell* v. *Cassidy*, 8 Cow. 271, decided in the same court, in the year 1828, the suit was upon a promissory note, payable sixty days after date, at the Franklin Bank, in New York; and the note had not been presented nor payment demanded at the bank: the court said, this case has been already decided by this court in the case of *Wolcott* v. *Van Santvoord*. And after noticing some of the cases in the English courts, and alluding to the confusion that seemed to exist there upon the question, they add, that whatever be the rule in the courts, the rule in this court must be considered settled, that where a promissory note is made payable at a particular place, on a day certain, the holder of the note is not bound to make a demand at the time and place, by way of a condition precedent to the bringing an action against the maker. But if the maker was ready to pay at the time and place, he may plead it, as he would plead a tender, in bar of damages and costs, by bringing the money into court.

It is not deemed necessary to notice very much at length the various cases that have arisen in the American courts upon this question, but barely to refer to such as have fallen under the observation of the court; and we briefly state the point and decision thereupon, and the result will show a uniform course of adjudication, that in actions on promissory notes against the maker, in the one case, and acceptor, in the other, and the note or bill made payable at a specified time and place, it is not necessary to aver in the declaration, or prove on the trial, that a demand of payment was made, in order to maintain the action. But that if the maker or acceptor was at the place at the time designated, and was ready and offered to pay the money, it was matter of defence to be pleaded and proved on his part.

*The case of *Watkins* v. *Crouch*, in the court of appeals of Virginia, 5 Leigh 522, was a suit against the maker and indorser, jointly, [*149 as is the course, in that state, upon a promissory note like the one in suit. The note was made payable at a specified time, at the Farmers' Bank, at Richmond, and the court of appeals, in the year 1834, decided, that it was not necessary to aver and prove a presentation at the bank and demand of payment, in order to entitle the plaintiff to recover against the maker; but that it was necessary, in order to entitle him to recover against the indorser; and the president of the court went into a very elaborate consideration of the decisions of the English courts upon the question; and to show, that upon common-law principles, applicable to bonds, notes and other contracts for the payment of money, no previous demand was necessary, in order to sustain the action, but that a tender and readiness to pay, must come by way of defence, from the defendant; and that looking upon the note as commercial paper, the principles of the common law were clearly against the necessity of such demand and proof, where the time and place were specified, though it would be otherwise, where the place, but not the time, was specified; a demand in such case ought to be made; and he examined the case of *Sanderson* v. *Bowes*, to show that it turned upon that distinction, the note being payable on demand, at a specified place.

The same doctrine was held by the court of appeals of Maryland, in the case of *Bowie* v. *Duvall*, 1 Gill & Johns. 175; and the New York cases, as well as that of the *Bank of the United States* v. *Smith*, 11 Wheat. 171, are

cited with approbation, and fully adopted ; and the court put the case upon the broad ground, that when the suit is against the maker of a promissory note, payable at a specified time and place, no demand is necessary to be averred, upon the principle that the money to be paid is a debt from the defendant, that it is due, generally and universally, and will continue due, though there be a neglect on the part of the creditor to attend at the time and place, to receive or demand it. That it is matter of defence on the part of the defendant, to show that he was in attendance to pay, but that the plaintiff was not there to receive it ; which defence generally will be in bar of damages only, and not in bar of the debt.

The case of *Ruggles* v. *Patten*, 8 Mass. 480, sanctions the same rule of construction The action was on a promissory note for the payment of money, at a day and place specified ; and the defendant pleaded that he was present at the time and place, and ready and willing to pay, according to the tenor of his promises, in the second count of the declaration mentioned, and averred that the plaintiff was not then ready or present at the bank to receive payment, and did not demand the same of the defendant, as the plaintiff in his declaration had alleged : the court said, this was an immaterial issue, and no bar to an action or promise to pay money.

So also, in the state of New Jersey, the same rule is adopted. In the case of *Weed* v. *Houten*, 4 Halst. (N. J.) 189, the chief justice says : "The
*150] question is, whether in an action by the payee of *a promissory note, payable at a particular place, and not on demand, but at time, it is necessary to aver a presentment of the note and demand of payment by the holder, at that place, at the maturity of the note. And upon this question, he says, I have no hesitation in expressing my entire concurrence in the American decisions, so far at is necessary for the present occasion ; that a special averment of presentment at the place, is not necessary to the validity of the declaration, nor is proof of it necessary upon the trial. This rule, I am satisfied, is most conformable to sound reason, most conducive to public convenience, best supported by the general principles and doctrines of the law, and most assimilated to the decisions, which bear analogy more or less directly to the subject."

The same rule has been fully established by the supreme court of Tennessee, in the cases of *McNairy* v. *Bell*, and *Mulhovin* v. *Hannum*, 1 Yerg. 302, and 2 Ibid. 81, and the rule sustained and enforced, upon the same principles and course of reasoning upon which the other cases referred to have been placed. And no case, in an American court, has fallen under our notice, where a contrary doctrine has been asserted and maintained. And it is to be observed, that most of the cases which have arisen in this country, where this question has been drawn into discussion, were upon promissory notes, where the place of payment was, of course, in the body of the note.

After such a uniform course of decisions, for at least thirty years, it would be inexpedient to change the rule, even if the grounds upon which it was originally established might be questionable ; which, however, we do not mean to intimate. It is of the utmost importance, that all rules relating to commercial law should be stable and uniform. They are adopted for practical purposes, to regulate the course of business in commercial transac-

tions ; and the rule here established is well calculated for the convenience and safety of all parties.

The place of payment, in a promissory note, or in an acceptance of a bill of exchange, is always matter of arrangement between the parties, for their mutual accommodation, and may be stipulated in any manner that may best suit their convenience. And when a note or bill is made payable at a bank, as is generally the case, it is well known, that according to the usual course of business, the note or bill is lodged at the bank for collection ; and if the maker or acceptor calls to take it up, when it falls due, it will be delivered to him, and the business is closed. But should he not find his note or bill at the bank, he can deposit his money, to meet the note, when presented, and should he be afterwards prosecuted, he would be exonerated from all costs and damages, upon proving such tender and deposit. Or should the note or bill be made payable at some place, other than a bank, and no deposit could be made, or he should choose to retain his money in his own possession, an offer to pay at the time and place, would protect him against interest and costs, on bringing the money into court ; so that no practical inconvenience or hazard can result from the establishment *of this rule, to the maker or acceptor. But on the other hand, if a [*151
presentment of the note and demand of payment at the time and place, are indispensable to the right of action, the holder might hazard the entire loss of his whole debt.

The next point presents the question as to the effect and operation of the proceedings under the attachment law of Alabama, as disclosed by the plea *puis darrien continuance*. The plea shows, that the proceedings on the attachment were instituted after the commencement of this suit. The jurisdiction of the district court of the United States, and the right of the plaintiff to prosecute his suit in that court, having attached, that right could not be arrested or taken away by any proceedings in another court. This would produce a collision in the jurisdiction of courts, that would extremely embarrass the administration of justice. If the attachment had been conducted to a conclusion, and the money recovered of the defendant, before the commencement of the present suit, there can be no doubt, that it might have been set up as a payment upon the note in question. And if the defendant would have been protected *pro tanto*, under a recovery had by virtue of the attachment, and could have pleaded such recovery, in bar, the same principle would support a plea in abatement, of an attachment pending prior to the commencement of the present suit. The attachment of the debt, in such case, in the hands of the defendant, would fix it there, in favor of the attaching-creditor, and the defendant could not afterwards pay it over to the plaintiff. The attaching-creditor would, in such case, acquire a lien upon the debt, binding upon the defendant, and which the courts of all other governments, if they recognise such proceedings at all, would not fail to regard. If this doctrine be well founded, the priority of suit will determine the right. The rule must be reciprocal ; and where the suit in one court is commenced prior to the institution of proceedings under attachment in another court, such proceedings cannot arrest the suit ; and the maxim *qui prior est in tempore, portior est in jure*, must govern the case. This is the doctrine of this court in the case of *Renner* v. *Marshall*, 1 Wheat 216, and also in the case of *Beaston* v. *Farmers' Bank of Delaware*,

12 Pet. 102 ; and is in conformity with the rule that prevails in other courts in this country, as well as in the English courts ; it is essential to the protection of the rights of the garnishee ; and will avoid all collisions in the proceedings of different courts, having the same subject-matter before them. 5 Johns. 100 ; 9 Ibid. 221, and the cases there cited. In the case now before the court, the suit was commenced prior to the institution of proceedings under the attachment. The plea was, therefore, bad, and the demurrer properly sustained.

The remaining inquiry is, whether the judgment by *nil dicit*, for the $675, was properly given, after overruling the plea *puis darrien continuance*. The argument at the bar was, that as the attachment went only to a part of the debt, the case stood, as to the residue, upon the original plea of payment.

*152] The facts disclosed in the plea *puis *darrien continuance*, do not raise the question intended to be presented ; for the defence set up in the plea *puis darrien continuance* goes to the whole cause of action, and leaves no part unanswered. And it may well be questioned, whether such pleading ought to be sanctioned, even if the plea *puis darrien continuance* went only to a part of the cause of action. It would introduce great confusion on the record, in the state of the pleadings.

It is laid down in Bacon's Abridgment (6 Bac. Abr. by Gwillim, 377), that if, after a plea in bar, the defendant pleads a plea *puis darrien continuance*, this is a waiver of his bar ; and no advantage shall be taken of anything in the bar. And it is added, that it seems dangerous to plead any matter *puis darrien continuance*, unless you be well advised, because, if that matter be determined against you, it is a confession of the matter in issue. This rule was adopted in *Kimball* v. *Huntington*, 10 Wend. 679. The court say, the plea *puis darrien continuance* waived all previous pleas, and on the record, the cause of action was admitted, to the same extent as if no other defence had been urged than that contained in this plea.

In the case now before the court, the oath of the defendant, taken in the proceedings on the attachment, is made a part of the plea *puis darrien continuance*. And he admits that he executed the note on which this suit is brought, for $4880. That he had paid on the note $372.34 ; and that the remainder of the note was due by him to the plaintiff. And if the $4204 attached could not be deducted, the whole debt, according to his own admission, was due, except the $372.34, set up by him to have been paid ; and the plaintiff remits upon the record $351.28, and the judgment will stand within a few dollars for the amount admitted by the defendant to be due. And this difference must arise from some error in the mere calculation, and may easily be corrected. The judgment of the court below is accordingly affirmed, with costs.

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

*The Lessee of SAMUEL REED, Plaintiff in error, *v.* WILLIAM MARSH, Defendant in error.

Error to state courts.

The certificate of the clerk of the court, that a motion was made for a new trial, and reasons and certain papers filed, on which the motion was founded, which are on the files of the court, is not a part of the record; nor do the reasons on the files of the court become a part of the record, by such certificate.

A writ of error, under the 25th section of the judiciary act, will not lie to a state court, in a case in which the proceedings of the court which the writ of error seeks to revise, appears from such a certificate by the clerk of the state court.

ERROR to the Supreme Court of Ohio, Scioto county. This was an action of ejectment, brought in the supreme court of the state of Ohio, by the plaintiff in error, against the defendant in error. The declaration, common consent rule, and plea of not guilty, were in the usual form, according to the practice in Ohio. Upon these pleadings, the case was tried in the supreme court for the county of Scioto, and a general verdict of not guilty was found for the defendant, Marsh. No bill of exceptions prayed for by either party to the charge of the court to the jury, nor was the evidence given to the jury made a part of the record, by special verdict, agreed statement of facts, bill of exceptions, or any other form. After the rendition of the verdict, the plaintiff submitted a motion for a new trial; and on the following day, filed his reasons with the clerk of the court. The court reserved the motion for decision by the court *in banc;* and the motion was, after argument and consideration, overruled.

The reasons for a new trial exhibited the title claimed by the plaintiff in the ejectment, under the ordinance of congress and acts of congress relative to lands in the territory north-west of the Ohio; and alleged, that by the construction of those acts which was asserted by the plaintiff, the land in controversy belonged to the plaintiff; and by a misconstruction of the statutes by the court, on the trial of the cause, the title of the defendant had been sustained. The motion stated, that the court had refused to charge the jury upon the matters exhibited by the plaintiff to sustain his title under the acts of congress, and upon the construction contended for in favor of the title set up by him. Other reasons for a new trial were also stated, founded on an allegation that the verdict was contrary to evidence; and that certain evidence was illegally admitted.

The reasons filed by the plaintiff for a new trial, were incorporated into the transcript of the record, which was certified up to this court. Appended to the record, were copies of the plaintiff's patent; copies of the surveyor's field-notes of certain surveys made for the United States; copies of maps and descriptions of the land in controversy, *and of the surrounding district of country; and copies of certain acts and ordinances of congress, which the clerk certified were referred to in the plaintiff's fifth reason for a new trial, as the same remained on the files of the court. [*154

Vinton, for the defendant in error, moved to dismiss the cause, for want of jurisdiction. It was a case removed to this court from the supreme court of Ohio, under the 25th section of the judiciary act; and it was not before the court on any of the principles which had been sustained and decided

upon that section of the law. The only part of the proceedings in the case, in the state court, on which the jurisdiction of this court is asserted to rest, is the refusal of the court to grant a new trial, and for refusing certain instructions which were asked of the court, upon the construction of acts of congress in relation to lands on the north and west of the river Ohio. These instructions do not appear in the record of the cause, and the evidence that they were before the court, on the motion for a new trial, is the certificate of the clerk of the court. The clerk has certified that they remain on the files of the court. Does this certificate make them what he certifies them to be, a part of the record? Certainly not—nothing can be properly certified as part of the record but what appears such by the record itself.

If a party is desirous to bring his case up for revision, upon questions of law, the proper course is to take a bill of exceptions, or have an agreed case on the record. Questions analogous to this have been brought before this court, and have also been decided in the courts of Massachusetts. Cited, *Williams* v. *Norris*, 12 Wheat. 118; *Fisher* v. *Cockerell*, 5 Pet. 253; *McFadden* v. *Otis*, 6 Mass. 323; 13 Ibid. 50. As to the cases in which this court will entertain jurisdiction of cases under the 25th section of the judiciary act of 1789: cited, *Crowell* v. *Randell*, 10 Pet. 368, and the cases there referred to.

Mason, against the motion, stated, that if the matters certified by the clerk were not regularly before the court, the plaintiff in error had no case for the consideration of this court. By the certificate of the clerk, it appeared, that on the motion for a new trial, certain acts of congress were before the court; and the title of the plaintiff rested upon their just construction. In the state of Ohio, there was no law which gave a writ of error to the supreme court of the state; and no case can be brought from that court, but in the manner in which this case is presented.

Vinton, in reply, insisted, that the record did not show that the acts of congress were before the court on the trial of the cause; or that the court in their decision had done anything which could give the supreme court of the United States jurisdiction of the *cause: an application for a new trial, is an appeal to the discretion of the court, and the decision of the court upon it, is never the subject of a writ of error.

*155]

Taney, Ch. J., delivered the opinion of the court.—This case is brought before the court by a writ of error to the supreme court of the state of Ohio, sitting for the county of Scioto, under the 25th section of the judiciary act of 1789. A motion is now made to dismiss the writ, upon the ground, that the case, as presented by the record, is not one in which this court have the right to revise, by writ of error, the judgment of a state court.

It appears from the court, that an action of ejectment for a certain tract of land was brought by the plaintiff against the defendant, and finally tried and decided in the supreme court of the state, sitting for Scioto county. The declaration is in the usual form, to which the plea of not guilty was entered; and upon the trial, the jury found a general verdict for the defendant, upon which the court entered judgment in his favor. There was no bill of exceptions taken in the case; and according to the judiciary system established in Ohio, a bill of exceptions could not, at that time, be regularly

taken, when the trial was had in the supreme court of the state. That court consists of four judges, two of whom are authorized to hold the court in the different counties; but at the close of each circuit, the four judges are required to meet *in banc*, at the seat of the government, and decide all questions reserved for their consideration on the circuit: and when the decision is made *in banc*, each cause is certified to the county from which it was brought, and the judgment is there entered.

In the case before us, a new trial was moved for, and among other reasons filed in support of the motion, is the refusal of the court to give certain instructions to the jury, which were requested by the counsel for the plaintiff; and we gather from the record, though not very distinctly, that this motion was reserved and heard *in banc*, and there overruled. The reasons assigned by the plaintiff for a new trial, and the title papers to which they refer, have been transmitted and certified to this court, by the clerk, together with the record of the judgment. It is, however, unnecessary to mention them particularly; because if the points set forth in the motion were raised at the trial and decided by the court, then it is very clear, that the construction of certain statutes of the United States was drawn in question, and the decision in the state court was against the title claimed under them by the plaintiff. But the difficulty is, whether these facts are sufficiently authenticated by the record. Can we receive the certificate of the clerk, that certain papers were offered in evidence, and the statement of counsel, upon a motion for a new trial, that certain instructions were refused by the court, as sufficient evidence of the facts they set forth; and proceed, upon that ground, to take jurisdiction and revise the judgment of the state court? We think not. In the case of the lessee of *Fisher* v. *Cockerell*, *5 Pet. 254, the court said, "In cases at common law, the course of this court has been uniform, not to consider any paper as a part of [*156 the record which is not made so by the pleadings, or by some opinion of the court referring to it. This rule is common to all courts exercising appellate jurisdiction, according to the course of the common law. The appellate court cannot know what evidence was given to the jury, unless it is spread on the record, in a proper legal manner. The unauthorized certificate of the clerk, that any document was read, or any evidence given to the jury, cannot make that document or that evidence a part of the record, so as to bring it to the cognisance of this court."

We think the doctrine in that case is entirely correct. The certificate of the clerk cannot make the papers above mentioned a part of the record; nor can the statement of counsel, on the motion for a new trial, authorize us to say, that certain questions were raised, and certain opinions given upon such evidence. It does not follow, that the court admitted, that the opinions imputed to them were given at the trial, because they have not disavowed them, in overruling the motion. On the contrary, it might sometimes happen, that such a motion would be overruled, because the court had not given the instruction mentioned in the motion. There is, therefore, nothing in the record that could warrant us in assuming, that the papers referred to were offered in evidence; nor that the opinions ascribed to the court were actually given. These facts should, in some mode or other, be authenticated by the court itself. This court have constantly adhered to this rule, and the cases upon the subject were carefully reviewed and considered, in the

case of *Crowell* v. *Randell*, 10 Pet. 368; and the rules there stated must be considered as too firmly settled to be shaken. The writ of error in this case must, therefore, be dismissed.

This case came on to be heard, on the transcript of the record from the supreme court of the state of Ohio, in and for the county of Scioto, and was argued by counsel: On consideration whereof, it is ordered and adjudged by this court, that the writ of error be and the same is hereby dismissed for want of jurisdiction.

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*157] The Ocean Insurance Company, Plaintiffs in error, *v.* William Polleys, Defendant in error.

Error to state courts.—Illegal contracts.

The settled construction given by the supreme court to the 25th section of the judiciary act of 1789, is, that to bring a case within the reach of that section, it must appear on the face of the record of the state court, either by express terms, or by clear and necessary intendment, that the question of the construction of a clause of a statute of the United States, did actually arise in the state court (not that it might have arisen or have been applicable to the case), and that the question was actually decided; not that it might have been decided by the state court against the title, right, privilege or exemption set up by the party. If, therefore, the decision made by the state court, upon the face of the record, is entirely consistent with the construction of the statute contended for by the party appellant, no case is made out for the exercise of the appellate jurisdiction of the supreme court.

In the exercise of the appellate jurisdiction of the supreme court on the decisions of state courts, the supreme court is not at liberty to resort to forced inferences and conjectural reasonings, or possible, or even probable, suppositions of the points raised and actually decided by those courts. The court must see, plainly, that the decision was either directly made of some matter within the purview of the 25th section of the act of 1789; or that the decision could not have been such as it was, without necessarily involving such matter.

It is to the record, and to the record alone, that the supreme court can resort, to ascertain its appellate jurisdiction, in cases decided in the supreme or superior court of a state.

A policy of insurance on a vessel, sailing under a register which has been obtained without conforming to the requisitions of the laws of the United States relative to the registry and enrolling of vessels of the United States, is not void; and an action may be maintained on such a policy, to recover a loss sustained by the assured. The policy may not have been designed to aid, assist or advance any unlawful purpose; it is a lawful contract in itself, and only remotely connected with the use of the certificate of registry. There are cases in which a contract may be valid, notwithstanding it is remotely connected with an independent illegal transaction; which, however, it is not designed to aid or promote. Suppose, a vessel had been actually forfeited, for some antecedent illegal act, are all the contracts of her future employment void, although there is no illegal object in view, and the forfeiture may never be enforced? [1]

Error to the Supreme Judicial Court of the state of Maine. The original action was *assumpsit* on a policy of insurance, dated July 17th, 1833, upon the schooner Mary, owned by said Polleys, for the term of one year, commencing on the 11th of said July: sum insured $3000. The schooner, during the said year, on June 10th, 1834, was totally lost. The general issue was pleaded.

It appeared on the trial, that a sloop was built in 1816, and enrolled by the name of the Sophronia, and was again enrolled in the custom-house, in Portland, by the same name, March 24th, 1822. That the schooner Mary

[1] See notes to Armstrong *v.* Toler, 11 Wheat. 258.

was built upon the keel, floor timbers and naval timbers of the said sloop Sophronia, and the size enlarged nearly twelve tons; that the name of the Mary given to her, after being so enlarged, and that this was known to the defendants, at the time of executing the policy; also that the certificate of Mark Leavit was procured by said Polleys, and presented to the custom-house, to obtain the enrolment of the schooner Mary, without any fraudulent intent to deceive or defraud, but with a fair and honest intention, as the jury believed. But that the enrolment of the sloop *Sophronia [*158 was not first surrendered and delivered up at the custom-house, before the issuing of the enrolment of the Mary, which was on the 3d day of June 1833.

The counsel for the original defendant, on the trial, objected to the admission in evidence of the enrolment of June 3d, 1833, as contrary to the laws of the United States; but the judge overruled the objection, and it was admitted: and the counsel further insisted, that the schooner, on the voyage in which she was lost, was sailing under circumstances rendering her liable to forfeiture for a violation of the laws of the United States, and that, therefore, a policy on a vessel pursuing such a voyage was not valid, or legal and binding; but the judge also overruled this objection, as insufficient to bar the action. The cause was, thereupon, submitted to the jury, who returned a verdict for the original plaintiff. The defendant prosecuted this writ of error.

The case was argued by *Fletcher*, for the plaintiffs; and by *Webster*, for the defendant.

For the plaintiff, the following points were submitted.

1. That the certificate of enrolment of the schooner named in the policy of insurance, enrolled by the name of The Mary, was procured by said Polleys but a short time before the commencement of the year for which she was insured, knowingly, in direct violation of the statute of the United States then in full force; of which statute he was bound to take notice.

2. That the enrolment of said schooner, thus procured by said Polleys, by a new name, was entirely illegal, and wholly null and void.

3. That said Polleys, by not delivering up the original certificate of registry, incurred a penalty of $500; and by being registered by a new name, the schooner lost her national character, and could no longer be deemed a ship or vessel of the United States.

4. That said certificate of enrolment was knowingly used for the schooner on the voyage upon which she was lost, during the year for which she was insured, she not being then actually entitled to the benefit thereof. That such use of said enrolment was illegal, and a direct violation of the 27th section of the act aforesaid; and the schooner was thereby rendered liable to forfeiture.

5. That a policy of insurance on a vessel prosecuting a voyage under a false and unlawful enrolment and certificate thereof, and in violation of a statute of the United States, in the manner aforesaid, is not a binding contract; and cannot be enforced in a court of law.

6. That the said certificate of registry being a void, useless and illegal document, the schooner, while sailing under its pretended sanction, was not

seaworthy; and that the implied warranty of seaworthiness was on that account violated.

*159] *Fletcher, for the plaintiffs in error, said, that on the question whether this court had a right to entertain jurisdiction of this writ of error to the supreme judicial court of Maine, all the cases were collected in the opinion of this court, in the case of *Crowell* v. *Randell*, 10 Pet. 368. To give the court jurisdiction, under the 25th section of the judiciary act of 1789, by which a writ of error is authorized to the supreme court of the state, the plaintiff must claim some privilege or exemption under an act of congress, which has been denied to him by a misconstruction of the act. There is no necessity that the claim shall appear on the face of the record; if it appear that, unless by a misconstruction of the act, the court could not have made the decision, or given the judgment complained of. The record, in the case before the court, shows more than is required by the decisions of this court. The counsel for the defendants in the state court, now the plaintiffs in error, objected to the admission in evidence of the enrolment of the vessel insured, as the enrolment was contrary to the laws of the United States, and the vessel was liable to forfeiture. A vessel sailing in violation of the law of the United States, could not be insured by a valid policy. The record shows that this position was denied, and thus the jurisdiction exists in this court.

The law applicable to the facts of this case is clear and explicit. By the act of congress of December 31st, 1792 (1 U. S. Stat. 287), when a ship or vessel is altered or increased in burden, or changed from one denomination to another, she must be registered anew, but by the same name, and the original register must be delivered up; a penalty of $500 is imposed for the violation of this provision of the law: and by the 27th section of the act, using a register, falsely or fraudulently obtained, if used knowingly, forfeits the vessel. The act of February 8th, 1792, puts coasting vessels under the same regulations as those provided by the act of December 31st, 1792, "concerning the registering and recording of ships and vessels." By a circular letter from the secretary of the treasury, providing for the execution of these laws, the collector is prohibited licensing, or enrolling or registering, a ship or vessel, unless her previous register is delivered up.

The registering of vessels has been required by all commercial nations. The object of those regulations is the encouragement of ship-building, and to prevent frauds on individuals. 3 Kent's Com. 139. The conduct of the defendant in error was contrary to the policy of the law, and in violation of it. No justification is offered for this act; and it is certain, that if the collector had known of the proceeding, he would not have given the register. By the register, a character was given to the vessel to which she was not entitled. She was, in fact, liable for foreign duties. What are the legal consequences of such proceeding? These are stated in the points submitted to the court. The schooner was entitled to a register as the Sophronia, not as the Mary; the register *originally granted to her *160] should have been delivered up to be cancelled, and when registered anew, her enlarged capacity, and the other alterations which had been made in her, should have been stated. The defendant in error was answerable for those violations of the law; and he cannot be permitted to recover on

a contract growing out of this conduct. There is a penalty of $500 imposed for these violations of the law. Imposing a penalty, is equivalent to an express prohibition of the act for which the penalty is imposed. Knowingly using a false register, subjects the vessel to forfeiture. Knowing, as meant by the statutes, is a knowledge of the facts, and does not require a knowledge of the law. In a former act of congress, "fraudulently using" a false register, was the language of the statute; but the act of 1792 contains the term "knowingly." Cited, Carth. 252; 1 Kent's Com. 467; 1 Binn. 10; 5 Barn. & Ald. 335.

The contract, not being binding, cannot be enforced in a court of law. 1 Kent's Com. 291. The Mary was constantly violating the laws of the United States. Every voyage was such a violation, and no policy of insurance could protect her in such proceeding. 12 East 303; 1 Bos. & Pul. 272; 1 Marsh. on Ins. 52; 6 Mass. 101; 1 Emerigon 542, ch. 12, 14; 2 Bos. & Pul. 35; 2 Doug. 467; 7 T. R. 187; 1 Taunt. 241; *The Julia*, 8 Cranch 181; *The Aurora*, Ibid. 203; *The Hiram*, 1 Wheat. 440; 15 Johns. 25; 12 East 200; 17 Mass. 258; 2 Bos. & Pul. 370; 1 Maule & Selw. 593. The implied warranty of seaworthiness was violated by the vessel sailing with false papers. The loss from another cause has no influence on this principle. The vessel was insured as the Mary, when her real name was Sophronia. This is a breach of warranty. Cited, 6 Mass. 220; 7 T. R. 105; 4 Taunt. 373; 3 Kent's Com. 257; Marsh. on Ins. 221.

Webster, for the defendants in error, objected to the jurisdiction of the court. It does not appear, that any statute of the United States was misunderstood. Suppose, the court had said the vessel is forfeited, but the insurance is valid; does this give jurisdiction? The enrolment, although imperfectly made, was in evidence. Has the superior court of Maine decided on the effect of an act of congress? This does not appear, because one of the parties has a defence connected with the statute. It does not give this court jurisdiction to revise the decision of the court before which the defence was made. If the court have decided wrong on the facts, yet it does not appear, the statute has been misinterpreted.

The enrolment, although irregularly obtained, was a legal paper. The parties could be visited by a penalty, but this was not a forfeiture of the vessel. To maintain, that a contract made for the protection of the property of the owner of such a vessel is void, it must *be shown that, by the manner of obtaining the enrolment, the party was deprived [*161 of any and all property in the vessel; or that the contract was made in aid of an illegal act. The case agreed exempts the assured from all fraud. The contract of insurance was legal. It had nothing to do with the act of the owner in obtaining an enrolment. It stood separate and apart from all the former transactions. It was not like a contract of insurance on a vessel carrying an enemy's license, where the license makes the property enemies' property. In reply to the cases cited by the counsel for the plaintiff in error, Mr. Webster said, they all established that the contract was itself unlawful. In such a case, a court of law will give no assistance to enforce such an agreement.

But the acts of congress did not make the forfeiture of the vessel, under

such circumstances, absolute, even if any forfeiture could be enforced. Proceedings against her were necessary. The government could alone enforce the law, and until this was done, the sailing of the vessel was lawful. The power to remit for any penalty or forfeiture, under such circumstances, is given by the statute. Thus, until the government had fully manifested its claim, and had refused a remission, no one could allege anything against the vessel. The Mary was a registered vessel of the United States, and had a right to protection as such. If a revolt had been committed on board of her, it would have been punished. If she had been attacked by a foreign military force, the government of the United States would have interfered. Cited, 13 Pick. 518; 15 East 364; 4 Taunt. 589; 13 Mass. 589; 6 Greenl. 68.

Story, Justice, delivered the opinion of the court.—This is a writ of error to the supreme judicial court of the state of Maine. The original action was *assumpsit* on a policy of insurance, dated the 17th of June 1833, whereby the Ocean Insurance Company insured $3000 on the schooner Mary, owned by Polleys, at sea or in port, for the term of one year, commencing the risk on the 11th of July 1833, at noon, and ending the 11th of July 1834, at noon. The schooner was totally lost by the perils of the sea, on the 10th of June 1834, while the policy was in force. At the trial, on the general issue, it appeared in evidence, that a sloop was built in 1816, and enrolled by the name of Sophronia, and was again enrolled in the custom-house in Portland, by the same name, on the 24th of March 1822. The schooner Mary was built upon the keel, floor timbers, and naval timbers of the said sloop Sophronia, the size was enlarged nearly twelve tons, and the name of Mary was given to her, after being so enlarged; and this was known to the insurance company at the time of executing the policy. A certificate of one Mark Leavit was procured by Polleys, and presented to the custom-house to obtain an enrolment of the schooner Mary, without any fraudulent intent
*162] to deceive or defraud, but with *fair and honest intentions, as the jury believed. But the enrolment of the Sophronia was not first surrendered and delivered up at the custom-house, before the issuing of the enrolment of the Mary, on the 3d of June 1833. Upon these facts, which appear upon the bill of exceptions taken at the trial, the counsel for the insurance company objected to the admission in evidence of the said enrolment of the Mary of the 3d of June of 1833, as contrary to the laws of the United States; but the judge who sat at the trial overruled the objection, and the enrolment was admitted. The same counsel further insisted, that the said schooner, on the voyage on which she was lost, was sailing under circumstances rendering her liable to forfeiture for a violation of the laws of the United States; and that, therefore, a policy on the vessel pursuing such a voyage, was not valid, or legal and binding. But the said judge also overruled this objection as insufficient to bar the action. Other points arose at the trial, upon which, however, it is unnecessary for us to dwell; because they are in no shape cognisable by this court in the exercise of its appellate jurisdiction over the judgments and decrees of the state courts, under the 25th section of the judiciary act of 1789, ch. 20. The jury found a verdict for the plaintiff (Polleys), which was confirmed by the whole court; and judgment passed thereon, accordingly, for him.

Two questions have been argued before us. The first is, whether, upon the face of the record, any case is made out for the exercise of the appellate jurisdiction of this court, under the 25th section of the act of 1789, ch. 20? The next is, whether the state court has in fact misconstrued the laws of the United States, upon the points in controversy at the trial, to the prejudice of the insurance company?

In our judgment, it is wholly unnecessary to consider the last question, because we are of opinion, that upon the face of the record, no case is shown for the exercise of the appellate jurisdiction of this court. The only clause of the 25th section of the judiciary act of 1789, ch. 20, conferring this appellate jurisdiction, which is applicable to the present case, is that where there is drawn in question in the state court the construction of a clause of a statute of the United States, and the decision of the state court is against the title, right, privilege or exemption set up or claimed by either party, under that clause of the statute; the settled construction of this court is, that to bring any case within the reach of the 25th section, it must appear upon the face of the record of the state court, either by express terms, or by clear and necessary intendment, that the question did actually arise in the state court, not that it might have arisen, or have been applicable to the case; and that the question was actually decided, not that it might have been decided by the state court, against the title, right, or privilege, or exemption set up by the party. If, therefore, the decision made by the state court is, upon the face of this record, entirely consistent with the construction of the statute contended for by the party appellant, no case is made out for the exercise of the appellate jurisdiction of this court.

*Let us now apply this doctrine to the circumstances of the present case. The first objection was to the admission of the enrolment [*163 of the Mary as evidence to the jury, upon the ground, that it was "contrary to the laws of the United States;" meaning, undoubtedly, that it was obtained contrary to the requirement of the act of congress concerning the registering and recording of ships or vessels, passed on the 31st of December, 1792, ch. 45. That act, in the 14th section, provides, among other things, that when any ship or vessel which shall have been registered pursuant to the act, shall be altered in form or burden, by being lengthened or built upon, or from one denomination to another, by the mode or method of rigging or fitting, the ship or vessel shall be registered anew, by her former name, otherwise she shall cease to be deemed a ship or vessel of the United States: and upon her being registered anew, the former certificate of registry is to be delivered up to the collector; and if not so delivered up, except where it is destroyed or lost, or unintentionally mislaid, the owner is made liable to the forfeiture of $500. Now, it is observable, that the present policy contains no warranty or representation of the national character of the Mary; and therefore, the only assignable reason for offering the new enrolment (as it is called), meaning the new certificate of registry, in evidence was, to establish the ownership of the vessel to be in Polleys. For this purpose, it was clearly admissible, however irregularly or wrongfully this enrolment may have been obtained at the custom-house. The court, might, therefore, very properly have admitted the paper in evidence for this purpose, and, for aught that appears on the record, actually did so, without in the slightest degree contesting that it had been obtained con-

trary to the laws of the United States. In this view, as a matter of evidence proper for the consideration of the jury on the question of ownership, it is clear, that the decision does not fall within the appellate jurisdiction of this court, under the 25th section of the act of 1789, already referred to.

Then, as to the other point. The objection made by the counsel for the insurance company was, that the schooner (Mary), on the voyage on which she was lost, was sailing under circumstances rendering her liable to forfeiture for a violation of the laws of the United States; and that, therefore, a policy on a vessel pursuing such a voyage was not valid, or legal and binding. But the judge also overruled this objection, as insufficient to bar the action. The objection was founded on the 27th section of the ship registry act of 1792, ch. 45, above referred to; which declares, that if any certificate of registry or record shall be fraudulently or knowingly used for any ship or vessel, not then actually entitled to the benefit thereof, according to the true intent of this act, such ship or vessel shall be forfeited to the United States, with her tackle, apparel and furniture. The objection, then, as insisted on by the counsel for the insurance company, involved two distinct propositions. The first was, that the schooner was sailing on the voyage, under circumstances which rendered her liable to forfeiture. The second was, that the policy on *her was, therefore, void. Now, the
*164] first might have been most fully admitted by the court, and yet the second have been denied, upon the ground that the policy was a lawful contract in itself, and only remotely connected with the illegal use of the certificate of registry; and in no respect designed to aid, assist or advance any such illegal purpose. We all know, that there are cases where a contract may be valid, notwithstanding it is remotely connected with an independent illegal transaction, which, however, it is not designed to aid or promote. The case of *Armstrong* v. *Toler*, 11 Wheat. 258, presented a question of this sort, and was decided in favor of such a contract. But cases might easily be put, where the doctrine itself would admit of a far more simple and easy illustration. Suppose, the Mary had been repaired in port, and the shipwrights had known the circumstances under which she had obtained the new certificate of registry; would they, in consequence of such knowledge alone, have lost their title to recover for their own work and labor? Suppose, a vessel had been actually forfeited by some antecedent illegal act, are all contracts for her future employment void; although there is no illegal object in view, and the forfeiture may never be enforced?

In order to bring the present case within the jurisdiction of this court, it must clearly appear on the face of the record, that the state court did decide against the construction of the laws of the United States, insisted on by the insurance company; for if the court did decide in favor of that construction, and yet held the policy valid upon other grounds, consistently with that decision, we have nothing to do with the latter point, and have no right to inquire, whether it was a just application of the general principles of commercial law, or not. Now, so far is it from appearing on the face of the record, that the state court decided against the construction of the laws of the United States, insisted on by the insurance company; the contrary may be fairly inferred, from the language of the court in overruling the objection. The objection was overruled as "insufficient to bar the action;" that is, the action on the policy was still maintainable, notwith-

standing the Mary "was sailing under circumstances rendering her liable to forfeiture for a violation of the laws" of the United States.

In the exercise of the appellate jurisdiction of this court over the decisions of state courts, we are not at liberty to resort to forced inferences and conjectural reasonings, or possible or even probable suppositions of the points raised and actually decided by those courts. We must see plainly that the decision was either directly made of some matter within the purview of the 25th section of the act of 1789; or that the decision could not have been what it was, without necessarily involving such matter. In the present case, we can arrive, upon the record, at no such conclusion. The consequence is, that the cause must be dismissed for want of jurisdiction.

We have been furnished with a copy of the opinion of the learned judges in the state court in this very case; and we are gratified in *finding [*165 that it abundantly confirms the deductions which we have drawn from the record. But it is proper to add, that that opinion, if it had been otherwise, could not have any influence upon our present opinion; since it constitutes no part of the record; and it is to the record, and the record only, that we can resort to ascertain our appellate jurisdiction in cases of this sort. The writ of error is, accordingly, dismissed, for want of jurisdiction.

Writ of error dismissed.

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*John Walker, Appellant, *v.* George Parker and others, [*166
Appellees.

Construction of will.

A testator devised to his wife one-third of his personal estate for ever, for her own proper use and benefit, and also one-third of all his real estate, during her lifetime, and in the event of her death, all the right in real property bequeathed to her should be, and by the will was, declared to be vested in his infant son; the testator then proceeded to devise sundry lots and houses to his mother, his sisters, his brothers, separately, and his son; these were given to the respective devisees "as their property for ever;" he then devised the balance of his real estate to his infant son, "for ever," believed to be certain lots specified in the will: *Held*, that the wife took, under the will, one-third of all the real estate of the testator, during her life, and that his son took a fee-simple in one-third of the property given to the brothers and sisters of the testator, subject to the devise to his mother, and a fee-simple in all the real estate, specifically devised to him, subject to the devise of one-third to his mother, during her life.

The devisee of one of the lots devised to him for ever, which the court held was subject to the right to one-third in the wife of the devisor, and one-third after her decease, in fee to the son of the devisor, cannot by a proceeding in chancery, compel a sale of the property devised, or a partition; without the court are satisfied it would be for the benefit of the infant son to make such sale, and without the consent of all the other parties interested in the property.

Appeal from the Circuit Court of the District of Columbia, and county of Washington. The appellant, John Walker, filed a bill in the circuit court of the county of Washington, stating that James Walker, late of Washington, by his last will and testament, had bequeathed to him and to his then wife, Ann Sophia Walker, since intermarried with George Parker, one-third of his real estate, during her life, and in the event of her death, all the right bequeathed to her was declared to be vested in his infant son, James Walker. James Walker, the son, claimed the right in fee-simple, after her

death, of the portion of the estate devised by the testator to his wife. The testator, in a subsequent part of his will, bequeathed other parts of his estate in fee to other persons; and among them, to his said infant son, James Walker. The bill then stated the particular estates devised by the will to the complainant himself, and the others of the family of the testator; and alleged the same to have been devised to them in fee-simple, free and clear of any right of the widow of the testator, or of his son. Ann Sophia Parker, who was the wife of the testator, James Walker, and her present husband, George Parker, the bill stated, insisted, upon the right of the said Ann to one-third of the lots and houses bequeathed by the will; and refused to permit the complainant to dispose of the same, and claimed a right to exact one-third of the rents thereof, and to have a right to rent the same as they pleased. The bill proceeded to state, that the complainant was advised, that Ann Sophia Parker and her husband, had no right in the lots held by him under the will of James Walker, nor had any other person a right to them to his prejudice; but should the court think differently, *the bill
*167] stated, that the property could not be divided without great injury; and that the complainant was desirous to sell the lots and property devised to him, and those under whom he held. The complainant stated, that he was desirous to have the exclusive control of his own property; and that if the said Ann Sophia had a right of dower in the property, he asked that the same be assigned to her; and that the rights of the minor be assigned: and if this could not be done, that the property be sold, and out of the proceeds of the sale, an equivalent be allowed for their interest therein. The bill asked, that Ann Sophia Parker, and the infant son of the testator, and his testamentary guardian, be enjoined from setting up any claim to the property held by him, or to which he was entitled, under the will of James Walker; and that he might be quieted in his possession and enjoyment of the premises. The bill also asked for further and general relief.

The will of James Walker was made on the 17th day of September 1832, and admitted to probate on the 25th day of September, in the same year. The material parts of the will were the following: "I bequeath and give to my dearly-beloved wife, Ann Sophia Walker, one-third of the whole of my personal estate, for ever, for her own proper use and benefit; and also one-third of all my real estate, during her lifetime; and in the event of her death, all the right in real property, hereby bequeathed to her, shall be, and is hereby declared to be, vested in my dear and infant son, James Walker. I bequeath and give to my dearly-beloved brother, John Walker, for ever, all of lot No. 6, in square 106, with the two-story brick house, back building, and all appurtenances thereto belonging. I bequeath and give to my dearly-beloved brother, Lewis Walker, for ever, lots 23, 24 and 25, in square No. 106, together with a two-story brick building, with a basement story, back building, and all appurtenances thereto belonging, and erected on one or more of said lots. I bequeath and give to my dearly-beloved brother, Henry Walker, for ever, lot No. 6, in square 403, together with the improvements thereon erected, and appurtenances thereto belonging. I bequeath and give to my dearly-beloved sister, Margaret Peck, lots No. 21, 22, 26 and 27, in square No. 106, together with a two-story frame house erected on lot No. 27, as her property for ever. I bequeath and give to my dearly-beloved sister, Louisa Ballard, for ever, lot No. 4, in square No. 432, together with

the three-story brick house erected thereon, and all the appurtenances thereto belonging. *I bequeath and give to my dearly-beloved sister, Sarah McCallion, part of lot No. 8, in square No. 74, together with the frame house erected thereon, as her property for ever. I bequeath and give to my dear and infant son, James Walker, lot No. 22, in square No. 352, together with two two-story brick houses, and other buildings thereto belonging, as his property for ever. I also bequeath and give to my infant son, James Walker, for ever, the balance of my real estate, believed to be and to consist in lots No. 6, 8 and 9, with a house, part brick and part frame, erected on one of said lots, in square 116 ; lots 31, 32 and 33, in square No. 140, and a slaughter-house erected on one of said lots ; lots No. 8 and 11, in square No. 250 ; and lot No. 28, in square No. 107. And further, I bequeath and give to my infant son, James Walker, $1000, to be paid out of my personal estate to, and applied, at the discretion of his guardian, hereinafter appointed, for the education of my son, James Walker. The balance of my personal estate, whatever it may be, I desire shall be equally divided between my mother, Dorcas Walker, my sister, Sarah McCallion, and my brothers, John, Lewis and Henry Walker." [*168

The defendants all answered (including the minor, James Walker, whose answer was put in by George Cover, under a special appointment of him by the court to answer for said infant), and substantially admitted the facts stated in said bill ; but they all, with the exception of Peck and wife, averred that the property could not be divided without prejudice, and refused to agree to a sale.

The case being submitted on bill, answers and exhibits, the court dismissed the bill ; from which dismissal, this appeal was taken by the complainant.

The case was argued by *Brent, jun.*, and *Key*, for the appellant ; and by *Bradley*, with whom was *Reden*, who submitted a printed argument, for the appellees.

For the *appellant*, it was contended :—1. That the court has jurisdiction of this case under the circumstances. 2. That neither the widow, Ann Sophia, nor the infant, James Walker, had any right, under the will, in the property devised to the complainant. 3. That even if the court should think the widow had one-third of each specific lot devised by the testator, yet the infant, James Walker, had, under the will, no greater estate or interest in the complainant's property than a life-estate ; and that the court should have so decided. 4. That, as the bill makes an alternative prayer, the court should *have ordered partition between these tenants in common, if they were so, on a true construction of the will ; or a sale, if a partition could not be made. [*169

Brent and *Key* contended, that the devise in the will of James Walker was of one-third of the real estate in value ; and this was to be made up out of the residuary estate. If it can be shown, that there is a fund which can be made to contribute, it should be brought in. The principle of law is, that where there is a charge on the real estate, the residuary estate is first to be taken to satisfy it ; and until this is exhausted, the real estate is not chargeable. Cited, 3 Paige 316. This is a case in which a court of chan-

cery will bring in the residuary estate, in order to carry into effect the several purposes of the testator.

As to the rights of the infant son of the testator, it was argued, that he took nothing in the property given to the wife, after her death. The words "for ever," which are used in the bequests to others, are not used in the devise to him of the property given to his mother. Cited, 1 Russ. & Mylne 549, 564 ; 2 Har. & Johns. 142. "All the right" given by the will to his son, is all the right in the real estate given the widow.

Under the laws of Maryland, the chancellor may in such a case as this, decree a sale of the property. Act of 1785, ch. 72, § 12 ; Act of 1794, ch. 60, § 8. But if the devises of the testator's will are construed to give the appellees the estates they claim, the complainant has a right to a partition. A bill for a partition is a matter of right, when a title is shown in the complainant. Jeremy's Equity 303 ; Ambl. 236.

It ought not to be considered, that it was the intention of the testator to give one-third of all his estate to his son. It was a large property, and he meant to give a liberal portion of it to others of his family.

For the *appellees*, it was argued :—The widow and infant son of James Walker contend, that they are entitled, under the first devise in his will, to one undivided third of the whole of his real estates—the widow for life, and the son in fee. The complainant, a devisee of part of his real estate, denies the right of the widow and son. The first difficulty aries out of this denial. The proceeding is in chancery, under the acts of assembly of 1785, ch. 72, § 12, and 1794, ch. 60, § 8. The first act authorizes the court to decree a sale, where an "infant" has a joint interest, or interest in common, with any other person, on its appearing to the chancellor, "that it will be for the interest and advantage both of the infant and of the other person to sell," &c. The second act, in the same case, where an infant is concerned, authorizes a partition. The complainant denies, that the infant in this case has any estate or interest in the property in controversy. *But it is only *170] where an infant is concerned, that the court is authorized, by these acts, to decree either partition or sale. Does the complainant make a case for the action of the court, without admitting that the infant has some estate in the premises? And may not the decree, dismissing the complainant's bill, be sustained, on the ground of his own denial of the infant's right? The 8th section of the act of 1786, ch. 45, to direct descents, has no application. It relates to a case of intestacy, and to the common-law side of the court. This is the case of a devise, and the proceeding is by bill on the chancery side of the court, under the two acts above mentioned. The only ground on which an application for a partition can be made, is that it is for the benefit of all the parties. This is denied, and no proof was made to sustain this allegation in the bill.

But the widow and son are entitled to one undivided third of the house and lots in this suit, under the will. The primary intention of the testator is to provide for his wife and son. With this view, he first carves out of his whole real estate one-third, and gives it, by the first clause of his will, to his wife, for life ; "and in the event of her death, all the right in real property hereby bequeathed to her, shall be vested in my infant son." "In the event of her death," means after her death ; and the words "hereby

bequeathed," refer to the real property, and not to the right or estate, given to her. "Right in real property," are words large enough to pass a fee. *Nicholls* v. *Butcher*, 18 Ves. 193; 16 East 221; 6 Cruise Dig. 240; *Newkerk* v. *Newkerk*, 2 Caines 345. The testator then goes on, and gives a particular house and lot to the complainant; and the residue of his real estate he gives to his son, first by a specific devise, and then by a residuary clause. The words of the first devise, disposing of the third in his whole estate, are clear. Effect must be given to every expression in a will, if possible. *Smith* v. *Bell*, 6 Pet. 76; Ram on Wills 97.

It is said, that the devise of that third is inconsistent with the devise to the complainant of the house and lots. The cases of inconsistency put in Cruise (6 Cruise Dig. 164, 408) are, where the whole of an estate is given to one, and the whole of the same estate is, by a subsequent clause, given to another. But here, the whole of the lots claimed by the complainant is not given, first, to the wife and son, and then, to the complainant; one-third only is given, by the first devise, to the wife and son, leaving two-thirds to pass by the second devise, to the complainant. And this was the meaning of the testator. He intended, that his wife should take one-third, and the complainant all that was left: as if he had said, that the gift in the second devise shall be subject to the part of the lots he had previously given by the first devise; it was not necessary he should say expressly, in the latter clause, that *the gift thereby made was to be subject to the gift made by the former. It is necessarily implied. The objection of [*171 inconsistency applies, if at all, as forcibly to the wife as to the son. But can it be doubted, that she takes one-third of the whole of the real estate, under the first clause of the first devise? And do not the words of the second clause give that third, after her death, to the son, with as much clearness as the preceding words give it to the wife? Does the wife take one-third in the lots given to the son, by the specific devise in his favor? How can she, if the complainant's rule of construction is to prevail? Is there any substantial difference in the words of devise? To say, that the complainant shall take the whole of this house and lot, would be to say, that the wife shall not take one-third of the whole real estate, but one-third of part only.

Our construction makes the whole will harmonize, and gives operation to every clause. It makes the first devise dispose of one-third of the premises to the wife and son, and the second, of the remaining two-thirds to the complainant. Their construction requires the total rejection and expunging from the will of the clause in favor of the son. Give the complainant the whole of these premises, and there would be nothing upon which that clause could operate; the son would take the lots specifically devised to him, under the devises in his favor, or as heir-at-law. Unless the second clause of the first devise had been inserted, the third of the premises in controversy, given to the wife for life, would, on her death, have vested in the complainant. It could be inserted for no other purpose than to intercept that third, and vest it in the son. If that clause be a kind of residuary devise, it is so of one-third only; and the subsequent specific devises would not derogate from it, so long as there was anything for those devises to operate on.

Suppose, then, that the wife and son are entitled to one undivided third

part of the house and lots in question; were the court right in dismissing the bill? The proceeding is under the two acts of '85 and '94, which authorize a sale or partition, on the court's being satisfied that it would be for the interest and advantage of the infant and other person to sell, &c. The complainant ought to have proved that fact. In the case of an infant, nothing can be taken for granted. But the answer denies that it would be for the infant's interest and advantage to have the house and lots in question divided and sold; which is responsive to the bill. There is no proof that the court could not, therefore, be satisfied that it was for the advantage of the infant and other party, that there should be a division or sale, and could not so decree.

McLean, Justice, delivered the opinion of the court:—This is an appeal from the decree of the circuit court for the district of Columbia. *The
*172] complainant filed his bill, stating that, as devisee of James Walker, he claims the fee in lot No. 6, in square 106, with all the improvements thereon, in the city of Washington; and also under a deed from Margaret and James Peck, lots No. 21 and 22, in the same square, which lots were devised to the said Margaret in the same will. And that the wife of the devisor, since intermarried with George Parker, claims, under the will, one-third of the above property, during her life, and that, at her death, it shall go to the son of the deceased, named in the will. And the complainant insists, that he is entitled to the whole of the property, free from the claims of the wife of the devisor or her son; and he prays that the courts may so decree. But if the court should think that he is only entitled to two-thirds of the property, then he asks a division of it, or that it may be sold, as shall be deemed proper.

The wife of the devisor and her present husband, and the infant son, by guardian, assert their interest in one-third of the premises, in their answers; and are opposed to a sale or division of the property, because, among other reasons, it would be prejudicial to the interest of the infant son and devisee of the deceased.

Almost every part of the will has some bearing on the question raised by the complainant. In his first devise, the testator says, "I bequeath and give to my dearly-beloved wife, Ann Sophia Walker, one-third of the whole of my personal estate for ever, for her own proper use and benefit; and also one-third of my real estate, during her lifetime; and in the event of her death, all the right in real property hereby bequeathed to her shall be, and is hereby declared to be, vested in my dear and infant son, James Walker." He then gives to his mother, "for ever," a certain lot, with its improvements. And then follows the devise to the complainant, in these words: "I bequeath and give to my dearly-beloved brother, John Walker, for ever, all of lot No. 6," &c. The devise of the two lots to Margaret Peck is, that they shall be "her property for ever." Several other devises of real property are made in the same form, to his brothers and sisters; and then he says, "I bequeath and give to my dear infant son, James Walker, lot No. 22, in square No. 352," &c. "I also bequeath to him for ever, the balance of my real estate, believed to be and to consist in lots No. 6, 8 and 9, in square 116, lots 31, 32 and 33, in square No. 140; lots No. 8 and 11, in square No. 250, and lot No. 28, in square No. 107."

It is contended by the counsel for the complainants, that the specific devises to the brothers and sisters of the deceased, show his intention *to give to them the property devised, clear of all incumbrance; and that the devise of the real estate to the widow, must be satisfied out [*173 of the residuary devise to the infant son of the deceased. The devises are inconsistent with each other, but they are not entirely so; the whole of any specific property is not devised to each of two devisees. The devise of one-third of his real estate to his wife, and at her death to his son, is, to this extent, inconsistent with the specific devises which follow, and which dispose of all his real estate. The devise of the "balance" of his real estate to his infant son, goes on to describe particularly the property.

From his first devise to his wife, there can be no doubt, that the testator intended to give her what the law allowed her to take. And it cannot be supposed, that by the subsequent specific devises, he designed to defeat this arrangement. It is equally clear, that he intended, on the death of his wife, that the property devised to her should go to his son.

The construction urged, that "all the right in real property hereby bequeathed to her," shall go to his son, means a life-estate only in one-third of the real property, to the son, cannot be sustained. The words, "all the right," fairly import the entire or perfect right, "in the real property given to his wife." This reference to the devise to the wife, is descriptive of the extent of the property to be vested in fee in the son. The right of his wife was to terminate at her death, and it would be inconsistent, to suppose that the testator would dispose of the same right, and no more, to his son.

This devise to his wife and son is a leading devise in the will. It was first in the mind of the testator, and must limit and control the other devises. The devises to the son are as specific as those to other persons; and there would seem to be little or no ground for the construction, that the devise to the wife must be satisfied out of the devises to the son. One-third of the entire real estate is given to the wife, and on her death, this third goes to the son; and in the conclusion of the will, certain lots are also specifically devised to the son. The son, in common with the other devisees, takes the lots specifically devised to him, subject to the devise of one-third to his mother, and at her death, he takes this third of these lots; and one-third of each specific devise in the will. This construction gives effect to the different devises of the will; and it would seem to be the only mode by which the intention of the testator can be effectuated. And it is in accordance with that well-settled rule in the construction of wills, which regards the interest of the heir-at-law. With the exception of the devises to the wife and son, all the devises are collateral, and take the property from the line of descent established by law.

*If the complainant can hold the lots claimed by him, free from [*174 the devise to the wife of the testator, by the same rule, every other devisee in the will must hold in the same manner. And this would defeat the leading devise, for the entire real estate is specifically disposed of in the will. If the devise to the wife be thrown upon the specific devises to the son, it not only violates the rule which it is claimed exempts the specific devises from this devise to the wife; but supposes that the testator first devises to his wife and son one-third of his real estate, and then, at the

conclusion of his will, gives specific devises to his son, which are intended wholly, as to him, to annul the first devise. This construction would do injustice to the language of the testator, and defeat his intention. Had the widow taken a life-estate under the law, her interest of one-third would have extended to every part of the real property of her deceased husband. And as the devise is made in as general terms as the statute which gives dower, it must have the same effect.

This construction of the will defeats the main object of the complainant's bill. But this counsel insists, that the part devised to the wife should be set off, or the sale of the property ordered. The bill does not seem to have been framed with a view to a partition or sale of the estate. Several of the devisees, all of whom are interested in such a proceeding, are not made parties. And a partition or sale is opposed by the infant son and his mother, as injurious to his interest. And the rights of the mother and son are so intimately blended, that any proceeding which shall affect the life-estate must affect the inheritance.

A partition or sale of this estate is regulated by the statutes of Maryland. The 12th section of the act of 1785, ch. 72, provides, that where an infant has an interest in lands, and it shall appear to the chancellor, upon application of any of the parties concerned, and upon the appearance of the infant, that it shall be to the interest and advantage of the infant, to have the land sold, he may order a sale. And in the 8th section of the act of 1794, ch. 60, it is provided, on a similar application and appearance of the infant, as stated in the above statute, for a partition, if the chancellor, "upon hearing and examining all the circumstances, shall think that it will be for the interest and advantage of all parties concerned," he may order a partition. In this case, there is no evidence which will enable the court to judge whether a sale or partition of the property, would be to the advantage of the infant and the other parties. And it should hardly be expected, that this court, in the absence of all evidence, should decree either of these alternatives, against the answer.

*175] *The complainant may be subjected to some inconvenience, by holding the property as tenant in common with the devisee of the testator; but it was a condition imposed by the terms of the will. And this court, acting under the law of Maryland, cannot remedy this inconvenience, unless the complainant shall bring himself clearly within the provisions and policy of that law. The decree of the circuit court, dismissing the bill, is affirmed, with costs.

Decree affirmed.

United States *v.* James E. Hardyman.

Receiving stolen goods.—Evidence.—Indictment.

The defendant was indicted for receiving treasury notes of the United States, stolen from the United States mail; the indictment, in one of the counts, described one of the treasury notes as bearing interest annually of one per centum; a treasury note was offered in evidence, bearing interest at one M. per centum; and parol evidence was offered to show that treasury notes, such as the one offered in evidence, were received by the officers of the government as bearing interest of one mill per centum per annum, not one per centum per annum. The court held, that treasury notes issued by the authority of the act of congress passed on the 12th of October 1838, were promissory notes, within the meaning of the act of congress of 3d March 1825.[1]

The letter M, which appears on the face of the note offered in evidence, is a material part of the description of the note.

It would be proper to receive parol evidence for the purpose of explaining the meaning of the letter M, and proving the practice and usage of the treasury department and officers of the government and others, lawful receivers of similar treasury notes, in order to show thereby the meaning intended to be attached, and actually attached, to the letter M, by the treasury department and others; and that by such meaning the said treasury note bears one mill per centum interest, and not one per centum interest.

When a note is given, payable in foreign coin, the value of such coin in current money must be averred; and under such averment, evidence of the value may be received.

Certificate of Division from the Circuit Court for the Eastern District of Virginia. James E. Hardyman was indicted in the circuit court of the eastern district of Virginia, for buying, receiving and concealing treasury notes of the United States, knowing them to have been stolen. The treasury notes were alleged to have been stolen from the mail of the United States, by Winston, a negro man, or by persons unknown. Winston was, at the same time, indicted for robbing the mail of the United States, of ten treasury notes. The indictment contained four counts, charging the defendant with receiving treasury notes, bearing interest at one per centum, and at five per centum per annum.

The defendant moved the court to quash the indictment, upon the ground that the papers described in the said indictment were not promissory notes under the act of congress approved on the 3d day of March 1825, under which the prisoner was indicted; and the act of congress, approved the 12th day of October 1837, by virtue of which the said notes were issued, described them as treasury notes, and did not provide, nor did any other act of congress provide, any penalty for stealing these notes from the mail of the United States, or receiving them, knowing them to be stolen; and upon this motion, the court being divided in opinion, the said indictment was not quashed.

The attorney for the United States, further proceeding in the case, offered as evidence to the jury, a treasury note for fifty dollars, payable in one year, bearing interest at the rate of one M. per centum. The counsel for the accused moved the court to exclude it from *the jury as evi- [*177
dence, upon the ground, that it does not answer the description of any one of the notes set forth in the indictment, as it bears interest after the rate neither of five per centum, nor of one per centum, but bears an interest

[1] United States *v.* Keene, 5 McLean 509.

after the rate of one mill per centum, as signified by the letter "M," after the word "one" upon the face of the said note; and to sustain this motion, the defendant proved, by the collector of the port of Richmond, that he received notes such as that above described, as notes bearing interest after the rate of one mill per centum, and not one per centum, and the government so received them from him; and the letter M aforesaid was understood to signify and be intended to mean mill; and also proved, that the secretary of the treasury had issued, so far as the said collector, and another witness who derived his impression from the treasurer of the United States and the officers of the government, knew and believed, no treasury note bearing interest after the rate of one per centum. Upon this motion, the court was also divided in opinion, not being satisfied that the note did appear by its face to bear interest after the rate of one mill, and not being satisfied that it was competent to the defendant by parol evidence to explain any word or letter upon the face of the said note, so as to show what its meaning was, either by resort to any definition of it, or to the exposition of it by the practice of the treasury department, and the officers of the government and the public; and therefore, that it was not competent to the defendant so to explain the letter M aforesaid, which appears on the face of the said note, and of which notice is taken in the indictment, for the purposes of showing that by that letter the makers of the said note intended to fix the rate of interest at one mill per centum. And thereupon, upon the motion of the accused, and with the consent of the attorney for the United States, the court adjourned to the supreme court of the United States for its decision, the following questions, viz:

1. Are the treasury notes issued by authority of the act of congress passed on the 12th day of October, in the year 1838, promissory notes, within the meaning of the act of congress approved on the 3d day of March 1825, under which the prisoner is indicted? and is there a sufficient averment in the indictment in this cause of the stealing and receiving of such treasury notes?

2. Is the letter M, which appears upon the face of the note offered as evidence, a material part of the description of the note?

3. Would it be proper to receive parol evidence, for the purpose of explaining the meaning of the said letter M, and proving the practice and usage of the treasury department and officers of the government and others, lawful receivers of similar treasury notes, in order to show thereby the meaning intended to be attached, and actually attached to the said letter M, by the treasury department and others; and that by such meaning, the said treasury note bears one mill per centum interest and not one per centum interest?

The case was submitted to the court, by *Grundy*, Attorney-General of the United States.

*178] *McLean, Justice, delivered the opinion of the court.—This case comes before this court on a certificate of division of opinion of the judges of the circuit court for the eastern district of Virginia. The defendant was indicted under the 45th section of the post-office law, for buying, receiving and concealing certain promissory notes, called treasury notes, which he knew had been stolen from the mail of the United States. And,

among others, one of the notes was described in the indictment, "as a promissory note called a treasury note, for the payment of fifty dollars, with interest at the rate of one per centum," &c. On the production of the note in evidence, it was found to be accurately described in the indictment in all parts which were attempted to be described, except on the face or the note, instead of the above words of "with interest at the rate of one per centum," &c., the words were, "with interest at the rate of one M. per centum." And the counsel for the defendant moved the court to exclude the note from the jury, for the variance; and to sustain this motion, the defendant proved, by the collector of the customs at Richmond, that he received notes, such as the one described, as notes bearing interest after the rate of one mill per centum, and not one per centum; and that the government so received them from him. And the judges being divided on this motion, as also on a motion to quash the indictment, on the ground, that the notes set forth in the indictment were not promissory notes, within the act of congress, the following points were certified for decision of this court.

1. Are the treasury notes issued by authority of the act of congress passed on the 12th day of October, in the year 1838, promissory notes, within the meaning of the act of congress, approved on the 3d day of March 1825, under which the prisoner is indicted? and is there a sufficient averment in the indictment in this cause, of the stealing and receiving such treasury notes?

2. Is the letter M, which appears upon the face of the note offered as evidence, a material part of the description of the said note?

3. Would it be proper to receive parol evidence, for the purpose of explaining the meaning of the said letter M, and proving the practice and usage of the treasury department and officers of the government and others, lawful receivers of similar treasury notes, in order to show thereby the meaning intended to be attached, and actually attached, to the said letter M, by the treasury department and others; and that by such meaning the said treasury note bears one mill per centum interest, and not one per centum interest?

As to the first point, we entertain no doubt, that the notes described in the indictment, are promissory notes, within the act of congress under which the indictment is framed. They contain a promise to pay money by the United States, and they are substantially and technically embraced by the law. And we think the averment, though not very technically expressed in the indictment, *that the defendant received the notes, knowing them to have been stolen from the mail, is sufficient. [*179

We think also, that the letter M, which appears on the face of the note, is a material part of it. It limits the interest on the note to one mill per centum, instead of one per centum, as stated in the indictment. The indictment does not profess to set out an exact recital of the note, but merely to give such a description of it, as to make it evidence in the case. And this is all that the law requires. But the description, as far as it goes, must be accurate, so as to identify the note. Any substantial variance between the note described, and the one offered in evidence, must be fatal to the prosecution. In this respect the rules of pleading are the same in criminal as in civil proceedings. If the note in question had been given by an individual, and an action of *assumpsit* had been brought on it, the declaration must have described it accurately;

and by a proper averment, shown the meaning and effect of the letter M, on the face of the note. And so, where a note is given, payable in foreign coin, the value of such coin, in current money, must be averred ; and under such averment, evidence of the value may be received. This treasury note might, perhaps, have been described in the indictment, with sufficient certainty, without stating the rate of interest which it bears ; but if this part of the note be described, it must be done accurately. And this might have been done, by copying the words of the note, including the letter M. It would not have been improper, though not essential, after the recital, to aver the meaning and effect of the letter M ; and then proof would be required to sustain the averment.

We think, under the circumstances of the case, that parol proof may be received, to show the meaning and effect of the letter M, as inserted in the body of the note ; and if such evidence shall establish a substantial variance between the note described in the indictment and the one offered in evidence, it must be fatal to the prosecution, whether such evidence be submitted to the decision of the court, or to the jury, under the instruction of the court.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the eastern district of Virginia, and on the points and questions on which the judges of the said circuit court were opposed in opinion, and which were certified to this court for its opinion, agreeable to the act of congress in such case made and provided, and was argued by counsel : On consideration whereof, it is the opinion of this court : 1st. That the treasury-notes issued by authority of the act of congress, passed on the 12th day of October, in the year 1838, are promissory notes, within the meaning of the act of congress approved the third day of March 1825, under which the prisoner is indicted ; and that there is a sufficient averment
*180] in the indictment in this *cause of the stealing and receiving such treasury notes. 2d. That the letter "M," which appears upon the face of the note offered as evidence, is a material part of the description of said note. And 3d. That it would be proper to receive parol evidence for the purpose of explaining the meaning of the said letter M, and proving the practice and usage of the treasury department, and officers of the government and others, lawful receivers of similar treasury-notes ; in order to show thereby the meaning intended to be attached and actually attached to the said letter M, by the treasury department and others, and that by such meaning the said treasury note bears one mill per centum interest, and not one per centum interest.

*William B. Stokes, Plaintiff in error, *v.* Francis W. Saltonstall, Defendant in error.

Negligence.

In an action against the owner of a stage-coach, used for carrying passengers, for an injury sustained by one of the passengers, by the upsetting of the coach, the owner is not liable, unless the injury of which the plaintiff complains was occasioned by the negligence or want of proper skill or care in the driver of the carriage, in which he and his wife were passengers; the facts that the carriage was upset, and the plaintiff's wife injured, are *primâ facie* evidence that there was carelessness, or negligence, or want of skill on the part of the driver, and casts upon the defendant the burden of proving that the accident was not occasioned by the driver's fault.[1]

It being admitted that the carriage was upset, and the plaintiff's wife injured, it is incumbent on the defendant to prove, that the driver was a person of competent skill, of good habits, and in every respect qualified, and suitably prepared for the business in which he was engaged; and that he acted on this occasion with reasonable skill, and with the utmost prudence and caution; and if the disaster in question was occasioned by the least negligence, or want of skill or prudence on his part, then the defendant is liable in the action.[2]

If there was no want of proper skill, or care, or caution on the part of the driver of a stage-coach, and the stage was upset by the act of the plaintiff or his wife, in rashly and improperly springing from it, then the defendant is not liable to an action, but if the want of proper skill or care of the driver placed the passengers in a state of peril, and they had, at that time, a reasonable ground for supposing that the stage would upset, or that the driver was incapable of managing his horses, the plaintiff is entitled to recover; although the jury may believe, from the position in which the stage was placed by the negligence of the driver, the attempt of the plaintiff or his wife to escape may have increased the peril, or even caused the stage to upset; and although they may also find, that the plaintiff and his wife would probably have sustained little or no injury, if they had remained in the stage.[3]

If the driver was a person of competent skill, and in every respect qualified and suitably pre-

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[1] Re-affirmed, in Railroad Co. *v.* Pollard, 22 Wall. 341. The upsetting of a stage is *primâ facie* evidence of negligence; a passenger who has been injured need show nothing more to sustain his action. McKinney *v.* Neil, 1 McLean 540. In Bishop *v.* Stockton, 1 West. L. J. 206, Judge Baldwin says: "The mere fact of an upset raises a legal presumption of negligence; it supposes a default, and supplies (in legal contemplation) the evidence as such negligence and unskilfulness, as makes the carrier responsible in damages. This presumption may be met and refuted by the circumstances of the case; the presumption is thus destroyed, and the plaintiff must prove such default." And in Tennery *v.* Pippinger, 1 Phila. 543, Judge Gibson said, "that the mere fact of an injury to a passenger raises a presumption of want of care, and throws on the carrier the burden of disproving it." When a passenger is injured, without negligence on his part, there is a *primâ facie* presumption of negligence, which can only be rebutted by proof of inevitable accident. Sullivan *v.* Philadelphia and Reading Railroad Co., 30 Penn. St. 234.

[2] See Pennsylvania Co. *v.* Roy, 102 U. S. 451, as to the liability of a carrier for an injury to a passenger, and the care and vigilance required of the former.

[3] An instinctive effort to escape a sudden impending danger, resulting from the negligence of another, does not relieve the latter from liability for the consequences. Coulter *v.* Union Express Co., 56 N. Y. 585. So, one who, without negligence, has placed himself in a position of danger, is not responsible for an error of judgment in extricating himself from the peril, so that he exercises it in good faith. Pennsylvania Railroad Co. *v.* Werner, 89 Penn. St. 59. And where one is placed, by negligent acts of another, in such a position, that he is compelled to choose, upon the instant, and in the face of apparently grave and impending peril, between two hazards, and he makes such a choice as a person of ordinary prudence, placed in the same situation, might make, and injury results therefrom, the fact that if he had chosen the other hazard, he would have escaped injury, does not prove contributory negligence. Twomley *v.* Railroad Co., 69 N. Y. 158; Dyer *v.* Erie Railway Co., 71 Id. 228; Voak *v.* Northern Central Railway Co., 75 Id. 320; Brown *v.* French, 14 W. N. C. 412.

pared for the business in which he was engaged, and the accident was occasioned by no fault or want of skill or care on his part, or that of the defendant or his agents, but by physical disability, arising from extreme and unusual cold, which rendered him incapable for the time to do his duty; then the owner of the stage is not liable to an action for damages, for an injury sustained by a person who was a passenger.

Saltonstall *v.* Stockton, Taney's Dec. 11, affirmed.

Error to the Circuit Court of Maryland. The defendant in error, Francis W. Saltonstall, in September 1836, instituted an action for the recovery of damages against Richard C. Stockton and William B. Stokes, owners of a line of stages for carrying passengers from Baltimore to Wheeling; Mr. Saltonstall and his wife having, on the 6th day of December 1836, been passengers in the stage, when, by the carelessness, unskilfulness and default of the driver, the stage was upset; by reason of which Mrs. Saltonstall had her hip fractured, and several other bones of her body broken, and was otherwise greatly cut, bruised and injured, so that her life was endangered.

By an agreement between the counsel for the plaintiff and the defendants, no objection was to be taken to the nonjoinder of other persons as defendants, who were also owners or interested in the line of stages, when the injury complained of in the action occurred; and the plaintiff might recover in this action any damages which *might be recovered in an action by himself and wife, or by himself alone.

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Richard C. Stockton having died after the institution of the suit, it was proceeded in against William B. Stokes, who survived him. The cause was tried before a jury, and a verdict was given for the plaintiff, under the instructions of the court, for $7130. On this verdict, the court gave a judgment for the plaintiff. The counsel for the defendant tendered a bill of exceptions to the opinion of the court; and he afterwards prosecuted this writ of error.

The bill of exceptions stated, at large, the evidence given on the trial of the cause. The evidence of the witnesses for the plaintiff, taken under a commission to New Orleans, and examined on the trial, stated, that at the last change of horses, before the accident, the passengers generally remarked, that the driver seemed to have drank too much to go on. Mr. Saltonstall, the plaintiff, went to the agent, or the person avowing himself as such, and who was acting in that capacity, and reported to him the observation made by the passengers; the agent replied, that the driver was all straight, and that the appearance of his being intoxicated was entirely owing to his having driven during the night previous, which had been excessively cold. When the stage arrived at about two miles from Bevansville, the passengers felt the stage strike against a mound or ridge on the right side of the road. Mr. Saltonstall, on observing this, immediately jumped out, as was believed, with the intention of stopping the horses; Mrs. Saltonstall attempted to follow her husband, but fell to the ground at the very instant the stage upset, and it fell directly on her. The upset took place on Sunday afternoon, the 5th day of December, at about four o'clock in the afternoon; it was broad daylight. The plaintiff's wife was dreadfully injured; she was taken up and carried to a log-house in the neighborhood. The injury was occasioned by the falling of the stage on her body.

A witness stated, that the road was perfectly level, and in good travel-

ling order. There had been ice, but it had been so beaten down, that there was only a little remaining on the sides of the road. The centre was free from it. The road was not considered dangerous or difficult. The driver was believed to be intoxicated, and his intoxication was increased by his drinking with a man on the seat alongside of him. This belief was produced by his reckless and irregular manner of driving, which called for repeated remonstrances from the passengers, and which were wholly unattended to; and from his apparently stupid and drunken manner of conduct, after the upset. He was totally unfit for anything; he could not, or would not, answer a question, nor afford the least possible assistance.

The injuries sustained by Mrs. Salstonstall were proved by the surgeons and medical attendants, and they were such as to make it impossible, or too dangerous, to attempt to move her from the log hut, from the time of the accident, the 6th day of December, until *the 18th day of December, when she was carried to Bevansville, where she remained until the 18th day of May following. In July of the same year, she was in Philadelphia, still in a state of great suffering, and using crutches. [*183

The plaintiff also proved, by Mr. Ludlow, who was a passenger in a stage which arrived after the accident, that the road was perfectly good, and was one on which a stage would not be likely to upset. The witness went to the driver, and had some conversation with him. The defendant's counsel objected to the statements of the driver being admitted in evidence; but the court declared them to be admissible; to which the counsel for the defendant excepted. The plaintiff then further proved by Mr. Ludlow, that he asked the driver how the accident happened, when he stated, he had upset fifty coaches, and he did not believe the woman was as much hurt as she said she was.

The testimony offered by the defendant, was intended to show the capacity and sobriety of the driver, and that the road was icy, difficult and dangerous; and that the upsetting of the stage might be accounted for by the slippery and icy condition of the road. The evidence for the defendants, it was contended, proved that had the wife of the plaintiff remained in the stage, no injury would have resulted to her. The other passengers were not materially bruised. The defendant also proved, that the coach and harness were properly made, and of sufficient strength; and that the horses were good and steady.

The defendant's counsel prayed the court to instruct the jury in sixteen different prayers. Among those were the following:

1. If the jury shall believe from the evidence in the cause, that the injury to the plaintiff's wife was occasioned solely by the overturning of the coach, and by its falling upon her; and that such overturning was occasioned by the act of the plaintiff and his wife, or either of them, in leaping from, or otherwise in leaving the said coach; and shall further believe, from the evidence in the cause, that at the time of such leaping from, or of such leaving, said coach, there did not exist any certain peril, nor any immediate danger of personal injury, nor any reasonable cause of apprehension of impending danger, by remaining in the coach; then the plaintiff is not entitled to recover upon the issue joined in this case, in respect to the said injury sustained by his wife; even if they also believe from the evidence in the cause, that the driver was guilty of carelessness,

negligence and misconduct, in placing the coach in the particular place and situation in which it was at the time of such leaping from, or leaving, the coach.

2. If the jury shall believe from the evidence in the cause, that the injury to the plaintiff's wife was occasioned solely by the overturning of the coach, and its falling upon her; and that such overturning was occasioned by the act of the plaintiff and his wife, or either of them, in leaping from, or otherwise in leaving, the coach, *and shall further believe from the evidence in the cause, that such leaping from, or such leaving, the coach, was not, under the actual circumstances, an act of prudent precaution for the purpose of self-preservation; nor such an act as a person of ordinary care, prudence or resolution would have adopted, under the actual circumstances, even if they shall believe from the evidence, that such leaping from, or such leaving, said coach, was under the existence and incitement of actual alarm and apprehension of supposed impending danger; then the plaintiff is not entitled to recover upon the issue joined in this cause, in respect of said injury sustained by his said wife.

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3. If the jury shall believe from the evidence in the cause, that the injury sustained by the plaintiff's wife was occasioned solely by the overturning of the coach, and by its falling upon her; and that such overturning was occasioned by the act of the plaintiff and his said wife, or by the act of either of them, in leaping from, or otherwise in leaving, said coach; and shall further believe from the evidence in the cause, that such leaping from, or leaving of, said coach was not effected with proper caution and prudence, under the actual circumstances, as well in reference to the situation in which the said plaintiff and his wife (if the overturning was occasioned by the act of both) were placed; or, if such overturning was occasioned only by the act of one, in reference to the situation of such one of them, by whom such overturning was occasioned, was placed; as also in reference to the situation in which said coach was placed in position, with respect to the ground on which it stood, and otherwise, then the plaintiff is not entitled to recover, in respect to said injury to his said wife.

4. If the jury shall believe from the evidence in the cause, that the injury to the plaintiff's wife was occasioned solely by the falling of the coach upon her, and that she was then outside of the coach and on the ground; and shall further believe, that at the time she leapt from, or left, the coach, she knew or believed, that it was overturning, or about to overturn, and leapt from, or left it, for that cause, and that she designedly alighted on the ground, in the direction in which the coach was overturning, or about to overturn; that then, such her act was a rash and imprudent act, and the defendant is not responsible, upon the issue joined in this cause, for the injury which she so sustained; even if the jury shall, at the same time, believe, that such overturning was occasioned by the fault or negligence of the driver.

5. If the jury shall find, from the evidence, that the plaintiff's wife, if she had remained in the coach, would not have been materially injured by the overturning of the same; and shall find from all the evidence in the cause, that a discreet and prudent person, under the circumstances in which she was placed, as disclosed in evidence, would have, and ought to have, remained in the coach; and that she placed herself, imprudently, and indis-

creetly and rashly, *in the way of incurring the actual injury which she sustained, that then the defendant is not liable, upon the issue joined in this case, to answer in damages for such injury.

6. If the jury shall believe from the evidence in the cause, that the plaintiff and his wife, or either of them, by leaping from the coach, or leaving the same, contributed, in fact, to produce the happening of the injury to the plaintiff's wife, which she actually sustained; and shall further believe, that in so leaping form, or leaving, the said coach, the same was done unnecessarily and indiscreetly, or imprudently or rashly, incautiously or without ordinary care, that then the plaintiff is not entitled to recover in respect of said injury; even if the jury shall believe that the driver was guilty of gross negligence and misconduct; and was partly, or even mainly, the cause of the happening of such injury.

16. That the *primâ facie* evidence of negligence arising from the fact of the upsetting of the coach, and the injury to the plaintiff's wife, is rebutted by the proof of the fact, if the jury so believe from the evidence, that the defendants had a first-rate coach, a competent set of horses, and good and proper harness, and a competent, prudent and careful driver, at the time of the accident; and that then the burden of proving negligence is thrown upon the plaintiff.

The plaintiff also offered prayers to the court for instructions to the jury. All the prayers offered by the defendant and the plaintiff were rejected by the court, and the court instructed the jury:

1. That the defendant is not liable in this action, unless the jury find that the injury of which the plaintiff complains was occasioned by the negligence or want of proper skill or care in the driver of the carriage, in which he and his wife were passengers; and the facts that the carriage was upset, and the plaintiff's wife injured, are *primâ facie* evidence that there was carelessness, or negligence, or want of skill, on the part of the driver; and throws upon the defendant the burden of proving that the accident was not occasioned by the driver's fault.

2. It being admitted, that the carriage was upset, and the plaintiff's wife injured, it was incumbent on the defendant to prove that the driver was a person of competent skill, of good habits, and in every respect qualified and suitably prepared for the business in which he was engaged; and that he acted on this occasion with reasonable skill, and with the utmost prudence and caution; and if the disaster in question was occasioned by the least negligence, or want of skill, or prudence, on his part, then the defendant is liable in this action.

3. If the jury find, there was no want of proper skill, or care, or caution, on the part of the driver, and that the stage was upset by the act of the plaintiff or his wife, in rashly and improperly springing from it, then the defendant is not liable to this action; but if the want of proper skill or care of the driver placed the passengers in a state of peril, and they had, at that time, a reasonable ground for *supposing that the stage would upset, or that the driver was incapable of managing his horses, the plaintiff [*186
is entitled to recover; although the jury may believe, from the position in which the stage was placed by the negligence of the driver, the attempt of the plaintiff or his wife to escape may have increased the peril, or even caused the stage to upset; and although they may also find, that the plaintiff

and his wife would probably have sustained little or no injury, if they had remained in the stage.

4. If the jury shall find, that the driver was a person of competent skill, and in every respect qualified and suitably prepared for the business in which he was engaged, and that the accident was occasioned by no fault, or want of skill or care on his part, or that of the defendant or his agents, but by physical disability, arising from extreme and unusual cold, which rendered him incapable, for the time, to do his duty ; then the defendant is not liable in this action.

The defendant excepted to the refusal of the prayers offered by him, and to the instructions given by the court to the jury.

The case was submitted to the court, in printed and written arguments, by *Schley*, for the plaintiff in error ; and by *Johnson*, for the defendant.

Schley, for the plaintiff, submitted to the court the following points and authorities :—When Mr. Ludlow was under examination, he stated, that, shortly after the accident happened, he went up to the driver and had some conversation with him. The defendant, by his counsel, objected to the admission in evidence of the statements of the driver ; the court overruled the objection, and the defendant excepted. The plaintiff then proved, by Mr. Ludlow, "that he asked the driver how the accident happened, when he stated, that he had upset fifty coaches, and he did not believe the woman was as much hurt as she said she was." This conversation, it will be observed, took place after the accident had occurred. If it can be considered as the driver's account of the manner in which the accident occurred, it is still but his representation of a past occurrence, and he ought to have been called as a witness to testify. But the statements were not even made in reference to his conduct in the particular transaction, but in relation to what he had done on former occasions ; and when, for aught that appears, he was not in the service of the defendant. If the fact had been established by competent testimony, that this driver had upset fifty coaches, it would have been pregnant evidence, before the jury, of his want of skill as a driver ; and if his statement to Mr. Ludlow was admissible evidence to establish this fact, it tended strongly to prove his want of competent skill. The position assumed by the appellant is, that the declaration of the driver to the witness, "that he had upset fifty coaches," was not admissible and competent evidence for any purpose whatever.

*187] *The defendant's first prayer is based on the hypothesis that the jury would find, from the evidence, that the immediate and proximate cause of the overturning of the coach was the act of the plaintiff or his wife, or both, in leaping from or leaving the coach ; and that, at the time of leaping from or leaving said coach, there did not exist any certain peril, nor any immediate danger, nor any reasonable apprehension of impending danger, by remaining in the coach. This prayer was framed with reference to the instruction of Lord Ellenborough, in *Jones* v. *Boyce*, 1 Stark. 403 ; and the language of the prayer was adopted from the language of his lordship. It concedes, that the defendant is liable for the negligence of the driver ; it further concedes, that even if the proximate cause of the injury was the act of the plaintiff or his wife, or both, the defendant was still liable, if there was want of skill, or if there was

negligence or misconduct on the part of the driver; provided that such want of skill, or negligence, or misconduct of the driver, produced a state of case which placed the plaintiff and his wife, or either of them, in a situation of certain peril or immediate danger, or as was sufficient to create a reasonable apprehension of impending danger. But the prayer assumes the law to be, that in case the act of the party injured was the proximate cause of the injury, the defendant is not liable, merely because there was default on the part of his driver, unless that default conduced to produce the injury; that is, unless there was a natural and reasonable connection between the default of the driver, as the cause, and the injury, as the consequence; and that natural and reasonable connection is assumed to be such as Lord ELLENBOROUGH has defined in the case above cited. In Story's Commentaries on the Law of Bailments, 377, the learned commentator, citing the case from Starkie, says, "And the liability of the coach proprietors will be the same, although the injury to the passenger is caused by his own act, as by leaping from the coach, if there is real danger, and it arises from the careless conduct of the driver."

The 2d, 3d, 4th and 5th prayers were all framed with reference to the language of the instruction in the case of *Jones* v. *Boyce*. It will be observed, that the several prayers were not intended to deny, *in toto*, the plaintiff's right of action, but were limited to the particular injury incurred by the plaintiff's wife, by reason of the imprudence, carelessness, unreasonable alarm, or rashness of the plaintiff or his wife, imputed by the hypothesis of each respective prayer. On the subject of reasonable apprehension of impending danger, some analogy may be found in the chapter "On Cruelty," in Poynter on Marriage and Divorce; and in the quotations from distinguished writers on the civil law, which will be found in the notes to that chapter.

The 6th prayer asserts, as a proposition of law, that if the plaintiff or his wife, or either of them, contributed, in fact, to produce *the injury, by leaping from the coach, unnecessarily or rashly, incautiously, or without ordinary care, that then the plaintiff is not entitled to recover in respect of said injury. The position is, that in case of mixed fault, the action will not lie; that the law will not speculate whether the fault of the defendant alone, without the concurrence of the fault of the plaintiff, would or would not have resulted in injury to the plaintiff; but that it is an answer to the action, in respect of any injury sustained, if it appears that the plaintiff aided in producing such injury. He must be himself blameless, before he can impute blame to another. In cases of collision, it has been frequently so adjudged. *Butterfield* v. *Forrester*, 11 East 60; *Flower* v. *Adam*, 2 Taunt. 314; *Pluckwell* v. *Wilson*, 5 Carr. & Payne 375; *Luxford* v. *Large*, Ibid. 421; *Williams* v. *Holland*, 6 Ibid. 23; *Turley* v. *Thomas*, 8 Ibid. 104; *Woolf* v. *Beard*, Ibid. 373; *Bridge* v. *Grand Junction Railway Co.*, 3 Mees. & Wels. 244; *Vanderplank* v. *Miller*, Moo. & Malk. 169; *Harlow* v. *Humiston*, 6 Cow. 191; *Smith* v. *Smith*, 2 Pick. 621; *Lane* v. *Crombie*, 12 Ibid. 177. [*188

Now, this case, it is true, was not a case of collision. But in the cases cited, the gist of the action was negligence, and so it is in this. The case of *Jones* v. *Boyce* was a case of a coach proprietor. It is true, that the passenger carrier is bound "for the utmost care and diligence of very cau-

tious persons." Story's Law of Bailments 379. But if any injury is produced by the concurrent fault of both parties, by what legal alchymy can we analyze the result, for the purposes of discovering how much of the injury was produced by the fault of the defendant or his agent, and how much by the fault of the plaintiff; or, whether, in fact, the injury would have resulted at all, but for the fault of the plaintiff? The defendant is liable in damages, for the consequences of the driver's negligence or want of skill; but unless the effect can be apportioned, he may be made liable for what was really a consequence of the plaintiff's own fault; and how can it be apportioned? In the case of *Hill* v. *Warren*, 2 Stark. 377, where there was negligence in the agents of both parties, in taking down a party-wall, it was ruled, that "it was not competent to the plaintiff to attach that blame to the defendant which was the common blame of both."

The 16th prayer assumes, that it is incumbent on the plaintiff to prove negligence. It concedes, that proof of the facts of the overturning of the coach and the injury are *primâ facie* evidence of negligence, and throws upon the defendant the *onus* of proving, not that the accident was not occasioned by the driver's fault, as ruled by the court in their final instructions, but that the coachman was a person of competent skill in his business, that the coach was properly made, the horses steady, &c. Story's Law of Bailments 375, and the cases there cited. The injury may have been the result of inevitable accident, arising from the state of the road, or from the
*189] physical inability *of the driver, caused by extreme and unusual cold; or it may have been occasioned by the fault of the plaintiff, or by the fault of the driver, or by mixed fault. The plaintiff, it is insisted, is bound to prove negligence, however slight, in order to maintain the action. Now, if the event itself is to be evidence of negligence, it would be right to vary the rule, and say that the defendant was bound to prove that there was no negligence. In the cases cited in the court below, the breaking down resulted from some supposed negligence in preparation; but when it is satisfactorily shown, that the driver is a person of competent skill, that the horses and coach, &c., were properly provided, it is shown, that there was no want of due preparation for the journey. If, in travelling on a level road, a wheel comes off, or an axle-tree snaps, it is strong *primâ facie* evidence of negligence in preparation; but mere proof of the breaking down, without showing the proximate cause of breaking down (as the coming off of the wheel, or the snapping of the axle-tree), is not *primâ facie* evidence of negligence. In our case, the mere overturning is ruled to be evidence of negligence, but the proximate cause of the overturning is not established. It was an open question, upon the evidence. Upon this distinction, it is conceived, that the instruction is not warranted by the cases; and that the burden of showing "that the accident was not occasioned by the driver's fault," was improperly thrown upon the defendant; and that it was, at least, rebutted by the hypothesis assumed in the 16th prayer. See *Lane* v. *Crombie*, 12 Pick. 177, and the cases cited *per curiam*.

Johnson, for the defendant.—The exception to the statement of the answer of the driver to Mr. Ludlow, was made before the evidence was given. The exception should have pointed out the part of the evidence which was objectionable, and not having done this, it must be overruled. This is a familiar

rule. But the evidence was proper. It cannot be denied, that the reckless and heartless declarations of the driver to Mr. Ludlow, with his other conduct, as proved by other witnesses, made while Mrs. Saltonstall was suffering the most severe agony, were proper testimony to go to the jury in aggravation of the damages.

The following propositions are sustained by authorities. 1. For the sufficiency of the stage coach, with reference to defects visible, or not visible, under ordinary examination, the carrier is responsible. 1 Carr. & Payne 414. *Sharp* v. *Gray*, 9 Bing. 457. 2. The breaking down, and consequently, the upsetting of the stage-coach, unexplained, is *primâ facie* evidence of negligence. *Christie* v. *Griggs*, 2 Camp. 79. 3. When there is danger in any particular part of the route, it is the duty of the driver of the stage to state its full extent to the passengers. *Dudley* v. *Smith*, 1 Camp. 167. 4. If a passenger is, by the negligence or want of skill of the *driver, or by the insufficiency of the carriage, in such a state of peril, as to render an effort to escape from it an act of prudence, and if, in escaping, he is injured, the owner of the stage is responsible. *Jones* v. *Boyce*, 1 Stark. 393. [*190

Barbour, Justice, delivered the opinion of the court.—This is a writ of error to a judgment of the circuit court of the United States for the fourth circuit and district of Maryland. It was an action on the case, brought by the defendant in error, against the plaintiff in error, and Richard C. Stockton, to recover damages for an injury sustained by his wife, by the up-setting of a stage-coach in which she was a passenger, and of which said Stockton and Stokes were the proprietors. The suit was brought in the name of Saltonstall alone ; but there is in the record an agreement, signed by the counsel of the parties, stipulating, amongst other things, that the plaintiff might recover in it, any damages which might be recovered in an action by himself and wife, or by himself and wife, or by himself alone.

The declaration alleges, that the injury complained of, was caused by the negligence and want of skill of the driver, then in the employment of the said Stockton & Stokes, and engaged in driving their coach, in which the plaintiff's wife was a passenger at the time she received the injury. In the progress of the case, Stockton, one of the defendants, died, and his death having been suggested upon the record, the case proceeded against Stokes. He pleaded the general issue of "not guilty," on which issue was joined.

At the trial, the defendant took a bill of exceptions to the ruling of the court ; from which it appears, that he asked the court to give to the jury sixteen several instructions, and the plaintiff asked of the court two instructions ; all of which, as well those asked by the defendant, as by the plaintiff, the court refused. But the court did give the jury the four following instructions, to wit :

1. That the defendant is not liable in this action, unless the jury find that the injury of which the plaintiff complains was occasioned by the negligence or want of proper skill or care in the driver of the carriage, in which he and his wife were passengers ; and the facts that the carriage was upset, and the plaintiff's wife injured, are *primâ facie* evidence that there was carelessness, or negligence, or want of skill, on the part of the

driver, and throws upon the defendant the burden of proving that the accident was not occasioned by the driver's fault.

2. It being admitted, that the carriage was upset, and the plaintiff's wife injured, it is incumbent on the defendant, to prove that the driver was a person of competent skill, of good habits, and in every respect qualified, and suitably prepared for the business in which he was engaged ; and that he acted, on this occasion, with reasonable skill, and with the utmost prudence and caution ; and if the disaster in question was occasioned by the least negligence, or want of skill, or prudence, on his part, then the defendant is liable in this action.

*191] *3. If the jury find there was no want of proper skill, or care or caution, on the part of the driver, and that the stage was upset by the act of the plaintiff or his wife, in rashly and improperly springing from it, then the defendant is not liable to this action ; but if the want of proper skill or care of the driver placed the passengers in a state of peril, and they had, at that time, a reasonable ground for supposing that the stage would upset, or that the driver was incapable of managing his horses, the plaintiff is entitled to recover ; although the jury may believe, from the position in which the stage was placed by the negligence of the driver, the attempt of the plaintiff or his wife to escape, may have increased the peril, or even caused the stage to upset ; and although they may also find, that the plaintiff and his wife would probably have sustained little or no injury if they had remained in the stage.

4. If the jury shall find, that the driver was a person of competent skill, and in every respect qualified and suitably prepared for the business in which he was engaged, and that the accident was occasioned by no fault or want of skill or care, on his part, or that of the defendant or his agents, but by physical disability arising from extreme and unusual cold, which rendered him incapable for the time to do his duty ; then the defendant is not liable in this action.

Under these instructions, the plaintiff obtained a verdict for $7130, for which the court rendered a judgment in his favor ; and from that judgment, this writ of error is taken.

We consider it altogether unnecessary to notice any of the instructions asked for by the defendant, and which the court refused to give, because those which they did give, cover the whole ground ; and therefore, it depends upon their correctness, whether the judgment is to be affirmed or not. We think, that the court laid down the law correctly in each and all of these instructions. It is certainly a sound principle, that a contract to carry passengers differs from a contract to carry goods. For the goods, the carrier is answerable, at all events, except the act of God and the public enemy. But although he does not warrant the safety of the passengers, at all events, yet his undertaking and liability as to them, go to this extent : that he, or his agent, if, as in this case, he acts by agent, shall possess competent skill ; and that so far as human care and foresight can go, he will transport them safely. The principle is in substance thus laid down in the case of *Christie* v. *Griggs*, 2 Camp. 79. So it is also, in the case of *Aston* v. *Heaven*, 2 Esp. 533, where it is said, that coach-owners are not liable for injuries happening to passengers, from accident or misfortune, where there has been no negligence or default in the driver ; that the action stands on the ground of

negligence, but that a driver is answerable for the smallest negligence. The principle is thus laid down in 2 Kent's Com. 466 : "The proprietors of a stage-coach do not warrant the safety of *passengers, in the character of common carriers ; and they are not responsible for mere accidents [*192 to the persons of the passengers, but only for the want of due care." What the author understood to be due care, will appear from this consideration, that in support of his proposition, he refers to the two cases which we have just cited.

In Story on Bailments, many cases are collected together upon this subject in pages 376–7, as illustrative of the principle, which is, by that author, laid down in these words : "If he (that is, the driver) is guilty of any rashness, negligence or misconduct, or is unskilful, or deviates from the acknowledged custom of the road, the proprietors will be responsible for any injuries resulting from his acts. Thus, if the driver drives with reins so loose that he cannot govern his horses, the proprietors of the coach will be answerable. So, if there is danger in a part of the road, or in a particular passage, and he omits to give due warning to the passengers. So, if he takes the wrong side of the road, and an accident happens from want of proper room. So, if, by any incaution, he comes in collision with another carriage." To which we will add the further example ; wherever there is rapid driving, which, under the circumstances of the case, amounts to rashness. In short, says the author, he must, in all cases, exercise a sound and reasonable discretion in travelling on the road, to avoid dangers and difficulties ; and if he omits it, his principals are liable.

The only case which is recollected to have come before this court on this subject, is that of *Boyce* v. *Anderson*, 2 Pet. 150. That was an action brought by the owner of slaves, against the proprietor of a steamboat, on the Mississippi, to recover damages for the loss of the slaves, alleged to have been caused by the negligence or mismanagement of the master and commandant of the boat. The court distinguished slaves, being human beings, from goods ; and held, that the doctrine as to the liability of common carriers for mere goods, did not apply to them, but that in respect of them, the carrier was liable only for ordinary neglect. The court seem to have considered that case as being a sort of intermediate one between goods and passengers. We think, therefore, that anything said in that case, in the reasoning of the court, must be confined in its application to that case ; and does not affect the principle which we have before laid down. That principle, in our opinion, fully justifies the first and second instructions given by the court ; except that part of those instructions which relates to the *onus probandi ;* and although we think this portion of the instructions as well founded in justice and law, as the other, yet it rests upon a different ground. The first part has relation to the liability of the defendant, the second, to the question, on whom devolves the burden of proof. If the question were one of the first impression, we should, upon the reason and justice of the case, adopt the principle laid down by the circuit court. But although there is no case which could have the weight of authority in this court, we are not without a decision in relation to it. The very point was decided in [*193 *2 Camp. 80 ; where it is said by Mansfield, Chief Justice, that he thought the plaintiff had made a *primâ facie* case, by proving his going on the coach, the accident, and the damage he had suffered.

It is objected, however, in the printed argument which has been laid before us, that although the facts of the overturning of the coach, and the injury sustained, are *primâ facie* evidence of negligence, they did not throw upon the defendant the burden of proving that such overturning and injury were not occasioned by the driver's default, but only that the coachman was a person of competent skill in his business ; that the coach was properly made, the horses steady, &c. Now, taking that portion of the first and second instructions which relates to the burden of proof together, we understand them as substantially amounting to what the objection itself seems to concede to be a proper ruling, and what we consider to be the law. For although, in the first, it is said, that these facts threw upon the defendant the burden of proving that the accident was not occasioned by the driver's fault ; yet, in the second, it is declared, that it was incumbent on the defendant, in order to meet the plaintiff's *primâ facie* case, to prove that the driver was a person of competent skill, of good habits, and in every respect qualified, and suitably prepared, for the business in which he was engaged ; and that he acted on the occasion with reasonable skill, and with the utmost prudence and caution.

This affirmative evidence, then, was pointed out by the court as the means of proving what was in terms stated in the form of a negative proposition before, that is, that the accident was not occasioned by the driver's fault. The third instruction also announces a principle, which we think stands supported by the soundest reason ; and we should, therefore, adopt it as being correct, if it were altogether a new question. But this, too, is in accordance with the doctrine of Lord Ellenborough, in 1 Stark. 493, in which he says, that to enable the plaintiff to sustain the action, it is not necessary that he should have been thrown off the coach ; it is sufficient if he were placed, by the misconduct of the defendant, in such a situation as obliged him to adopt the alternative of a dangerous leap, or to remain, at certain peril ; if that position was occasioned by the fault of the defendant, the action may be supported. On the other hand, if the plaintiff's act resulted from a rash apprehension of danger, which did not exist, and the injury which he sustained is to be attributed to rashness and imprudence, he is not entitled to recover. The instruction which we are now considering is framed in the spirit of the principle which we have just stated, and we think it wholly unexceptionable.

The fourth instruction which was given to the jury was in favor of the defendant, now plaintiff in error, and therefore, need not be *con-
*194] sidered. Upon the whole, we think that there is no error in the judgment. It is, therefore, affirmed, with costs.

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

*Meriwether L. Clark, Executor, and William P. Clark, George R. H. Clark, and Jefferson Kennerly Clark, an infant under the age of twenty-one years, by his Guardian *ad litem* and next friend, the said George R. H. Clark, Heirs-at-law of William Clark, deceased, Appellants, *v.* Andrew Smith, Appellee.

Indian lands.—Kentucky land-titles.—Cancellation of instruments in equity.—Federal practice.—State laws.

The colonial charters, a great portion of the individual grants by the proprietary and royal governors, and a still greater portion by the states of the Union, after the revolution, were made for lands within the Indian hunting-grounds; North Carolina and Virginia, to a great extent, paid their officers and soldiers of the revolutionary war, by such grants, and extinguished the arrears due the army by similar means; it was one of the great resources which sustained the war, not only by those states, but by other states. The ultimate fee, incumbered with the right of Indian occupancy, was in the crown, previous to the revolution, and in the states of the Union, afterwards, and subject to grant; this right of occupancy was protected by the political power, and respected by the courts, until extinguished, when the patentee took the unincumbered fee; so this court and the state courts have uniformly held.

The state of Kentucky has an undoubted power to regulate and protect individual rights to her soil, and to declare what shall form a cloud on titles; and having so declared, the courts of the United States, by removing such cloud, are only applying an old practice to a new equity created by the legislature, having its origin in the peculiar condition of the country. The unappropriated lands of the state of Kentucky have been opened to entry and grant, at a very cheap rate, which policy has let in abuses; the clouds upon old titles, by the issuance of new patents for the same lands, were the consequence; and the citizens of other states are entitled to come into the courts of the United States, to have their rights secured to them by the statute of Kentucky of 1796.

The state of Kentucky may prescribe any policy for the protection of the agriculture of the country, that she may beem wise and proper; she has, in effect, declared that junior patents, issued for previously-granted lands, shall be delivered up and cancelled; with the addition that a release of title shall be executed; and it is the duty of the courts to execute the policy.

Where the legislature declares certain instruments illegal and void, there is inherent in the courts of equity a jurisdiction to order them to be delivered up, and thereby give effect to the policy of the legislature.

The state legislature have, certainly, no authority to prescribe the forms or modes of proceeding in the courts of the United States; but having created a right, and at the same time prescribed the remedy to enforce it, if the remedy prescribed is substantially consistent with the ordinary modes of proceeding on the chancery side of the federal courts, no reason exists why it should not be pursued in the same form as in the state courts; on the contrary, propriety and convenience suggest, that the practice should not materially differ, when titles to land are the subjects of investigation.[1]

In the state of Tennessee, the legislature has provided, that the courts of equity may divest a title, and vest it in another party to a suit; and that the decree shall operate as a legal conveyance; in Kentucky, the legislature has declared, that courts may appoint a commissioner to convey, as attorney in fact of litigant parties, and such deed shall pass the title; in both instances, binding infants and *femes covert*, if necessary. The federal courts of the United States, in the instances referred to, have adopted the same practice, for many years, without a

[1] The courts of the United States have jurisdiction in common law and in chancery, and whenever such jurisdiction may be appropriately exercised, there being no objection to the citizenship of the parties, the courts of the United States have jurisdiction. Fitch *v.* Creighton, 24 How. 162; Lorman *v.* Clarke, 2 McLean 568; s. c. 4 Id. 18. Whilst it is true, that alterations in the jurisdiction of the state courts cannot affect the equitable jurisdiction of the circuit courts of the United States, so long as the equitable rights themselves remain, yet an enlargement of equitable rights may be administered by the circuit courts, as well as by the courts of the states. Broderick's Will, 21 Wall. 520.

doubt having been entertained of its propriety; it may be said, with truth, that it is a mode of conveyance, and of passing title, which the states have the exclusive right to regulate.

The undoubted truth is, that when investigating and decreeing on titles in this country, the court must deal with them in practice as it finds them, and accommodate our modes of proceeding, in a considerable degree, to the nature of the case, and to the character of the equities involved in the controversy, so as to give effect to state legislation and state policy; not departing however from what legitimately belongs to the practice of a court of chancery.

*196] *Appeal from the Circuit Court of Kentucky. William Clark, the father of the appellants, filed a bill in the circuit court of the district of Kentucky, praying the court to compel the defendant to release his pretended title to certain lands in the state of Kentucky, claimed by him under certain patents obtained from that state, more than thirty years after the registration of the survey of the ancestor of the complainants, George Rogers Clark. The possession of the land had continued in the ancestor of the complainant, and in himself, up to the time of the filing of the bill. The conveyance asked by the bill was sought to be in conformity with the provisions of the act of the assembly of Kentucky giving jurisdiction to courts of equity in such cases.

The circuit court was unanimously of opinion, that the complainants had established the legal title to the land mentioned in the bill, under a valid grant from the commonwealth of Kentucky, to George Rogers Clark, his ancestor, and that he was in possession of the same, at the commencement of this suit; and that the defendant had not shown that he had any right or title, either in law or equity, to the land, or any part of it: but the judges of the circuit court being divided in opinion on the question of the jurisdiction of the circuit court to compel the defendant to execute the conveyance prayed for in the bill, it was not the opinion of the court (the defendant having set up and exhibited junior patents from the commonwealth of Kentucky for the land, to himself), that on any other ground, apparent in the cause, the circuit court had jurisdiction, on the general principles which determine the equity jurisdiction of the courts of the United States, to grant to the complainants any other relief. The bill of the complainants was dismissed; and they prosecuted this appeal.

A printed argument was submitted to the court, by *Crittenden*, for the appellants. No counsel appeared for the defendant.

Crittenden stated:—This is a suit in chancery, under the 29th section of the act of 1796 (Ky. Stat. Law 293), to compel the defendant to release his pretended claim to the land in question. The complainant derives title as follows, to wit: Patent to George Rogers Clark, dated 15th September 1795, founded on an entry on treasury-warrants, made the 26th October 1780, "to begin on the Ohio, at the mouth of the Tennessee river, running down the Ohio," &c., surveyed June 7th, 1784, and registered June 4th, 1785; the survey and patent being for 36,962 acres. The patentee, George Rogers Clark, afterwards conveyed to William Clark, by deed dated 28th July 1803, proved and recorded in the court of appeals, in November 1803. At the suit of a creditor of the said patentee, the same tract of land, after the deed to William Clark, was subjected to sale, for satisfaction of the
*197] creditor's demand, and was then again purchased by George Woolfolk, to whom the commissioner of the court *(Samuel Dickinson) con-

veyed it, by deed of the 14th June 1827 ; and Woolfolk, by deed of the 13th October 1827, conveyed to the said William Clark. William Clark, thus doubly invested with assurance of title, and alleging possession of the land, filed his bill to compel a release of the defendant's pretended claims.

The defendant, by his answer, contests Clark's title, on various grounds, and asserts his own claims, which are nothing more than nine-penny claims, originating within a few years past, by entries and purchases made with, and of, the public receiver, under the laws of Kentucky for the disposal of the lands of the state below the Tennessee river.

The documentary evidence establishes, beyond question, the legal title of the complainant. His possession is not denied by the answer, is fully proved by the depositions, and is incontestable.

The origin of the defendant's pretended claims was between thirty and forty years after the date of Clark's patent, and about half a century after Clark's survey was registered in the proper office of the state of Virginia, from whose laws his title originally emanated.

Here the case ends. It is necessary to look no further, to embrace its whole merits as a legal controversy ; and the conclusion is clear and obvious, in favor of the complainant, both on general principles, and on the terms of the act of assembly under which the bill is filed. In accordance with this are the cases of *Starling* v. *Hardin*, 2 Bibb 522 ; and *Loftus* v. *Cates*, 1 T. B. Monr. 98 ; in the first of which, it is expressly said, that in a contest with those who have no title, originating anterior to the patent, no other evidence of title than the patent need be produced.

But the defendant has gone altogether beyond those limits, and proposes to litigate questions that, in our opinion, do not belong to or arise in the case. He contends, that the land was not subject to appropriation by Clark's warrants, at the date of his entry, and that, therefore, his claim is null and void.

It will not be denied, that the land in question was within the territorial limits of the state of Virginia, until the separation of Kentucky placed it under the jurisdiction of the latter state. Virginia had, then, the right to dispose of it according to her policy or pleasure. By the act of 1779 (1 Litt. 408), her whole unappropriated territory was thrown open for individual appropriation by treasury-warrants, with these only exceptions, that "no entry or location shall be admitted within the country and limits of the Cherokee Indians, or on the north-west side or the Ohio river, or on the lands reserved by act of assembly for any particular nation or tribe of Indians, or on the lands granted by law to Richard Henderson & Co., or in that tract of country reserved by resolution of the general assembly for the benefit of the troops serving in the present war, and bounded by the Green river, and south-east coast, from the head *thereof to the Cumberland mountains, with said mountains to the Carolina line, with the Carolina [*198 line to the Cherokee or Tennessee river, with the said river to the Ohio river, and with the Ohio to the said Green river, until the further order of the general assembly." This was the only restriction upon Clark's right to locate his warrants anywhere within the territorial limits of Virginia. His entries were made below the Tennessee river, and in the year 1780. They did not include any part of the excepted territories. Most clearly, they did not interfere with the military reserve.

It is true, that after Clark's entries at the November session 1781 (1 Litt. 432), the Virginia legislature enlarged the military reserve, by adding to it the country below the Tennessee, including the land now in suit. But it will scarcely be contended, that this act could affect, or was intended to affect, the previously-acquired and vested rights of Clark; while it clearly shows, that the legislature considered itself as having full power to dispose of this additional reserve; and that without this reservation, the land would have been, and before it was, subject to individual appropriation. The only purpose of the reservation was to exempt it from such appropriation, to which it was then liable. The decision in the case of *Marshall* v. *Clarke*, Hughes 39, is a direct adjudication that the land was subject to appropriation by Clark's entries.

Neither in 1779, nor at any time since, has either the government of the United States, or Virginia, or Kentucky, ever recognised the land now in suit as embraced either by the limits of the Cherokee Indians, or within the limits of any reservation made by any act of assembly, for any nation or tribe of Indians. At least, we know of no such recognition; let the defendant show it. The treaties with the Cherokee Indians show that they were never considered as owning the country where this land lies. (See those Treaties, 7 U. S. Stat. 39, *et seq.*) On the contrary, the Indian title to the country below the Tennessee river was supposed to be extinguished by the treaty of 1818, made with the Chickasaw Indians, by Shelby and Jackson, as commissioners. And in several acts of the Kentucky legislature (Stat. Law, 1040 and 915), the country below the Tennessee is recognised as land that was within the "Chickasaw Indian boundary." The land in question certainly does not lie within Henderson's grant, which is at the mouth of Green river.

Upon the whole, we conclude that Clark's claims, at the date of their location, in 1780, where not within any of the limits or territories exempted and excepted from appropriation by the act of 1779; and, consequently, that the land in question was legally subject to appropriation, and was legally appropriated by Clark's entries.

But suppose, those entries, and survey or surveys, were made without sanction of law, and upon lands excepted or reserved from appropriation by them, was it not competent for Virginia and Kentucky, the successive sovereign owners of the country, to waive any *objection to such irregularities? And when, afterwards, the title, however irregular in its inception and progress, was consummated by patent from the state, is not that, at least, *prima facie* evidence of such waiver on the part of the state, and is it not conclusive upon all persons subsequently acquiring title from the state? To us, it seems, that all these questions must be answered in the affirmative.

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There are numerous decisions by the court of appeals of Kentucky, that certificates for land, granted by commissioners or by county courts, are conclusive upon the state, and upon all parties subsequently acquiring a claim from the state; and that such subsequent claimants cannot impeach or inquire into the prior certificates. These decisions seem to have a decided bearing upon the present case; and the principle of them must equally exclude the defendant from questioning or impeaching the patent under which the complainant claims. The decisions alluded to are so numerous and well

known that it would be idle parade to cite them; it is a well-settled doctrine, too, that one claiming under an entry, &c., originating subsequent to a patent on the same land, cannot avail himself of any defect or irregularity in the entry or survey of the prior patentee. *Ward* v. *Lee*, 1 Bibb 33; *Fitche's Devisees* v. *Bullock*, Ibid. 229; *Greenup* v. *Kenton*, Hardin 15; *Patterson* v. *Bradford*, Ibid. 105; and *Jasper* v. *Quarles*, Ibid. 469, &c.

But if all these analogies, principles and precedents should fail us, we contend, that the legislative authority has sanctioned and made good the survey of Clark, whatever defect or objection previously existed in it or to it, or the entry on which it was founded. It will be seen, by the register's certificate, that the survey was registered "in the register's office of Virginia," at the time of, and before, the separation of Kentucky from that state. By the act of 1794, it was enacted by the legislature of Kentucky, "that the register of this state shall receive and issue grants on all certificates of survey which were in the register's office of Virginia at the time the separation took place, and on which grants have not issued." Stat. Law 910. Acting in the same spirit of sound policy and good faith towards Virginia claimants, this state, in the year 1811, enacted, that all claims, founded on the laws of this commonwealth, which interfered with "any survey or grant, surveyed or granted under or by virtue of any law of Virginia, &c., shall be void," &c. Stat. Law 915. See also, the act of 1792, 1 Litt. 75, 159. Clark's survey comes completely within the protection and ratification conferred by these statutes.

If a distinction be attempted between the claim of the defendant, and claims on Virginia treasury-warrants, on the ground, that the latter were expressly confined to "unappropriated land," it is answered, first, that these words are mere expletives, used out of abundant caution, and that the construction must have been the same, *if these words had not been used; second, that the ground of the distinction does not, in fact, exist; the act of 1825, § 2 (Stat. Law), authorizing the receiver to expose to sale only the "unappropriated sections," &c. It is inferred, therefore, that it could not have been intended, that purchases by private entries should have been made of any but "unappropriated sections." The whole country had been sectionized, and it was well known to, and recognised by, the legislature, that much of it had been appropriated; and it is but common respect to its justice, to suppose, that it designed this as an express and abundantly cautious saving of all individual rights and claims. [*200

Upon the hearing of the cause in the court below, the court, both judges concurring, were of opinion that the complainant, Clark, had the legal title to the land in question, and was in the actual possession thereof, at the commencement of this suit; and yet the court refused to decree the defendant to relinquish his pretended claim, because of a division of opinion with the judges, as to the jurisdiction of the court. One of the judges was of opinion, that, although the case came completely within the provisions of the act of assembly of Kentucky, giving jurisdiction to courts of equity in such cases, still that the federal court could not exercise that jurisdiction; its jurisdiction was limited by the "general principles" of the equity jurisdiction of the courts of the United States; and that the case being embraced by those general principles, the court could not exercise a jurisdiction created by an act of assembly of Kentucky. In consequence of this

division of opinion, the complainant's bill was dismissed; and he has appealed to this court, and will insist, that the circuit court had jurisdiction of the case, and ought to have exercised it, by decreeing in favor of the complainant, and that it erred in dismissing his bill. 7 Pet. 542.

Catron, Justice, delivered the opinion of the court.—By patent of the 15th September 1795, there was granted to George Rogers Clark, by the commonwealth of Kentucky, 36,962 acres of land, beginning on the Ohio river, at the mouth of the Tennessee; running south 16° east, 1280 poles, north 74° west, 3840 poles, north 16° east, 1800 poles, to the bank of the Ohio, about three miles below Fort Massac; thence running up the Ohio, with its several meanders, 4480 poles, to the beginning. The patent is in conformity to a survey of 7th June 1784, returned to the land-office of Virginia; founded on an entry, and an amendment thereof, dated 17th May, and 26th of October 1780; made by virtue of various treasury-warrants. The entry having been for 71,962 acres, with liberty to return one or more surveys. The identity of the land, as entered, surveyed and patented, is established beyond doubt, as the survey made by order of the court below, represents it.

William Clark, the complainant, by various mesne conveyances, became the *201] owner in fee of the same; and, by his tenant, has *been in possession from 1819, up to the time of filing the bill; the claim of the Chickasaw Indians having been extinguished to the country where the land lies, by the treaty of the 19th of October 1818; to which time the right of possession was necessarily suspended.

The first exception taken by the answer is, that the patent was made for lands lying within a country claimed by Indians; and therefore, void. To which it may be answered, that the colonial charters, a great portion of the individual grants by the proprietary and royal governments, and a still greater portion by the states of this Union, after the revolution, were made for lands within the Indian hunting-grounds. North Carolina and Virginia, to a great extent, paid their officers and soldiers of the revolutionary war, by such grants; and extinguished the arrears due the army by similar means. It was one of the great resources that sustained the war, not only by these states but others. The ultimate fee (incumbered with the Indian right of occupancy) was in the crown, previous to the revolution, and in the states of the Union afterwards, and subject to grant. This right of occupancy was protected by the political power, and respected by the courts, until extinguished; when the patentee took the unincumbered fee. So this court, and the state courts, have uniformly, and often, holden. 6 Cranch 87; 9 Ibid. 11.

By the act of November 1781, Virginia opened the whole country, south of the Tennessee river, for the satisfaction of military claims, and excluded the location of treasury-warrants; and the officers and soldiers, through their superintendents, Thomas Marshall and others, caveated George Rogers Clark's claim, praying no grant might issue to him for the 36,932 acres. The *caveat* was filed in the supreme court of the district of Kentucky; but because the judges were interested in the event, the suit was transferred, pursuant to an act of assembly, to the court of appeals of Virginia, where it was pending from 1786 to 1791; when that court, amongst other things,

held, "that the dormant title of the Indian tribes remained to be extinguished by the government, either by purchase or conquest; and when that was done, it inured to the benefit of the citizens who had previously acquired a title from the crown, and did not authorize a new grant of the lands, as waste and unappropriated." And the state, having succeeded to the royal rights, could appropriate the waste lands within her chartered limits in the same manner. 2. That by the act of 1779, the lands south of Tennessee river, were subject to be located by treasury-warrants; and that the act of 1781, for the benefit of the officers and soldiers, could not have a retrospective operation, so as to defeat General Clark's prior entry, made according to the existing laws. The opinion having been returned to the court of appeals of Kentucky, at the October term thereof, 1793, the *caveat* was dismissed; *and in September 1795, General Clark obtained his patent. Hughes 39. [*202

The validity of the title of the complainant, is, therefore, not now open to controversy on these grounds; and such was the opinion of the circuit court. But that court being divided in opinion on the question of jurisdiction, no decree could be made, in conformity to the prayer of the bill, and which was dismissed for this reason. It seeks to enforce the act of Kentucky of 1796, which provides, that "any person having both legal title to, and possession of, land, may institute a suit against any other person setting up a claim thereto; and if the complainant shall be able to establish his title to such land, the defendant shall be decreed to release his claim thereto, and pay the complainant his costs, unless the defendant shall, by answer, disclaim all title to such lands, and offer to give such release to the complainant; in which case, the complainant shall pay to the defendant his costs, except, for special reasons appearing, the court should otherwise decree." The foregoing extract is the 29th section of an act professedly regulating proceedings in the courts of chancery.

Conflicts of title were unfortunately so numerous, that no one knew from whom to buy or take lands with safety; nor could improvements be made, without great hazard, by those in possession, who had conflicting claims hanging over them; and which might thus continue for half a century—the writ of right being limited to fifty years in some cases; that is, where it was brought upon the seisin of an ancestor or predecessor, and to thirty years, if on the demandant's own seisin. (Act of January 1796.) During all which time, the party in possession had no power to litigate, much less to settle the title at law; for he might be harassed by many actions of ejectment, and his peace and property destroyed, although always successful; by no means an uncommon occurrence. This evil, it was the object and policy of the legislature to cure; not so much by prescribing a mode of proceeding, as by conferring a right on him who had the better title and the possession, to draw to him the outstanding inferior claims. It is, in effect, declared, that the junior claimant shall be deemed to hold as trustee for him in possession, and be compelled to release his inferior title by a conveyance, so that the junior patent, for instance, could not be perfected by possession, and the lapse of time into the better right (by force of the acts of limitation); now reduced, in Kentucky, in such cases, to a seven years' adverse holding. The junior patent, as between the state and the grantee, is a valid title; and if, in this instance, Smith were to hold adverse

possession of any one of his thirty-two tracts, for seven years, he would have the better legal title: and if the grants of Smith are released to Clark, a holding by him in virtue of the release, would have the same effect.

The legislature having declared that he who has the legal and equitable title, and the possession, may treat the adverse claimant as a trustee, and
*203] coerce a release to himself of the inferior claim, *of course, the statute secures a highly valuable right; which it is the duty of the courts to enforce, and which can only be enforced in a court of equity.

Kentucky has the undoubted power to regulate and protect individual rights to her soil, and to declare what shall form a cloud on titles; and having so declared, the courts of the United States, by removing such clouds, are only applying an old practice to a new equity created by the legislature, having its origin in the peculiar condition of the country. The unappropriated lands of that state have been opened to entry and grant, at a very cheap rate, as this record shows; which policy has let in the abuse sought to be remedied by the bill. That clouds upon old titles, by the issuance of new patents for the same lands, would be the consequence, was manifest; and that citizens of other states are entitled to come into the courts of the United States, to have the rights secured to them by the statute of 1796, enforced, we cannot doubt.

But we apprehend, jurisdiction may be assumed by the federal, equally with the state courts, upon another ground. Kentucky may prescribe any policy for the protection of the agriculture of the country that she may deem wise and proper; she has, in effect, declared, that junior patents, issued for previously granted lands, shall be delivered up and cancelled; with the addition, that a release of title shall be executed; and it is the duty of the courts to execute the policy. Where the legislature declares certain instruments illegal and void, as the British annuity act does; or as the gaming acts do; there is inherent in the courts of equity a jurisdiction to order them to be delivered up, and thereby give effect to the policy of the legislature. 10 Ves. 218; 5 Ibid. 604; 2 Yerg. 524; 1 Madd. Ch. Pr. 185, and authorities cited.

The state legislatures certainly have no authority to prescribe the forms and modes of proceeding in the courts of the United States; but having created a right, and at the same time prescribed the remedy to enforce it, if the remedy prescribed is substantially consistent with the ordinary modes of proceeding on the chancery side of the federal courts, no reason exists why it should not be pursued in the same form as it is in the state courts; on the contrary, propriety and convenience suggest, that the practice shoul not materially differ, where titles to lands are the subjects of investigation. And such is the constant course of the federal courts. For instance, in Tennessee, the legislature has provided that the courts of equity may divest a title, and vest it in another party to the suit; and that the decree shall operate as a legal conveyance. So, in Kentucky, the legislature has declared, that the courts may appoint a commissioner to convey, as the attorney in fact of a litigant party; and that such deed shall pass the title; in both instances, binding infants and *femes covert*, if necessary. The federal courts in the states referred to, have adopted the same practice, for many years,
*204] without a doubt having been entertained of its property. It may be said, *with truth, that this is a mode of conveyance and of passing

title which the states have the exclusive right to regulate; still the same statute that conferred the power thus to decree a conveyance, prescribed the mode of proceeding; and had the form of the remedy been rejected by the courts of the United States, the right to have such record conveyance would have fallen with it, as they could not be separated.

The undoubted truth is, that when investigating and decreeing on titles in this country, we must deal with them, in practice, as we find them, and accommodate our modes of proceeding, in a considerable degree, to the nature of the case, and the character of the equities involved in the controversy; so as to give effect to state legislation and state policy; not departing, however, from what legitimately belongs to the practice of a court of chancery.

The complainant's case being one coming clearly within the rules alluded to, we order that the decree of the court below be reversed, and the cause remanded to be proceeded in according to the rights of the parties.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Kentucky, and was argued by counsel: On consideration whereof, it is adjudged and decreed by this court, that the decree of the said circuit court in this cause be and the same is hereby reversed, with costs, and that this cause be and the same is hereby remanded to the said circuit court, for further proceedings to be had therein, in conformity to the opinion of this court.

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*Downes & Company *v.* Edward B. Church. [*205

Bills of exchange.

The plaintiffs in an action on the second set of a foreign bill of exchange, which was protested for non-acceptance, with the protests thereto attached, can recover, without producing the first of the same set, or accounting for its non-production.

Certificate of Division from the Circuit Court of Mississippi. This was an action of *assumpsit*, founded on the second of a foreign bill of exchange, by the indorsee against the indorser, for non-acceptance. The plaintiffs declared upon the "second" of the set of exhange, which "second of the set" was protested for non-acceptance; and the same, with the protest thereto attached, was read in evidence to the jury. Whereupon, a question arose, whether the plaintiffs could recover upon the said second of exchange, without producing the first of the same set, or accounting for its non-production; upon which the judges were opposed in opinion. Whereupon, the same was ordered to be certified to the supreme court of the United States.

The case was submitted to the court, on a printed argument, by *O. Hoffman*, for the plaintiff. No counsel appeared for the defendant.

Hoffman stated:—The only questiom that arises is, whether the plaintiff can recover upon the second of exchange, without producing the first of the same set, or accounting for its non-production. These bills are so many securities for the same debt, and so drawn, for convenience, and to avoid accident. Where one is paid, the one so paid has discharged the duty of the whole,

and the others cease to have legal existence. They contain this very condition on their face ; and show that each has a full operation, dependent only upon the rest not having disharged their office. If one is sufficient to present, so as to authorize the holder to demand payment, it would seem to follow, as a matter of course, that that which gave the right to demand payment or acceptance would be sufficient to support an action for non-payment or non-acceptance. If the presentation of one is sufficient to create a liability, that one must be sufficient to support an action founded on such liability. Whatever gives the right, must be enough to sustain the remedy.

Not a single case has been found, where the objection has been taken or decided by the courts, although the books abound with cases where the objection would have applied. The only exception to the general rule, that neither one of the set can perform the office of all the set is, that the particular bill protested must be the one declared upon and given in evidence, in order to save the drawer or indorser from liability to the person who may have interferred, **supra* protest, for his honor. Chancellor KENT says, "If several parts, as is usual, of a bill of exchange, be drawn, they all contain a condition to be paid, provided the others remain unpaid, and they collectively amount to one bill, and a payment to the holder of either is good, and a payment of one of a set is payment of the whole. The drawer or indorser, to be charged on non-acceptance or non-payment, is entitled to call for the identical bill or No. of the set protested, before he is bound to pay, and it would be sufficient to produce it at the trial, or account for its absence, as without it, he might be exposed to claims from some *bonâ fide* holder or person who had paid it, *supra* protest, for his honor." 3 Kent's Com. 109. The same doctrine was still more strongly recognised by the court, in *Kenworthy* v. *Hopkins*, 1 Johns. Cas. 197, which case the court will find cited and commented upon in *Wells* v. *Whitehead*, 15 Wend. 527. In this latter case, the court decided, that the set actually protested must be produced, in a suit brought by indorsee against indorser, to guard against a subsequent claim by an acceptor *supra* protest. The court say, "that the identical bill protested must be presented. It is true, as a general rule, that payment of one of the set is payment of the whole ; but if the drawer or indorser is entitled to call for the identical bill dishonored, before he is obliged to pay it, the omission to do so would subject him to the charge of negligence, and make him accountable to any person who had accepted it for his honor. His security, therefore, requires, that he should be allowed to call for the bill protested, before a recovery is permitted to be had against him." There is a *dictum* in Starkie, that "in cases of foreign bills, drawn in sets, both the sets should be produced." 2 Stark. on Evid. 142. But no authorities are cited to support this, and it is in hostility to the reasoning of the authorities to which I have referred.

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STORY, Justice, delivered the opinion of the court.—This is the case of a certificate of division of the judges of the circuit court for the district of Mississippi. The action was *assumpsit*, founded on the second part of a foreign bill of exchange, by the indorsee against the indorser, for non-acceptance. The plaintiffs declared upon the second of the set of exchange, which second of the set was protested for non-acceptance, and the same, with the protest attached thereto, was read to the jury. Whereupon, a

question arose, whether the plaintiff could recover upon the said second of exchange, without producing the first of the same set, or accounting for its non-production; upon which question, the judges were opposed in opinion. And the same has been accordingly certified to this court, under the act of congress.

We are of opinion, that the plaintiffs are entitled to recover upon the second of the set, without producing the first, or accounting for its non-production. No authority has been referred to, which is *exactly in point, nor are we aware that the question has ever been judicially decided. Mr. Starkie, in his work on Evidence (part 4, p. 228, 1st edit.), has said, "In the case of a foreign bill, drawn in sets, both the sets should be produced;" but for this proposition he has cited no authority. The question, must, then, be decided upon principle. The object of drawing a foreign bill in sets, is for the convenience of the payee, or other holder, to enable him to forward the same for acceptance, by different conveyances, and thus to guard against any loss, by accident or otherwise, which might occur, if there were but a single bill. But from the very frame of the set, if one is paid or discharged by the acceptor, or other party liable on it, he is ordinarily discharged from the others; since each part contains a condition, that it shall be payable only when the others remain unpaid. Now, when one of the set is protested for non-acceptance, and due notice is given to an indorser, and on the trial of an action brought against him by the indorsee, the same bill of the set on which the protest is made, is produced, that is *primâ facie* proof of his being responsible thereon. Either of the set may be presented for acceptance, and, if not accepted, a right of action presently arises, upon due notice, against all the antecedent parties to the bill, without any others of the set being presented; for it is by no means necessary, that all the parts should be presented for acceptance, before a right of action accrues to the holder. Under such circumstances, it is properly a matter of defence on the other side, to show either that some other bill of the set has been presented and accepted, or paid; or that it has been presented at an earlier time and dishonored, and due notice has not been given; or that another person is the proper holder, and has given notice of his title to the party sued; or that some other ground of defence exists, which displaces the *primâ facie* title made out by the plaintiff. The law will not presume, that the other bills of the set have been negotiated to other persons, merely because they are not produced. And the indorser is not put to any hazard or peril, by the non-production of them; since, like the acceptor, if he once pay the bill, without notice of any superior adverse claim, by a negotiation of another of the set, to another party, he will be completely exonerated. On the other hand, great inconveniences might arise from compelling the plaintiff to produce the other parts of the set, or to account for their non-production; as he might not be able satisfactorily to prove that they had not been negotiated, or that they had been lost. In short, if the plaintiff, before he could recover, were required to produce or to account for all the parts of the set, he would be obliged, in every case where the bills had been transmitted by different conveyances abroad, to arm himself with proofs of every stage of their route and progress, until they should come back again into his hands, as preliminaries to his right to recover, upon their being dishonored. Such a requirement would create

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most serious embarrassments in all commercial transactions of this sort; and instead of bills drawn in sets being a public convenience, they would be *208] greatly obstructed *in their negotiability, since the rights and the remedies of the holder might be materially impaired thereby. We are, therefore, of opinion, that the question upon which the judges of the circuit court were opposed, ought to be anwered in the affirmative; and we shall send a certificate to the court accordingly.

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 Mississippi, and on the point and question on which the judges of the said circuit were opposed in opinion, and which was certified to this court for its opinion, agreeable to the acts of congress in such case made and provided; and was argued by counsel: On consideration whereof, it is the opinion of this court, that the plaintiffs in this case could recover upon the second of a foreign bill of exchange, which was protested for non-acceptance, with the protest thereto attached, without producing the first of the same set, or accounting for its non-production. Whereupon, it is ordered and adjudged by this court, that it be so certified to the said circuit court accordingly.

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*209] *John F. Stein, Plaintiff in error, *v.* William Bowman and others, Defendants in error.

Evidence.—Consular certificate.—Hearsay.—Pedigree.—Husband and wife as witnesses.—Depositions.

Certain German documents were offered in evidence by the plaintiff, in the district court of Louisiana, for the purpose of using such parts of them as contained depositions which related to the pedigree of the plaintiff, which were overruled by the district court, on the ground that they were not duly authenticated. In the case of Church *v.* Hubbart, 2 Cranch 187, this court held, that the certificate of a consul, under his consular seal, is not a sufficient authentication of a foreign law, to make it evidence; it not being one of his consular functions to grant such certificates; and also, that the proceedings of a foreign court, under the seal of a person who styled himself the secretary of foreign affairs in Portugal, was not evidence; on the principles of this case, the circuit court very properly rejected the depositions offered. The certificate and seal of the minister-resident for Great Britain, from Hanover, is not a proper authentication of the proceedings of a foreign court, or of the proceedings of an officer authorized to take depositions; it is not connected in any way with the functions of the minister; his certificate and seal could only authenticate those acts which are appropriate to his office.

The only mode in which depositions can be taken in a foreign country, is under a commission.

No rule is better established, than that a party cannot be a witness in his own case.

The objection to the competency of a party to a suit as a witness, does not arise so much from the small pecuniary liability to the payment of the costs, as from that strong bias which every party to a suit must naturally feel, and this influence is not the less dangerous, if the party be unconscious of its existence; every individual who prosecutes or defends a suit, is, in the nature of things, disposed to view most favorably his own side of the controversy, and, with no small prejudice, the side of his adversary. To admit a party on the record, under any circumstances, to be sworn as a witness in chief, would be attended with great danger; it would lead to perjuries, and the most injurious consequences, in the administration of justice.

From necessity, in cases of pedigree, hearsay evidence is admissible; but this rule is limited to the members of the family, who may be supposed to have known the relationship which existed in the different branches; the declaration of these individuals, they being dead, may be given in evidence to prove predigree. And so is reputation, which is the hearsay of those who may be supposed to have known the fact, handed down from one to another, evidence. As evidence of this description must vary with the circumstances of each case, it is difficult, if not impracticable, to deduce from the books any precise and definite rule on the subject.

Stein v. Bowman.

It is not every statement or tradition in a family, that can be admitted as evidence; the tradition must be from persons having such a connection with the party to whom it relates, that it is natural and likely, from their domestic habits and connections, they are speaking the truth, and that they could not be mistaken.

The declarations offered as evidence were made subsequent to the commencement of the controversy, and, in fact, after the suit was commenced. It would be extremely dangerous to receive hearsay declarations in evidence, respecting any matter, after the controversy has commenced; this would enable a party, by ingenious contrivances, to manufacture evidence to sustain his cause. It is therefore, essential, when declarations are offered as evidence, that they should have been made before the controversy originated; and at a time, and under circumstances, when the person making them could have no motion to misrepresent the facts.

It is a general rule, that neither husband nor wife can be a witness for or against each other; this rule is subject to some exceptions, as when the husband commits an offence against the person of his wife.

The husband and wife may be called as witnesses in the same case, and if, in their statement of facts, they should contradict each other, that would not destroy the competency of either; it would not follow, from such contradiction, that either was guilty of perjury. And in some cases, the wife may be a witness, under peculiar circumstances, where the husband may be interested in the question, and to some extent, in the event of the cause.

*The wife cannot be a witness to criminate her husband, or to state that which she has learned from him in their confidential intercourse. The rule which protects the domestic relations from exposure, rests upon considerations connected with the peace of families; and it is considered, that this principle does not afford protection to the husband and wife, while they are at liberty to invoke it or not, at their discretion, when the question is propounded, but it renders them incompetent to disclose facts in evidence, in violation of the rule. The husband being dead, does not weaken the principle: it would seem rather to increase than lessen the force of the rule.[1] [*210

To sustain a claim to the admission of the deposition of a witness in evidence, the affidavit of a

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[1] It has been decided, in Pennsylvania, that on the trial of a man, charged with adultery, the husband of the alleged *particeps criminis* is not a competent witness for the prosecution. Commonwealth *v.* J. F., 12 W. N. C. 108; Commonwealth *v.* Gordon, 2 Brewst. 569. And also, that a wife cannot be a witness against another woman, charged with fornication with the husband of the former. Commonwealth *v.* Shriver, MS. These cases were decided on the authority of Rex *v.* Cliviger, 2 T. R. 268, and Broughton *v.* Harper, 2 Ld. Raym. 752. But in Commonwealth *v.* Reid, 8 Phila, 385, it was ruled, in an exhaustive consideration of the authorities, that a wife is a competent witness against a person accused of producing an abortion upon her, at her husband's procurement. In the latter case, the learned judge labors to show that the case of Rex *v.* Cliviger has been overruled, and is not law. But it is remarkable, that in none of these cases is Stein *v.* Bowman cited or considered, in which Rex *v.* Cliviger is approved, though not to its full extent. In that case, the court of king's bench decided, that in no case shall a wife be permitted to give evidence *tending* to criminate her husband; and therefore, that in a settlement case, where a marriage in fact has been proved between two paupers, the first wife of the husband is not a competent witness to prove a former marriage with him, because such evidence shows him to have been guilty of bigamy. And the same principle was involved in the case of Broughton *v.* Harper, 2 Ld. Raym. 752. It is admitted, that the rule was laid down too broadly in Rex *v.* Cliviger, but then it is to be remembered, that that was a settlement case, not a criminal prosecution. See also, State *v.* Gardner, 1 Root 485, and State *v.* Welch, 26 Maine 30. The result of the authorities seems to be, that a wife may be received to prove facts going to show the criminality of the husband, provided her testimony, thus given, will not be evidence to affect him in a subsequent prosecution for the offence. Van Cort *v.* Van Cort, 4 Edw. Ch. 624. In that case, however, the learned vice-chancellor says, that it might involve consequences of too serious a character to domestic peace, to adopt the rule in all cases. Id. And in Commonwealth *v.* J. F., *ut supra*, the court say: "It is essential to the happiness of social life, that the confidence subsisting between husband and wife should be sacredly protected and cherished, in its most unlimited extent, and that to break down or impair the great principles which protect the sanctities of that relation, would be to destroy the best solace of human existence." The authority of Commonwealth *v.* Reid is, therefore, a question of great doubt.

person who represented himself to be the agent of the plaintiff, stated, that the witness had left Louisiana, before the commencement of the suit, and ascended the Mississippi, with the intention of going to Ohio; and that since then, the person who made the affidavit had not heard from him, although he had made inquiries. This does not amount to that degree of diligence which the law requires, to introduce secondary evidence.

Error to the District Court for the Eastern District of Louisiana. In the district court of the eastern district of Louisiana, on the 8th day of April 1836, Johann Frederick Stein, an alien and a subject of the king of Hanover, presented a petition, stating that he was the sole and lawful heir of Nicholas Stein, or sometimes called Nicholas Stone, who had died some time before, in the parish of St. Tammany, in the state of Louisiana. The petition prayed, that William Bowman, who had been appointed curator of the estate of the deceased Stein, by the proper tribunal, should be decreed to account for the estate and effects received by him, and to deliver to the petitioner the property of the succession, which had not been sold, and to pay to him the amount in his hands. The answer of William Bowman, the curator, denied that the petitioner, Johann Frederick Stein, was the heir or related to the deceased Nicholas Stein or Stone; and averred, that the claim was interposed to vex and harass the respondent, and the true heirs of Nicholas Stein.

Afterwards, Andreas Stein, residing in the kingdom of Hanover, presented a petition to the district court, stating, that in April 1834, he had applied to the court of probate of New Orleans, claiming the succession to Nicholas Stein, as the heir of the deceased, and that by the unjust interference of Johann Frederick Stein, he had been prevented recovering the same. Subsequently, Johann Stein, Anna Sophia Stein, wife of Mathias Ahreus, and Luer Stein, a minor, assisted by his curator or trustee, and by his guardian, all of the kingdom of Hanover, filed their petition in the circuit court, stating that they were the only heirs of Nicholas Stein, and that in 1835, they had instituted a suit against William Bowman, which suit was still pending. They averred, that the claim of Johann Frederick Stein was fraudulent, and that he was not the heir of Nicholas Stein, as he alleged. They prayed leave to intervene in the suit, and stated, that William Bowman was a mere stakeholder. William Bowman afterwards filed a petition in the district court, setting forth that individuals belonging to three different families, the petitioners, pretended to be the nearest relations of the late
*211] Nicholas *Stein, and to be entitled to his estate; and he asked, as he was only a stakeholder, that the parties contesting the claims of each other might be called in to take cognisance of this suit, and defend him against it. The petitioner, Johann Frederick Stein, put in a general replication to each of the petitions of intervention.

The case was, on the application of William Bowman, referred to a jury, and on the 3d of March 1837, it came on for trial; and the jury found a verdict for the defendant. On the trial of the cause, bills of exception were signed by the court to the decisions of the court, on points arising during the trial of the cause.

The affidavit of John Rist was laid before the court, stating, that he had made diligent inquiry for Francis Stuffle, whose deposition was taken in the cause in the parish court, between the plaintiff and Bowman; "that he was unable to find him, and had been informed, and truly believed, he was dead;

this information had been derived from those who knew him." The deposition also stated, that Nicholas Mouzat, whose testimony was taken in the same cause, left Louisiana, before the commencement of this suit, and ascended the Mississippi, with the intention of going to the state of Ohio; that he had not since heard from him, although he had made inquiries for him. The deposition of Francis Stuffle was then offered in evidence by the plaintiff, and was admitted by the court; to which the defendant excepted.

The defendant called the wife of Francis Stuffle, he being dead, to prove that her husband had been bribed by John Rist to give evidence in the case; and also to prove, he had frequently told her, he knew nothing of the plaintiff, or of Nicholas Stein. The plaintiff objected to the admission of the witness; but the court allowed her to be sworn, and she gave her testimony. The plaintiff excepted.

The plaintiff then offered in evidence certain German documents, to prove the pedigree of the petitioner, which were rejected by the court, as not being sufficiently authenticated; and to this rejection, the plaintiff excepted. The depositions which were taken, and which were in the German language, were not signed by the deponents; and at the end of each deposition, it was stated, that each of the witnesses assented to the same. A magistrate of the place certified to this fact, and this was attested under his seal by the "Royal British Hanoverian Landrostey;" and his signature is attested under his seal, by the "Royal British Hanoverian Minister Residentis."

The defendant, William Bowman, was, during the trial, admitted as a witness by the court, to testify as to the merits of the controversy. The plaintiff excepted to his admission.

The court refused to admit Stultz as a witness for the plaintiff, *to prove that he had been in Hanover the preceding summer, and there heard from many old persons of whom he inquired, that the [*212 plaintiff was the brother of Nicholas Stein. The witness stated, that he had gone to Germany for the purpose of taking a deposition: the court were of opinion, that the depositions of those persons should have been taken.

The plaintiff prosecuted this writ of error.

The case was submitted to the court, on printed arguments, by *Crittenden*, for the plaintiff in error; and by *Garland*, for the defendant.

Crittenden, for the plaintiff in error, stated, that:—The plaintiff, J. F. Stein, insists, that the court erred in all the opinions and decisions excepted on his part, and has prosecuted a writ of error, to reverse the judgment rendered against him. A decision by this court, on all the questions presented by these bills of exceptions, will probably be necessary to the proper final disposition of the case in the court below, and therefore, they are all insisted upon, and submitted to this court. If the single object was merely a reversal of the judgment, it is supposed, that errors obvious and sufficient for the purpose are made manifest by the bills of exception. From the first exception, it appears, that the court permitted Bowman, the defendant, to become a witness in his own case; and, in the second, that a woman was permitted to violate the sacred confidence and intimacy of married life, by giving testimony to betray and criminate her deceased

husband. The law condemns it. 2 Stark. on Evid., part 4, page 705, &c., and 709, &c.

Garland, for the defendant in error.—Nicholas Stein, generally called and known as Nicholas Stone, died in the parish of St. Tammany, Louisiana, in the year 1833, leaving an estate estimated to be worth about $25,000. In October 1833, Bowman, one of the present defendants, was appointed by the proper tribunal, curator of the estate, and took upon himself the administration. The plaintiff alleges, that Nicholas Stein died without leaving either legal ascendants, descendants, or collaterals, except himself; and that he is the only brother and sole heir. That the term allowed by law to Bowman to administer the estate has expired, and he is entitled to the whole of it. He, therefore, asks for an account and payment of the amount that has been received. Bowman denies positively that the plaintiff is the brother or any relation of Nicholas Stein, deceased; and says that his claim to the estate is unfounded and fraudulent, and intended to defraud, vex and harass him and the real heirs.

Andrew Stein intervenes in the suit, and alleges, he is the nearest of kin, and sole heir of Nicholas Stein, and claims the estate; *and that
*213] he has instituted a suit in one of the state tribunals, to wit, the probate court of the parish of St. Tammany, to recover it; which suit was then, and is now pending. Johann Stein, Anna Sophia Stein, wife of Mathias Ahreus, and Luer Stein, a minor, also intervene in the suit; and say they are the only heirs of Nicholas Stein, and claim the estate. In answer to all these petitions, Bowman, the defendant, answers, that he is merely a stakeholder; that he has three suits pending against him to recover the same property, to wit, the case now on trial, and two suits in St. Tammany. The plaintiff and appellant answers the two petitions of intervention, and takes issue with the parties named in them, as to their claims to be recognised as heirs.

Nicholas Stein, it appears from the testimony, came to the United States about thirty years previous to his death, from the kingdom of Hanover. After his arrival, he never heard from any of his relations, or did he ever have any intercourse with them, except writing one letter, which is in the possession of one of the interpleaders, addressed to him as a brother. The record shows that a man named Rist (who is a gambler in Louisiana) is the person who is procecuting this claim in the name of the plaintiff and appellant. We allege it is fraudulent, and is attempted to be sustained by perjury; and that Rist is the party really interested.

It also very satisfactorily appears, that a suit was instituted, in 1834, by the appellant, or rather by Rist, in his name, in the probate court of the parish of St. Tammany, against the appellees, to recover this same property. This was in the parish where Nicholas Stein had resided many years previous to his death, and where all the circumstances relating to his affairs were known. That suit was decided against the plaintiff, on the merits. He took an appeal to the supreme court of the state, where every point taken in the inferior court, and decided upon in the course of the trial, was affirmed; but that tribunal set aside the final judgment on the merits, without giving any reason for so doing, and entered up a judgment of nonsuit. The cause was tried by a jury, and after an investigation of three days, a general verdict was rendered in favor of the defendant, on the 4th of March

1837. On the 11th of March 1837, the plaintiff, in an informal manner, moved the court for a new trial, on various grounds; which motion was rejected, because not asked for within the delay prescribed by law and the rules of the court. It will not be denied, that so far as all questions of practice are involved, that the laws of the state of Louisiana, and the decisions of its courts, are to govern in the courts of the United States. (4 U. S. Stat. 62.)

In this case, a new trial cannot be awarded, and the cause remanded, even if the court should be of opinion there was error in the decision of any of the points made in the district court; because *the appellant has [*214 abandoned or lost the right he may have had to have his case revised or examined in that way. A new trial being one of the modes prescribed by law of having a judgment revised or re-examined, if the party does not avail himself of it in the manner and within the time directed, he can no more have that benefit than he could that of an appeal, if he had not taken it within the time and in the manner directed by law. Louisiana Code of Pract. art. 556–7; 4 Mart. (N. S.) 532. The manner of applying for a new trial, and the time within which the application must be made, is specially and particularly described; and the appellant has not complied with the law in a single particular. Louisiana Code, art. 558–61.

Taking it for granted, that the court will not remand the cause, it must be examined on its merits; and it is submitted, whether there are sufficient grounds to set aside the verdict of the jury, and reverse the judgment? The law of the case is very plain, if the plaintiff has sustained his allegations by proof. Is he the sole relative in the ascending, descending or collateral line to Nicholas Stein, deceased? If he is, there is an end of the question. Is there enough on the record, to satisfy the court that he is, even admitting all the evidence rejected in the court below? It is not sufficient, the plaintiff should show he is a brother; but before he can claim the whole estate, he must show the father and mother of Nicholas Stein are dead. If both or either of them are alive, the brother cannot inherit the whole estate; because, in Louisiana, ascendants inherit as well as brothers and sisters. Ascendants are what are called forced heirs, and like descendants, cannot be disinherited even by testament, but for cause. Fathers or mothers do not entirely exclude brothers or sisters, or their descendants; but before these last can inherit solely, they must show no forced heirs are living. Louisiana Code, art. 883, 899, 907–8, 1481–2; 12 Mart. 390.

As to the plaintiff's first bill of exception, it is not necessary to say anything. It is taken to the admission of Bowman's affidavit, offered for the purpose of affecting the jurisdiction of the court; and as the court afterwards decide that the exception to the jurisdiction was made too late, there is no necessity for it, unless the court shall consider it in connection with the defendant's third bill of exception.

The second bill of the plaintiff is taken to the rejection of certain documents in the German language. These are the same papers that were offered in evidence in the first suit of the probate court, rejected by it, and that decision affirmed by the supreme court of the state of Louisiana. It is sufficient to refer to that decision, and the decisions therein referred to.

*The plaintiff's third bill is to the admission of Bowman as a [*215

witness. The bill does not specify any particular objection, which it certainly ought to do, and the court is left to conjecture the ground of exception. No objection to the defects in the bill are intended to be waived; on the contrary, we insist on all the legal exceptions to it. It is supposed, the objection to Bowman is that he is a party on the record. But the court will recollect, he has no personal interest in the case. He is a mere stakeholder, ready to deliver any property or money he has in possession to whoever is legally entitled to receive it. The plaintiff has never been recognised as an heir. If he had been, and then Bowman refused to pay over, the case would be different. As to the recognition of heirs and their rights, before and after, the court is respectfully referred to the Louisiana Code. Louisiana Code of Pract. art. 1000–4, and the amendment at page 348. Bowman is not individually liable for costs, until the plaintiff shall be recognised as heir, and he has put him in delay; until then, he is the representative of all persons interested, and the costs are paid out of the estate. As a stakeholder, Bowman is a competent witness.

The plaintiff's fourth bill is to the rejection of Stultz as a witness. The court was certainly correct in rejecting his testimony. The cases in which hearsay testimony is admitted are all specified. They are exceptions to a general rule, and the counsel for the appellant must show that this is one of the exceptions. It will be difficult, it is believed, to convince the court that the authority referred to will authorize the reception of the evidence of this witness. The persons whose declarations are to be stated, are alive. It is, besides, shown to the court, that the plaintiff or appellant has alleged that he had documentary evidence of his being the heir, and that he offered it in evidence, but it was rejected, because not presented in a legal shape. Ancient boundaries and pedigree may sometimes be proved by tradition, and the common understanding of all persons; but affinity and the relationship of collateral heirs do not come within the rule.

The plaintiff's fifth bill is to the admission of Mrs. Stupfel, or Stuffle, to testify as a witness. There is no known law, that prohibits man and wife from giving testimony in a cause between third persons, or prohibits the wife from contradicting the husband, or proving any other facts she may know. She cannot testify for or against him in a suit in which he is a party, or interested.

The plaintiff's sixth bill of exception is to the rejection of a deposition of a witness named Mouzat, which had been taken under a commission issued in the suit, in the probate court, and which the plaintiff wished to read as evidence in this suit, on the pretext that Mouzat was absent, and could not be found. The judge was not *satisfied of his absence; it
*216] was not pretended he was dead. It does not appear, any effort was made to procure his attendance, or have his deposition taken.

The plaintiff's seventh bill of exception is to the refusal of the court to award a new trial, or to permit a motion for it, and the grounds to be filed. The district judge was certainly correct in his opinion. By the rules of the court, the time had expired, and the motion was not made in the manner or the time prescribed by law. Louisiana Code of Pract. art. 557–61.

If, in conformity with this opinion, that the court cannot send the cause back for a new trial, and it shall proceed to investigate the merits, it will not perhaps be necessary to decide on any of the defendants' bills of exception.

But if the court should determine to send the cause back, contrary to expectation, or should it be considered necessary in the investigation, it is not intended to waive any legal ground taken in them.

The first exception of the defendants is to the reception by the district judge of a document called a deposition *de bene esse*, of a person called Henry Munget. It is not taken by the authority of any court, nor is any notice given to the defendants of its being taken. As to the first ground taken in the bill, see Louisiana Code of Pract. art. 424–31, &c., also, amendment, page 156. As to the second and third grounds, it is not necessary to produce authorities. The fourth is settled by the decision given in the supreme court of Louisiana, in this case already referred to.

The defendant's second exception is to the admission of the deposition of Francis Stupfel or Stuffle. As to first and third grounds, in is sufficient to refer again to the case between these parties in the supreme court of Louisiana. As to the second, a reference is made to Code of Practice, art. 430–5, &c.

The verdict of the jury has negatived every allegation of the plaintiff that he is a brother or heir of Nicholas Stein, deceased; and it is presumed the court will not disturb it.

Mr. Garland also submitted an additional printed argument. He stated, that as to the plaintiff's third bill of exception, he would refer the court to 4 Mart. (N. S.) 21; and also to page 72 of the same volume, and 10 Mart. 637, as applicable to the point under consideration, and to several others in the case. The court are asked to attend particularly to what Bowman states in his affidavit: it is, that Rist is the real party, having purchased all the rights of Stein, the plaintiff, and he could prove it by witnesses who are named in the affidavit, who were afterwards introduced, and actually did prove it. The facts stated by Bowman having been proved by other legal testimony, the bill ought not to be noticed. 5 Mart. 213.

Bowman is competent to testify as to the identity or relationship of Stein, the plaintiff, in a case where several are claiming the property *in his possession. It is a matter of no concern to him, who is recognised as the heir. He has to pay to whoever shall recover. The costs are paid out of the estate. His commissions, as curator, are neither increased nor diminished, nor has he any interest in the event of the suit which will disqualify him. The case would be different, were a stranger claiming something of the curator as a debt, or if he were claiming a debt, or the benefit of a contract. The effect of his evidence, then, would be to increase or diminish the amount of the succession, and consequently, the compensation of the curator. Bowman is the legal agent of all the heirs, or those claiming as such, until some one is recognised as heir according to law. To test the competency of Bowman, the court have only to examine whether he will directly gain or loss anything by the event of this suit. 2 Mart. (N. S.) 333; 4 Ibid. 539; 3 Ibid. 11, 166. [*217

The question raised by the plaintiff's fifth bill of exception is, whether the widow of Francis Stuffle can testify to what her deceased husband told her, previous to his death; which statement would go to discredit his evidence. She is certainly a competent witness to testify in the case, and the plaintiff must show such questions as are propounded ought not to be answered. Has he done so? By answering the question, would she criminate

her husband, subject him to any penalty or action of any kind? Clearly not, for he is beyond the reach of any legal proceedings. No breach of confidence is involved, nor do the relations exist, in which it is the object of the law to preserve harmony, by preventing the husband or wife from testifying as to what one tells the other. The authority cited by the counsel does not go the length that is contended. It is hoped the court will examine it particularly, and reference is made to the second English edition of Starkie on Evidence, vol. 2, p. 401–2, and the authorities there cited.

In the case of the *King* v. *Inhabitants of All Saints, Worcester*, the court evidently intended to narrow very much, if not entirely contradict the positions previously taken, which Starkie says were certainly too extensive and indefinite. The only effect of the evidence of Mrs. Stuffle would be, to cast a reflection upon the memory of her deceased husband. During his lifetime, she might have been called to prove what might have disgraced him, and he might have been compelled to answer himself a question that would have had the same effect. 1 Starkie (2d Eng. Ed.) 167–72, inclusive.

The court were also referred to the opinion of the supreme court of Louisiana, in a suit between the same parties, decided on the 21st of March 1836.

McLean, Justice, delivered the opinion of the court.—This case was brought originally in the district court of the United States for the eastern district of Louisiana; and on the trial certain exceptions were taken to the
*218] rulings of the court by the *plaintiff, and which he now brings before this court on a writ of error.

The action was brought by petition, in the form peculiar to the courts of Louisiana, to compel the defendant to render an account, as curator of the estate of Nicholas Stone, or Stein, deceased. The plaintiff represents himself as an alien, and as the only heir-at-law of the deceased. Some time after the defendant had answered the petition, Johann Stein and others filed their petition of intervention, denying the statements in the plaintiff's petition, and representing themselves to be the true heirs of the deceased.

The cause was submitted to a jury; and on the trial, to sustain his case, the plaintiff offered in evidence certain German documents, for the purpose of using such parts of them as contained the depositions which related to the pedigree of the plaintiff; which were overruled by the court, on the ground that they were not duly authenticated. And this constitutes the first exception.

Several depositions appear to have been taken, but none of them were signed by the deponents. At the close of them it is stated: "After the preceding depositions were read to the deponents, they gave their assent to them and approbation.

[Seal.] (Signed) R. V. D. Busseke.

Seen, for attestation of the preceding signature of the Royal Amtsvagtey Burgwedel.

Luneburg. Royal British Hanoverian Landdrostey.

[Seal.] Ruemern."

To which is added :—"The subjoined signature of the Royal Britannic Land Bailiwick at Luneburg is hereby attested. Hamburg, Sept. 19th, 1843.

Royal Britannic Hanoverian Minister Residentis.

Im Ausftrage, by authority. G. W. KERN."

[Seal.]

In the case of *Church* v. *Hubbart*, 2 Cranch 187, this court held, that a certificate of a consul, under his consular seal, is not a sufficient authentication of a foreign law, to go in evidence; it not being one of his consular functions to grant such certificates. And also, that the proceedings of a foreign court, under the seal of a person who styles himself the secretary of foreign affairs in Portugal, is not evidence. On the principle of this case, it would seem, that the court very properly rejected the depositions offered. The certificate and seal of the minister resident from Great Britain, in Hanover, is not a proper authentication for the proceedings of a foreign court, or of the proceedings of an officer authorized to take *depositions. [*219 It is not connected in any way with the functions of the minister. His certificate and seal could only authenticate those acts which are appropriate to his office. The authority to take the depositions, by the person before whom they were taken, nowhere appears; and it is not shown, that the Royal Britannic Hanoverian Land Bailiwick, Ruemern, was authorized to attest, as he has done, the signature of R. V. D. Busseke. If the attestation of the signature, and right of the person who administered the oaths, were duly certified under the seal of a responsible officer, whose appropriate duty it was to give such certificate, it might be received, so far as the authentication goes, as *primâ facie* evidence, though not under the great seal of the state. It may be proper, however, to remark (though the point was not raised in the court below), that if the authentication had been sufficient, the depositions would have been inadmissible, they not having been taken under a commission; which is the only mode by which depositions in a foreign country can be taken.

In the course of the trial, Bowman, the defendant, was admitted as a witness by the court; and, being sworn, gave evidence to the jury respecting the merits of the case. And to this decision of the court, overruling the objection made, the plaintiff also excepted. No rule is better established, than that a party, in an action at law, cannot be a witness in his own case. In the case of *Scott* v. *Lloyd*, 12 Pet. 149, this court said, "The decision in Pet. C. C. 301, where the court held a party named on the record might be released, so as to constitute him a competent witness, has been cited and relied on in the argument." "Such a rule," the court remarked, "would hold out to parties a strong temptation to perjury; and we think it is not sustained either by principle or authority." Bowman was a party on the record, was curator, as represented, and was *primâ facie* liable for the costs of suit. But if there could have been a release for the costs executed, or the money to cover the costs had been paid into court, his competency would not have been restored. The objection to his competency does not arise so much from the small pecuniary liability to the payment of costs, as from that strong bias which every party to a suit must naturally feel. And this influence is not the less dangerous, if the party be unconscious of its existence. Every individual who prosecutes or defends a suit is, in the nature of things, disposed to view most favorably his own

side of the controversy, and with no small degree of prejudice, the side of his adversary. We think, therefore, to admit a party on the record, under any circumstances, to be sworn as a witness in chief, would be attended with great danger. It would lead to perjuries, and the most injurious consequences, in the administration of justice. We think, therefore, the court erred in admitted Bowman as a witness.

*220] *The next exception of the plaintiff arises from the rejection of Stultz as a witness, who was introduced to prove that he had been in Hanover, in Germany, "last summer;" and there heard, from many old persons of whom he inquired, that the plaintiff was the brother of Nicholas Stone, deceased. And this court have no doubt that this evidence was properly overruled by the district court. From necessity, in cases of pedigree, hearsay evidence is admissible. But this rule is limited to the members of the family, who may be supposed to have known the relationship which existed in its different branches. The declarations of these individuals, they being dead, may be given in evidence to prove pedigree; and so is reputation, which is the hearsay of those who may be supposed to have known the fact, handed down from one to another, evidence.

As evidence of this description must vary by the circumstances of each case, it is difficult, if not impracticable, to deduce from the books any precise and definite rule on the subject. "It is not every statement or tradition in the family that can be admitted in evidence." The tradition must be from persons having such a connection with the party to whom it relates, that it is natural and likely, from their domestic habits and connections, that they are speaking the truth, and that they could not be mistaken. 1 Phillips 174; 2 Dall. 116. The declarations proposed to be proved by the witness, do not appear to have been made by members of the family, or by persons who had such connections with the deceased as to have a personal knowledge of the facts stated. And these persons, for aught that appears, are still living; and their depositions might be taken.

On both these grounds, the evidence was inadmissible. But there is another ground on which the opinion of the district court can be sustained, and it is proper to state it. The declarations offered as evidence were made subsequent to the commencement of this controversy, and, in fact, after the suit was commenced. It would be extremely dangerous to receive hearsay declarations in evidence, respecting any matter, after the controversy has commenced. This would enable a party, by ingenious contrivances, to manufacture evidence to sustain his cause. By interrogatories propounded in a cautious manner to unsuspecting individuals, he might elicit the answers he most desired. It is, therefore, essential, when declarations are offered as evidence, that they should have been made before the controversy originated, and at a time, and under circumstances, when the person making them could have no motive to misrepresent the facts. *Case of the Berkeley Peerage*, 4 Camp. 409.

The plaintiff having read the deposition of Francis Stuffle, deceased, in evidence, the defendant called the wife of the deceased to prove, as stated in the bill of exceptions, that her husband had been bribed by John Rist to

*221] give evidence in that case, and also to *prove that he had frequently told her he knew nothing of the plaintiff, or of Nicholas Stone, deceased. The plaintiff objected to the swearing of the witness, but the court

overruled the objection, and permitted the witness to give evidence. To this opinion, the plaintiff excepted. It is a general rule that neither a husband nor wife can be a witness for or against the other. Co. Litt. 6 *b*; Hawk. B. 2, ch. 46, § 70; Gilb. Evid. 11; Bull. N. P. 286; *Fitch* v. *Hill*, 11 Mass. 286. This rule is subject to some exceptions; as, where the husband commits an offence against the person of his wife. 1 Hale, P. C. 301; Hawk. B. 2, c. 46, § 77; Bull. N. P. 287; 1 Bl. Com. 413. The wife may exhibit articles of the peace against her husband. Bull. N. P. 287. The husband and wife may be called as witnesses in the same case, and if, in their statement of facts, they should contradict each other, that would not destroy the competency of either. It would not follow from such contradiction, that either was guilty of perjury. And in some cases, the wife may be a witness, under peculiar circumstances, where the husband may be interested in the question, and, to some extent, in the event of the cause. 8 East 203; Gilb. Evid. 139.

In the case of the *King* v. *Cliviger*, 2 T. R. 268, the court held, that a wife should not be called in any case to give evidence even tending to criminate her husband. Mr. Justice GROSE, in that case, observed, "In all the books which treat of evidence, there are certain technical rules laid down, which are highly beneficial to the public, and ought not to be departed from. Some of these relate to husband and wife; and we find the general rule as to them to be founded, not on ground of interest, but on policy, by which it is established that a wife shall not be called to give testimony in any degree to criminate her husband. And Lord HOLT says, that she shall not be called, indirectly, to criminate him. And the rule seems to have governed all the decisions from that time to the present." In the case of the *Executrices of Stead* v. *Pritchett*, 6 T. R. 680, the court said, "Ratcliff is one of the plaintiffs on the record; he has, therefore, an interest in the cause, and that cannot be prejudiced by any act, or by the evidence of the wife." In the case of *Aveson* v. *Kinnaird*, 6 East 192, the counsel asserted in the argument, that the declarations of the wife could not be admitted as evidence to show that her husband had been guilty of fraud, or in any manner to criminate him. And he contended, that the rule of law was general, and extended even to cases where the wife was afterwards divorced from her husband. Lord ELLENBOROUGH, assenting to the rule, observed, "that goes on the ground, that the confidence which subsisted between them at the time, shall not be violated in consequence of any future separation." And his lordship observes, in the same case, "It is sound doctrine, [*222 *that trust and confidence between man and wife shall not be betrayed." In this case, however, the court permitted the declarations of the wife to be given in evidence, as to the bad state of her health about the time the policy of insurance on her life was executed, the action being founded on such policy. The above case of the *King* v. *Cliviger* has been somewhat considered in the court of king's bench, in the case of the *King* v. *Inhabitants of All Saints, in Worcester*; and the court seemed to think, that the rule laid down in that case was too large and general. But, at the same time, they observed, that the rule in the case of the *King* v. *Cliviger*, admitting it to its utmost extent, did not exclude the evidence in the case then under discussion. Phillips Evid. 69.

It has been said, that on the grounds of state policy, the wife is a com-

petent witness against her husband in case of treason. Bull. N. P. 289; 1 Brownl. 47; Bac. Abr. Evid. A. 1. But it has since been settled, that the wife is not bound to discover the treason of the husband. 1 Brownl. 47.

The law does not seem to be entirely settled, how far, in a collateral case, a wife may be examined on matters in which her husband may be eventually interested. Nor whether, in such a case, she may not be asked questions as to facts, that may, in some measure, tend to criminate her husband, but which afford no foundation for a prosecution. The decisions which have been made on these points, seem to have been influenced by the circumstances of each case, and they are somewhat contradictory. It is, however, admitted, in all the cases, that the wife is not competent, except in cases of violence upon her person, directly to criminate her husband; or to disclose that which she has learned from him in their confidential intercourse. Some color is found in some of the elementary works for the suggestion, that this rule, being founded on the confidential relations of the parties, will protect either from the necessity of a disclosure; but will not prohibit either from voluntarily making any disclosure of matters received in confidence; and the wife and the husband have been viewed, in this respect, as having a right to protection from a disclosure, on the same principle as an attorney is protected from a disclosure of the facts communicated to him by his client.

The rule which protects an attorney in such a case, is founded on public policy, and may be essential in the administration of justice; but this privilege is the privilege of the client, and not of the attorney. The rule which protects the domestic relations from exposure, rests upon considerations connected with the peace of families. And it is conceived, that this principle does not merely afford protection to the husband and wife, which they are at liberty to invoke or not, at their discretion, when the question is propounded; but it renders them incompetent to disclose facts in evidence
*223] in violation *of the rule. And it is well that the principle does not rest on the discretion of the parties. If it did, in most instances, it would afford no substantial protection to persons uninstructed in their rights, and thrown off their guard and embarrassed by searching interrogatories.

In the present case, the witness was called to discredit her husband; to prove, in fact, that he had committed perjury; and the establishment of the fact depended on his own confessions. Confessions which, if ever made, were made under all the confidence that subsists between husband and wife. It is true, the husband was dead, but this does not weaken the principle. Indeed, it would seem rather to increase than lessen the force of the rule. Can the wife, under such circumstances, either voluntarily be permitted, or by force of authority be compelled, to state facts in evidence, which render infamous the character of her husband? We think, most clearly, that she cannot be. Public policy and established principles forbid it. This rule is founded upon the deepest and soundest principles of our nature. Principles which have grown out of those domestic relations that constitute the basis of civil society; and which are essential to the enjoyment of that confidence which should subsist between those who are connected by the nearest and dearest relations of life. To break down and impair the great principles which protect the sanctities of husband and wife, would be to

destroy the best solace of human existence. We think that the court erred in overruling the objections to this witness.

The next exception by the plaintiff arises from the rejection of the deposition of Mouzat, which had been taken in the case of the parties in the parish court. To lay the foundation for reading this deposition, John Rist, who represents himself to be the agent of the plaintiff, swore that the witness left Louisiana, before the commencement of this suit, and ascended the Mississippi, with the intention of going to Ohio; and that since then, he has not heard from him, although he has made inquiries. This does not amount to that degree of diligence which the law requires to introduce secondary evidence, and such was the deposition offered. The plaintiff might have taken out a *subpœna*, the return of which, not served, would have been better evidence that the witness was not within the judicial district. We think, therefore, that the court did not err in rejecting the deposition.

For the errors above specified, the judgment of the district court must be reversed; and the cause sent down for further proceedings.

Baldwin, Justice, dissented.

*This cause came on to be heard, on the transcript of the record from the district court of the United States for the eastern district of Louisiana, and was argued by counsel: On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said district court in this cause be and the same is hereby reversed, with costs; and that this cause be and the same is hereby remanded to the said district court, for further proceedings to be had therein, in conformity to law and justice, and the opinion of this court. [*224

Ex parte Duncan N. Hennen. [*225

Practice.

The chief justice of the supreme court, residing in the fourth circuit, who, under the act of congress of 1802, ch. 31, holds the court at the August term, has not power to grant a rule for a *mandamus*, or a rule to show cause why a *mandamus* shall not issue. Such a rule does not fall within the description of cases enumerated in the act of congress, for the action of the court at the August term.

At the August term 1838 of the Court, Duncan N. Hennen filed a petition for a *mandamus* to the Honorable Philip K. Lawrence, judge of the District Court of the United States for the eastern district of Louisiana, requiring the said judge to restore Duncan N. Hennen to the office of clerk of the district court.

Coxe, of counsel for the petitioner, filed and read the petition, which was addressed to the chief justice and associate justices of the supreme court, setting forth, that on the 21st day of February 1834, the petitioner was appointed clerk of the district court of the United States in and for the eastern district of Louisiana, by the Honorable Samuel H. Harper, judge of the district court, and a commission was given to him appointing him to the said office. The petition stated, that the appointment was accepted, and the same was recorded on the minutes of the district court on the day of

the appointment, and the oath of office, and a bond was given by the petitioner, with sureties, in conformity with the provisions of the statute in such case made and provided, for the faithful performance of the duties of the said office; all of which was also entered on the minutes of the court.

The petition further stated, that Duncan N. Hennen entered on the duties of the office of clerk of the district court for the eastern district of Louisiana, and held the same, and continued to perform the duties thereunto appertaining, "methodically, promptly, skilfully and uprightly," to the satisfaction of the said district court, and of the parties suitors in the said court. That by virtue of the appointment, and of the provisions of the statute in such case made and provided, the petitioner was also, from the period of the organization of the circuit court of the United States for the said district of Louisiana, in like manner, the clerk of the said circuit court, and performed all the duties appertaining to said office; and during the period aforesaid, the petitioner, in like manner, received the fees and emoluments of office belonging to the same.

The petition further stated, that he so continued to perform the said duties, and to receive the said emoluments, and in all respects to hold and in all respects to hold and occupy said offices, until on or about the 18th day of May, in the year 1838, when he received a communication from the Honorable Philip K. Lawrence, then and now the judge of the said district court of the United States for the eastern district of Louisiana, in the following terms:

*"New Orleans, May 18th, 1838.

*226] "DEAR SIR:—The object of this communication is to apprise you of your removal from the office of clerk of the United States district court of the eastern district of Louisiana, and of the appointment of Mr. John Winthrop in your place. In taking this step, I desire to be understood as neither prompted by an unfriendly disposition towards you, personally, nor wishing to cast the slightest shade of censure on your official conduct. On the contrary, whether it will afford you any gratification to be thus assured or not, I avail myself of the occasion to declare to you, that my most ardent wishes respecting you, are for your entire success and prosperity in life. I consider it due to myself to have made this declaration; and a sense of justice to you demands that I should do what lies in my power to repel any unfavorable inference that might be drawn from your dismissal from the office of clerk, in regard to the manner in which the duties of the office have been discharged by you. On this subject, the situation in which I have been placed, during the last two years and upwards, has afforded me the means of speaking advisedly; and I am happy in being able to testify, as I now do, unreservedly, that the business of your office, during that period, has been conducted methodically, promptly, skilfully and uprightly. In appointing Mr. Winthrop to succeed you, I have been purely actuated by a sense of duty, and feelings of kindness towards one whom I have long known, and between whom and myself the closest friendship has always subsisted. I cannot but consider his claims to any benefit in my power to confer, as of a paramount character; and as his capacity to fill the office in question cannot be disputed, I feel that I am not exercising any unjust

preference, in bestowing on him the appointment. I am, very respectfully, &c. P. K. LAWRENCE,

United States Judge, District of Louisiana."

"To D. N.° HENNEN, Esq.

The petition proceeded to state, that on the 18th day of May 1838, Judge Lawrence executed and delivered to John Winthrop a paper purporting to be a commission appointing him clerk of the district court of the United States for the eastern district of Louisiana; and that Mr. Winthrop, under and by virtue of that commission, claimed a right to hold the said office, and did, in fact, to a certain extent, exercise the duties appertaining thereto; and he was by Judge Lawrence recognised as the only legal clerk of the district court, and received the fees and emoluments of said office. He had obtained possession of the records, minutes and documents of the office, and he claimed to exercise all the duties of clerk of the district court; and he and Judge Lawrence prevented the petitioner from performing any of the duties of clerk, or receiving the fees and emoluments belonging to the office.

The petition further stated, that on the 21st day of May 1838, [*227 *the circuit court of the United States for the eastern district of Louisiana met, according to law, when the Honorable John McKinley, one of the associate justices of the supreme court of the United States, and the said Judge Lawrence, took their seats on the bench as judges of the circuit court; and the petitioner and John Winthrop severally presented themselves, each claiming to be rightfully and lawfully the clerk of the circuit court; and the matter was argued by counsel for each of the said claimants. The judges differed in opinion on the question of right; and being unable to concur in opinion, neither of the said parties was admitted to act as clerk, or recognised by the court as being the rightful clerk; and no business was or could be transacted, and the court adjourned.

The petitioner further represented, that he was advised, and verily believed, that he was legally and in due form appointed the clerk of the said district court, and by virtue thereof became lawfully the clerk of the said circuit court; and he had never resigned the said office, nor been legally removed from the same, and he was rightfully entitled to hold and exercise the same, and to receive the fees and emoluments to the same belonging; and that he was illegally kept out of the said office of clerk of the said district court, and prevented from performing the duties thereof, and from receiving the fees and emoluments attached to the same, by the illegal acts and conduct of the said Philip K. Lawrence, judge as aforesaid, and of the said John Winthrop, claiming to hold the said office, by some pretended, but, as the petitioner was advised and believed, illegal and void appointment or commission, from said Judge Lawrence.

The petition further stated, that the judges of the said circuit court continued to differ in opinion as to the legal rights of the petitioner and said John Winthrop to said offices, so that no one did or could perform the duties of said office of clerk of the circuit court aforesaid; and that the suitors in this court were thereby delayed, and the administration of justice therein wholly suspended, and the appellate jurisdiction of the supreme

court of the United States over the judgments and decrees of said circuit court was wholly suspended, and incapable of being exercised. All these evils were stated to be remediless in the ordinary proceedings before the district and circuit court, and could only be terminated by the interposition of this court, by its extraordinary process of *mandamus*. The petitioner therefore prayed, that a writ of *mandamus* might be awarded, to be directed to the Honorable Philip K. Lawrence, judge of the said district court of the United States for the eastern district of Louisiana, commanding him that he forthwith restore the petitioner to his office of clerk of said district court of the United States for the eastern district of Louisiana ; or for a rule on the district judge, to show cause why such a writ of *mandamus* should not be awarded.

Chief Justice TANEY, then holding the August term of the supreme court, ordered that a rule on Philip K. Lawrence district judge as afore-
*228] said, should be awarded, requiring him to show cause, *at the following January term of the supreme court, why a *mandamus* should not be awarded to the district judge, as prayed for ; with leave to any party interested in the premises to move for a discharge thereof, on or before the return-day, the second Saturday of the term. Notice of this rule was required to be served on the district judge, and on John Winthrop, Esq.

Before the return of the rule, *Gilpin*, of counsel for John Winthrop, Esq., moved the court to discharge the rule granted by Chief Justice TANEY, at the August term of the court ; on the ground, that the court held at that time had not authority to make such a rule. He stated the readiness of Mr. Winthrop to meet the question raised by the proceedings ; and proposed that there should be substituted a rule, to be now granted by the court, of the same tenor with that made at the August term ; and that the same should be returnable on the second Saturday of this term. This proposition was accepted by the counsel of the relator, and approved by the court.

TANEY, Ch. J., delivered the following opinion, on the motion of Mr. Gilpin.—At the August term of the supreme court, held by the chief justice, or judge for the fourth circuit, according to the act of congress of 1802, a motion was made for a rule on the judge of the district court of the United States for the eastern district of Louisiana, to show cause why a *mandamus* should not issue, commanding the said judge to restore Duncan N. Hennen to the office of clerk of the said district court.

It appeared from the depositions and other evidence laid before the court at that term, that Duncan N. Hennen, the relator, who had been for several years clerk of the district court, had been recently removed from office by the district judge, and John Winthrop appointed in his place ; and a letter from the judge to the relator was produced, stating that the removal had not been made on account of any misconduct on his part, but merely from the desire of the judge to make provision for Winthrop, who was his personal friend, and well qualified for the office. It also appeared, that at the meeting of the circuit court, which took place shortly afterwards, the presiding judge of the circuit court was of opinion, that the removal was not authorized by law, and that Hennen was still the clerk of the district court, and

consequently, by virtue of the acts of congress, was also the clerk of the circuit court ; that the district judge, however, adhered to his opinion, that Winthrop was lawfully appointed by him, and the court being thus divided, neither of the claimants could be recognised as clerk ; and that the whole business of the circuit court was, therefore, continued over, and that no process could now issue from the court, until this controversy should be settled.

Upon this evidence, the rule to show cause was granted, returnable *to the supreme court, on Saturday, the 26th of January, with leave to the district judge to move to discharge the rule, even before the return-day above mentioned. A motion was now made to discharge the rule, upon the ground that the judge of the fourth circuit, sitting alone at the August term, had not the power to lay the rule. The court stopped the counsel in support of the motion, and the chief justice said :—The court do not desire an argument on the subject. When I granted the rule, I stated, that I strongly inclined to the opinion that I had no power to lay such a rule, in any case, at the August term ; and it is due to the counsel for the relator to say, that he acknowledged his own doubts, when he brought the subject before the court. But as the question was an important one, and might again occur ; I thought it proper that it should be settled by the judgment of the court, at its regular session, and not by a single judge. I, therefore, laid the rule, because it was the only mode in which I could bring the subject before the court for decision. We have conferred together, since we assembled for the present session, and we are unanimously of opinion, that such a rule cannot be laid at the August term ; that the act of 1802, ch. 31 (2 U. S. Stat. 156), gives the power to the judge of the fourth circuit, at that term, " to make all necessary orders touching any suit, action, appeal, writ of error, process, pleadings or proceedings, returned to the said court, or depending therein ;" but that a rule to show cause why a *mandamus* should not issue, does not fall within the description of cases enumerated in the act of congress ; and that the judge of the fourth circuit, when sitting at the August term, has not, therefore, the power to grant such a rule in any case. The rule to show cause must, therefore, be discharged. [*229

Rule discharged.

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*In the Matter of Duncan N. Hennen.

Clerks of courts.

Motion for a rule on the district judge of the eastern district of Louisiana, to show cause why a *mandamus* should not be issued, requiring him to restore Duncan N. Hennen to the office of the clerk of the district court. The petition stated the appointment of the relator to the office of clerk of the district conrt, in 1834; the full and complete performance of his duties as clerk of the court, until May 1837; the acknowledgment of the fidelity and capacity with which the duties of the office were performed, stated in writing by the district judge; and the appointment of another person to the office, from personal motives, and the influence of friendship, and a knowledge of the capacity of the person appointed to perform the duties of the office. The petition also stated the performance of the duties of clerk of the circuit court of the eastern district of Louisiana, under the appointment as clerk of the district court, and the offer to perform those duties after his asserted removal as clerk of the district court; and that the judges of the circuit court being divided in opinion as to his right to exercise the office of clerk, the business of the circuit court was entirely suspended.

The appointment of clerks of courts properly belongs to the courts of law; a clerk of the court is one of those officers contemplated by the provision in the constitution, giving to congress the power to vest the appointment of inferior officers as they think proper. The appointing power designated by the constitution, in the latter part of the second section of the second article of the constitution, was, no doubt, intended to be exercised by the department of the government to which the officer to be appointed most appropriately belonged.

It cannot be admitted, that it was the intention of the constitution, that those offices which are denominated inferior offices should be held during life; in the absence of all constitutional or statutory provision as to the removal of such officers, it would seem to be a sound and necessary rule, to consider the power of removal as incident to the power of appointment.[1]

The tenure of ancient common-law offices, and the rules and principles by which they are governed, have no application to the office of the clerk of a district court of the United States; the tenure, in those cases, depends, in a great measure, upon ancient usage; but in the United States, there is no ancient usage, which can apply to and govern the tenure of offices created by the constitution and laws; they are of recent origin, and must depend entirely on a just construction of our constitution and laws; and the like doctrine is held in England, where the office is not an ancient common-law office, but of modern origin, under some act of Parliament; in such a case, the tenure of the office is determined by the meaning and intention of the statute.

The law giving the district courts the power of appointing their own clerks, does not prescribe any form in which this shall be done; the power vested in the court, is a continuing one; and the mere appointment of a successor would, *per se*, be a removal of the prior incumbent; so far at least as his rights were concerned.

The supreme court can have no control over the appointment or removal of a clerk of the district court; nor entertain any inquiry into the grounds of the removal; if the judge is chargeable with any abuse of his power, the supreme court is not the tribunal to which he is answerable.

The Court having decided that the rule granted at the August term of the court, held by Chief Justice Taney, should be discharged; the counsel presented another petition to the court, setting forth the same facts as those stated in the petition, the matters of which are set forth in the report of the preceding case, with others.

The additional facts stated in the petition were, that the petitioner was in the full and undisputed possession of the seal of the circuit court for the eastern district of Louisiana, and of the records of the said circuit court.

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[1] Handlin *v.* Wickliffe, 12 Wall. 173; United States *v.* Avery, 1 Deady 204; Commonwealth *v.* Haworth, 3 Brewst. 445; Commonwealth *v.* Mitchell, 7 Phila. 356; Houseman *v.* Commonwealth, 100 Penn. St. 222; People *v.* Fire Commissioners, 73 N. Y. 437.

*That there was now pending in said circuit court, a cause in which the petitioner, a citizen of the state of Louisiana, was the plaintiff and Rezin D. Shepherd, a citizen of Maryland, was the defendant; that the value of the property in controversy between petitioner and said Shepherd, exceeded in amount the sum of $6000 in cash. That in consequence of the disagreement between the judges of the circuit court, and the refusal of Judge Lawrence to allow the petitioner, the true and lawful clerk of said court, to perform the duties thereof, the petitioner was prevented from proceeding in said cause; and the petitioner was prevented from bringing the said cause up to this court for its final decision. The petitioner further stated, that the judges of the said circuit court continued to differ in opinion, as to the legal rights of the petitioner and said John Winthrop to the offices of clerk of the district and circuit courts, so that no one did or could perform the duties of the office of clerk of the circuit court aforesaid; and that the suitors in said court were thereby delayed, and the administration of justice therein wholly suspended; and the appellate jurisdiction of the supreme court of the United States over the judgments and decrees of said circuit court wholly suspended, and incapable of being exercised. All which evils were remediless at and by the ordinary proceeding before the said district or circuit courts, and could only be terminated and redressed by the interposition of this honorable court, by its extraordinary process of *mandamus*.

The petition prayed, that the court, after consideration, would award a writ of *mandamus*, to be directed to the Honorable Philip K. Lawrence, judge of the district court of the United States for the eastern district of Louisiana, commanding him forthwith to restore the petitioner to his office of clerk of the district court of the United States for the eastern district of Louisiana.

By an agreement between the counsel for the relator and the judge of the district court of Louisiana, the questions presented to the court on the petition were argued; the usual notice being dispensed with. The motion for a *mandamus* was argued by *Coxe* and *Southard*, for the relator; and by *Gilpin* and *Jones*, for the district judge of Louisiana.

Coxe, with whom was *Southard*:—The case, which it is proposed to submit to the consideration of the court, is one equally novel and interesting. The principles which it involves are alike important to the parties on the record and to the public. It is a case of the first impression; for although, on a cursory and superficial examination, it may be thought to bear an analogy to others which have been heretofore and elsewhere discussed and disposed of, a more careful examination will make it perfectly apparent, that it is now, for the first time, in its naked simplicity, presented *for investigation and decision. At all events, it is, beyond all doubt, now for the first time exhibited as the subject of judicial consideration. [*232

The record presents a plain and unembarrassed case. In 1834, Mr. Hennen, the relator, was duly appointed to the office of clerk of the district court for the eastern district of Louisiana. He accepted the appointment, took the oath of office prescribed by law, and gave a bond, with sureties, approved by the judge, conformable to the provisions of the act of congress. Of all these facts the record contains the most abundant evidence. He continued to hold this office, and to perform its duties "methodically, promptly,

skilfully and uprightly," until the 18th of May 1838 ; when he received from the Honorable Philip K. Lawrence, who then held the office of district judge, the letter which is contained in the record.

This letter demands the earnest attention of the court. 1. It purports to be an act of removal of Mr. Hennen from the office which he held, and the appointment of Mr. Winthrop as his successor. 2. It contains the highest testimonials to the qualifications of every kind of Mr. Hennen for the office which he held, and the fidelity and skill with which he had discharged its duties. 3. It assigns, as the only reason for the exercise of the power with which he claims to be invested as a public officer, "a sense of duty, and feelings of kindness towards one, between whom and himself the closest friendship had ever existed." He considers the claims of his personal friend to every benefit in his power to confer in the exercise of his official functions, "as of a paramount character."

This letter, then, raises for the consideration of the court three distinct propositions. 1. That, by law, the district judge possesses the power, acting ministerially, not judicially, to remove from office the clerk of the district court. 2. That he may lawfully exercise this power, at his own absolute will, in the case of a public officer of acknowledged merit and undoubted qualifications ; in the absence of any act of misfeasance or nonfeasance. 3. That he may lawfully employ a power confided to him as a public officer, for public purposes, as a means of gratifying the calls of private friendship; and that in the exercise of such an authority, he recognises the claims of personal friendship as of a paramount character. Such are the doctrines promulgated by the learned judge. How far they are correct, it is for this court to pronounce. They are, at least, new, if they are not equally illegal. They are, at least, anti-republican, if they be not also unconstitutional.

1. The only source from which the power which is claimed can be derived, is the 7th section of the judiciary act of 1789 (1 U. S. Stat. 76),
*233] *which provides that the supreme court and the district courts shall have power to appoint clerks for their respective courts. It is a power vested in these courts, as courts. Does it involve, by necessary implication, the power of removal? The power of removal from office, as an incident to the power of appointment, has been much discussed as a political question, from the period of the first congress to the present day. Although by many it is considered as a settled question, it is believed, that a careful examination of the proceedings of that congress will conduct us to the conclusion, that so far as regards the case at bar, if any authoritative opinion has been expressed, it is hostile to the power now claimed.

In the congress of 1789, the question did arise, whether or not the president possessed the power of removing from office a head of one of the executive departments. The debate on that question elicited the best talents of the able men who then adorned the house of representatives. As that debate has been sometimes erroneously reported, and as frequently misapprehended ; it will be important to give to it a careful attention. It originated in the house of representatives, and grew out of a clause in the bill which provided for the organization of an executive department, to be styled the department of foreign affairs. This bill contained a clause, which provided that the secretary should be removable by the president. It appears to have been discussed in committee, before the debate occurred in the

house; and it was, therefore, not taken up in the house as entirely a new question, but one to which the attention of members had already been directed. The debate continued several days; and from the very full and accurate report recently furnished to the public (1 Gale's and Seaton's Register of Debates 473), four entirely distinct opinions may be perceived to have existed in relation to the subject.

1. That inasmuch as, under the constitution, the senate were to participate in appointing to office, it must also have an equal participation in the act of removal. Messrs. White, Sherman, Jackson, Stone, Gerry, and others, maintained this doctrine.

2. That as the constitution had, in terms, provided for the removal of officers, by the process of impeachment, for certified specified causes, removal in any other manner, or from any other cause, was impliedly excluded. Messrs. Smith and Huntingdon were among the most prominent who asserted this proposition.

3. That as congress possessed the power of creating the office, it was competent for the legislative department, to prescribe its duration, and the manner in which, and the power by whom, the officer might be removed. Messrs. Lawrence, Jackson, Lee, Sylvester, and others, concurred in this view of the subject.

4. That as an incident to the executive power, and a necessary means of enabling him to perform his own constitutional duties, the power of removal belongs exclusively and absolutely to the president, when no other tenure of office is prescribed. Messrs. Madison, *Boudinot, Ames, Sedgwick, Vining, Hartley, Clymer, Benson, Goodhue, Baldwin, and [*234 others, asserted this to be the true constitutional doctrine.

The decision of the house was finally had, upon a motion to strike out the clause, which in terms conferred the powers of removing upon the president, and inserting a clause which provided for a substitute for the principal officer, "whenever he shall be removed by the president, or in any other case of vacancy." The motion to strike out was carried by a vote of 31 to 19; and that to insert, 30 to 18. 1 Gale's and Seaton's Debates 600–1. This decision of the house of representatives was concurred in by the senate, by the casting vote of the vice-president.

A difference occurred in regard to the organization of the treasury department, between the two houses; and it was finally adjusted by a species of compromise. The senate receded from an amendment they had made to the house-bill, which struck out the clause making the secretary removable by the president; and the house concurred in changing the title which, as originally drafted, designated the treasury as an executive department. The proceedings of the senate were at that period secret, and therefore, there exists no record of the debates in that body. An examination, however, of the debate in the house, will show that substantially the decision was:

1. That the power of appointment was a concurrent one, which the president and senate exercised concurrently; and that this did not, by implication, vest the power of removal in these two distinct authorities, as growing out of the expressly granted power.

2. That the power of removal belonged to the president, not simply in consequence of his having an agency in the appointment, but as the execu-

tive of the nation, compelled to resort to agents as the instruments by which he was to perform his duties; and being responsible for the conduct of such agents, he must, necessarily, possess the power of appointment and removal, at his own single pleasure.

It is perfectly manifest, then that, these proceedings of the congress of 1789, cannot justly be considered as a legislative exposition of the constitution, that the power of appointment necessarily implies a power of removal. To the extent to which the case at bar would carry this doctrine, these proceedings give it not the least countenance. It is equally apparent, that the arguments advanced on that occasion in favor of the executive power of removal, leave the case at bar untouched. While, therefore, we regard with great respect the opinions then promulgated by the fathers of the country and of the constitution, and are disposed to leave them wholly unquestioned, the distinction between the question then decided, and that now under consideration, is widely different.

It is conceded, that in the exercise of a high political power, the president possesses, and ought to have, a large discretion on the *subject of re-
*235] moval. As the executive magistrate of the country, he is the only functionary intrusted with the foreign relations of the nation. The secretary of state and foreign ministers are the agents through whom he performs these duties of his office. He is the commander-in-chief of the army and navy, and the secretaries of these departments are his agents in communicating his orders and instructions. Being responsible for the manner in which these high trusts are executed, he must, from the very nature of things, be at liberty to employ and dismiss, at pleasure, those whom he employs as his agents. The laws, therefore, which create those departments, expressly recognise this relationship and this control. Act of 27th July 1789, establishing the department of foreign affairs; act of 7th August 1789, establishing the department of war; and the act of 30th April 1798, establishing the navy department.

Widely different is the relation which subsists between the court and its clerk. The latter is in no respect the agent of the former. His duties are prescribed by law; he gives bond to the United States, for the security of those whose interests may be affected by his malconduct. The court which appoints him, is in no sense responsible to those who may be injured by his malpractices. Another palpable difference exists between the cases.

The president may have occasion to exercise this power of removal, summarily, in cases of great public exigency, and as a necessary means of preserving the country from impending danger or dishonor; and for causes, the disclosure of which before he acted, might involve the most serious consequences. Nor does any power exist to accomplish the same good, and to ward off these dangers, in any other mode. The court, however, may arrest a clerk in his career of misconduct, may enforce obedience to his duties, may punish for misconduct, may remove for sufficient cause; this may all be done judicially. This will be again adverted to in the subsequent part of the argument.

The general proposition was advanced, but as confidently denied, in the debate in 1789, that the power of removal was an incident of the power of appointment. It may be asserted, that there is nothing either in the provisions of the constitution, or in the principles of our institutions, which coun-

tenances the doctrine. By the express terms of the constitution, the judges are independent of the appointing power. The president is appointed by electors, who, having performed their constitutional function, are extinct; and have no power or right to control the conduct of their appointee, or to remove him from his high office. Such also is the case with the vice-president. The senators are appointed by the state legislatures, and such appointment is irrevocable. The members of the house of representatives, when once elected, are independent of those whom they represent. In truth, the principle is nowhere found, except in the executive department, and in the exercise of political power.

There is nothing in the office of clerk of a court, which requires the application of this principle to him. A court, in making such *an appointment, exercises not a judicial, but a purely ministerial, function. Such [*236 was the understanding of the respondent himself in this case. He never would or dared to have assigned as his motive for exercising a judicial power in a particular mode, that it was done in obedience to the paramount duty imposed on him by the relations of private friendship. To assign such a reason for a judicial decision, would stamp it with condemnation. In performing this merely ministerial function, he was executing a merely naked power.

A review of the causes which led to this provision in the judiciary act, will corroborate these views. Courts were to be created co-extensive with the Union. Casualties might occur, which would leave the office vacant, and the most serious consequences might result from leaving the place unfilled, until the president could be notified of the fact, and make a new appointment. In the country from which we have borrowed so many of our constitutional and legal doctrines, the same practice extensively prevailed. It is believed, it generally existed among the colonies. Wherever it did prevail, the power of appointment was considered as a naked power, which was exhausted by the act of itself; and then slumbered, until another vacancy awakened it again to life.

As a general principle of the common law, in all cases of appointments under powers, the appointment is not revocable, unless expressly made so at the creation of the power. When an appointment is made, the party takes, in contemplation of law, immediately from him who created the power. An officer thus created is the creature of the law which confers the power of appointment, and holds as if his name had been specifically mentioned in the statute. 1 Show. 523, *per* GREGORY, J.

Such powers, and such exercises of them, and such results, are usual and familiar. The marshal or sheriff selects and summons jurors, but when once they have entered upon the performance of their duties, he cannot discharge them. In case of an insufficiency of numbers, or the setting aside a verdict, or their discharge without rendering a verdict, a new exercise of the authority being required, the power revives.

This general principle has been for a long series of years adopted in the English law, as applicable to all concerned in the administration of justice; to the inferior and ministerial officers, as well as to the judges. Originally, the king had the appointment of all, for the courts were emphatically his courts: *per* HOLT, 1 Show. 528–9. The appointing power was subsequently vested in the courts themselves. Ibid. 130; 2 Inst. 425. But, as was distinctly

asserted in *Harcourt* v. *Fox*, 1 Show. 532, 535, the person having the power to make the appointment, having executed that power, hath done with the business; he hath no more to do with the officer; the clerk of the peace being in by that constitution which hath limited how the clerk shall be estated in his office. Ibid. 532. In the case of the chief justice granting officers in his gift, all that he had to do was to point out the person who should have
*237] the office. Ibid. 535. The *same great judge commends the policy of this law: "it seems the public good was designed, for it was a great mischief to have the office so easily vacated." Ibid. 534. In the course of his learned opinion, Lord Holt lays considerable stress upon other considerations which are equally applicable to the case at bar: he says, "I am the more inclined to be of this opinion, because I knew the temper and disposition of the parliament, at the time when this act was made; their design was, that men should have places, not to hold precariously or determinable at will or pleasure, but to have a certain durable estate, that they might act in them, without fear of losing them." He also considered this expression of the intentions of the legislature as a contemporaneous exposition of the statute. It will be seen presently, how stringent is the application of these principles to the case under consideration.

Hawkins, Book 2, ch. 10, § 38, contains this general *dictum* in relation to some of the executive officers of the court: "It seems clear, that the sheriff or steward having power to place a constable in his office, has, by consequence, a power of removing him." For this, he cites Bulst. 174. A reference, however, to the case reported by Bulstrode, shows that the decision was, that this power of removal could only be a removal for cause. According to the principles of the same law, an officer thus removed without cause, could be reinstated by the process of *mandamus*. Bulst. 174; 2 Hawk. ch. 10, § 47. So, in Massachusetts, it has been adjudged, that a power to appoint a minister, at all times, does not carry with it the power to remove. *Avery* v. *Inhabitants of Tyringham*, 3 Mass. 160.

Such were the principles of law, of general policy and of individual right, which prevailed when the judiciary act of 1789 was framed; and a reference somewhat in detail to the proceedings of that congress will demonstrate, it is believed, the proposition, that neither the judiciary committee who reported the bill, nor the senate that passed it, nor the house which concurred, dreamed that they were conferring upon the district judge the power to remove the clerk, at his own mere capricious will.

The bill originated in the senate. It was reported by the committee, on the 12th of June 1789, and the 22d of the same month was assigned for the second reading. It was taken up for consideration on that day, and was the subject for discussion during several consecutive days. While this bill was under the consideration of the senate, that for the organization of the department of foreign affairs was under debate in the house. That bill was brought up to the senate, and a similar motion to that which had been discussed in the house, was made. The judiciary bill passed the senate on the 17th July, before the other was finally acted upon. On the 18th of July, the question on the president's power of removal was carried by the casting vote of the vice-president. The judiciary committee of the senate contisted of Messrs. Ellsworth, Paterson, Maclay, Strong, Lee, Bassett, Few, Wingate, Carroll and Izard. In the vote upon the question of the execu-

tive *power of removal, they stood: for striking out, Few, Izard, Lee, Maclay and Mingate; against it, Bassett, Carroll, Paterson, Strong. It thus appears, that of the nine members who reported the judicial bill, five entertained the opinion that the president had not the power of removing the secretary of state from office.

With what show of reason can it be inferred, in direct opposition to the opinions avowed by these gentlemen in that vote, that they believed that they were conferring, by implication, upon the judges of the district court, the power of removing a clerk? With the views they had taken of the constitution, it is impossible to believe, that such a construction of the law upon which they were employed, ever suggested itself to them. Experienced lawyers as they were, could they be supposed to innovate so deeply upon the well-established principles of the common law; to change so essentially its wise provisions; and that this result was to be accomplished by a remote and questionable implication? The supreme court of Pennsylvania has decided, that this power of removal, as incident to that of appointment, has never, in this country, been held to exist, beyond the executive department; and does not extend to officers concerned in the administration of justice. 5 Rawle 203.

It must be apparent, then, that the court is not called upon to unsettle or disregard the constitutional doctrines adjudged by the legislature in 1789. The counsel for the relator have no such wish or design. Independently of the weight of authority which sanctioned that decision, we are free to confess, that were the question now an open one, we should fully concur in the decision then made. We cannot believe, that the government could exist a twelve-month, under a different rule. Unless, then, we can satisfy the court that the decision then made leaves this case wholly unaffected, we bow to that authority. But in our judgment, the argument of Mr. Madison is conclusive; and there is every reason to believe, as well from tradition as from the report of the debate itself, that that argument was mainly instrumental in bringing about the result. Mr. Madison did not rest his argument principally upon the ground, that the power to remove was an incident of the power to appoint. He proceeded upon the principle, that the relation of principal and agent existed between the president and the secretary; that such a power was essential to enable the former to perform his own constitutional duties; that he was responsible to the country for the acts of his agents; that no other power existed which could guard against the mischiefs and dangers that might threaten the nation, if one of these high functionaries should become faithless or incompetent. That argument leaves this question untouched. The clerk is not in any sense the agent of the court. The doctrine of responsibility does not exist. The clerk may be controlled by the judicial power of the court. He may be adjudged, on familiar principles of the common law, to forfeit his office, by breach of the condition annexed *to it; by misfeasance or nonfeasance. 1 Hawk. [*239
412. He may be punished by process of attachment, for a contempt in not obeying the lawful orders of the court, even under the mitigated law, as it exists since the act of March 1831. (4 U. S. Stat. 487.)

The possession of this ample judicial control excludes the idea that the judge, by virtue of the power of appointment, a power ministerial and not judicial, can remove the clerk at his own will and pleasure. He can oust

him from office for good cause; there is, therefore, no room for implying a power to remove him without cause. He may eject an officer who is incompetent, who neglects to perform his duties, or who abuses the trust reposed in him; this takes away the necessity for vesting in him, by implication, a power of removal; which, if exercised under any other circumstances, or in any other cases, must involve, as in this case, a flagrant breach of public duty, and a flagrant abuse of power. Powers are only implied from necessity. If no cogent reason exists why that which is not in express terms granted, should yet pass by implication, such a construction is not to be favored.

It has been shown, that this authority is not conferred upon the judge in any larger grant, or as a necessary means to perform his own positive duties, as in the case of the president; that it does not grow out of the relation of principal and agent, as in that case; and that, without invoking the aid of this strained construction, the superintending power of the court, acting within its appropriating sphere, and in conformity with its ordinary rules, is ample for every lawful or useful purpose; that such a construction is not in analogy to the principles of our institutions; that it is at variance with the wise and liberal principles of English law, and contrary to the avowed doctrine of those who drafted the statute under which the power is claimed. Upon all these grounds, separately so strong, and in their joint authority so conclusive, it is submitted, that the first point in the argument is established—that as a ministerial power, growing out of the authority to appoint, it does not belong to the district judge.

2. The second point contended for on behalf of the relator is, that admitting the power of removal to reside in the district judge, yet the act of removal of Mr. Hennen was not a legal exercise of a legal authority, but a palpable and gross abuse; that such abuse is *per se* illegal, and cannot operate to deprive the relator of his office, or to confer the rights of office upon Mr. Winthrop. In general, the motives which stimulate men to act, excepting so far as they are apparent in the act itself, are inscrutable to human ken. The motive is sometimes, however, worse than the mere act itself would indicate, as in the celebrated case decided under the Coventry act; in which one brother, indicted for an assault upon another with intent to maim and disfigure, had the audacity to defend himself upon the ground that his intention was to kill. In the present case, the learned judge, with more frankness than prudence, in the very act of dismissing the relator, bestows upon him the highest eulogium, declares him methodical, prompt, skilful and *upright, in the discharge of his duties, and assigns as the motive of his conduct, the paramount claims of personal friendship. The question, then, is distinctly presented, whether, when such objects and such motives are avowed, the act can be deemed a legal and constitutional exercise of power; or whether it be not a gross and flagrant abuse which invalidates the act. Such a proceeding as that presented by the record, is a clear violation, by the judge, of his oath of office. He is required by law to take an oath that he will "faithfully and impartially discharge and fulfil all the duties incumbent upon him as district judge, according to the best of his abilities and understanding." (1 U. S. Stat. 76, § 8.) The phraseology of this oath marks clearly the manner in which he is to execute all the powers confided to him officially.

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Here again, we may advert with advantage to the debate in the house of representatives, in 1789. Mr. Lawrence (1 Gale's and Seaton's Debates 504), in an early stage of the debate remarked: "If the president abuses his trust, will he escape the popular censure? And would he not be liable to impeachment for displacing a worthy and able man, who enjoyed the confidence of the people." Mr. Madison (p. 517) observed: "The danger then consists merely in this, that the president can displace from office a man whose merits require that he should be continued in it. What will be the motive which the president can feel for such abuse of his power, and the restraints that operate to prevent it? In the first place, he will be impeachable by the house, for such an act of mal-administration; for I contend, that the wanton removal of meritorious officers would subject him to impeachment and removal from his own high trust." Mr. Vining (p. 531) remarked, that, "if the president removes a valuable officer, which seems to be the great danger the gentleman from South Carolina apprehends, it would be an act of tyranny which the good sense of the nation would never forget." And Mr. Baldwin (p. 580) pronounces such an act, "an abuse of power." Not one gentleman who participated in the debate dissented from these views. We hold this to be the sound constitutional doctrine. It is a vital principle of our institutions. To assert the contrary, is to confound power with right, and involves the absurdity of making every exercise of power a rightful and lawful exercise.

The president has the power to interpose his veto upon any act of congress; were he, in the exercise of this high function, to avow his conviction that the law submitted to him was just and proper, demanded by the wants of the community and the voice of the nation, and that no constitutional objection could be urged against it, but that under the impression it might materially affect the interest of individuals, towards whom he cherished feelings of affection, he had recognised the paramount claims of private friendship, and vetoed the bill; who could doubt, that he had violated his high trust, grossly abused the power reposed in him, and merited the severest punishment the violated laws of his country could inflict? Did a judge assert the same paramount influence as furnishing *him with a motive to award judgment against a party whose legal rights he at [*241 the same time recognised, can a doubt exist, that he would meet with the appropriate recompense?

This principle extends throughout the entire sphere of official duty; it is applied by courts in the administration of private justice. In *Mc Queen v. Farquhar*, Lord Eldon observes, "it is truly said, this court will not permit a party to execute a power for his own benefit. In *Lord Sandwich's Case*, a father, having the power of appointment, and thinking one of his children was in a consumption, appointed in favor of that child; and the court was of opinion, that the purpose was to take the chance of getting the money as administrator of that child." If such an act would invalidate the exercise of a power involving the pecuniary interest of a citizen, must it not work the same result, when an individual abuses a public trust confided to his hands from considerations of the general good? Can there result any injury or wrong from carrying out, in every case, the pure principles of private morality and fidelity in the discharge of a trust?

This doctrine has long been engrafted into the English law. Lord Coke

in his first Institute (1 Thomas' Co. Litt. 239–40) says: "there be at this day more conditions in law annexed to offices than there were when Littleton wrote; for example, for offices in any way touching the administration of justice, or clerkship in any court of record," &c. "For if any of these officers bargain or sell any of their offices, or any deputation of the same." &c., "he shall not only forfeit his estate, but be adjudged a disabled person to have or enjoy the same office," &c. "Therefore," he concludes the subject, "by the law of England, it is further provided, that no officer or minister of the king shall be ordained or made for any gift or brokage, favor or affection, nor that any which pursueth, by him or any other, privily or openly, to be in any manner of office, shall be put in the same office or any other; but that all such officers shall be made of the best and most lawful men and sufficient; a law worthy to be written in letters of gold, but more worthy to be put in due execution. For certainly never shall justice be duly administered, but where the officers and ministers of justice be of such quality, and come to their offices in such manner as by this law is required." The act then does not depend exclusively for its legality merely upon the fact that it is within the power which the party possesses. An abuse of a legal authority is illegal, an abuse of constitutional power a high misdemeanor. In the opinion of some of the most eminent men our country has produced, the very act which is the subject of our present consideration constitutes an impeachable offence. That conduct which is impeachable, cannot be legal. An illegal exercise of a power is a nullity, and void.

Nor does this doctrine rest merely upon these authorities, venerable and respectable as they are. Chancellor KENT (1 Kent's Com. 288–9) recognises the doctrine, that for an abuse of the executive trust, the president is
*242] impeachable, and he considers it as an abuse of his *authority to violate the constitution or law of the land. Judge STORY (Com. on Const. § 788), speaking of the president, says, "if he ventures upon a system of favoritism, he will not escape censure, and can scarcely avoid public detection and disgrace." § 789. "It should never be forgotten, that in a republican government, offices are established and are to be filled, not to gratify private interests and private attachments; not as a means of corrupt influence or individual profit; but for purposes of the highest public good." In § 792, we are told, that "it is the duty of the president," among other things, "to disregard the importunities of friends; the hints or menaces of enemies; the bias of party, and the hope of popularity." § 794. The courts of the Union possess the narrow prerogative of appointing their own clerk and reporter, without further patronage. No intimation is given of the power to remove at pleasure. In contrast with this narrow prerogative, this distinguished judge contrasts the exorbitant power, grown up from a small "seminal principle" of the postmaster-general; of which he says, "the great anomaly in the system is the enormous patronage of the postmaster-general, who is invested with the sole and exclusive authority to appoint and remove all deputy-postmasters." Finally, in § 798, he adopts to the fullest extent, the opinions of Madison and others, as pronounced in 1789; and declares, that "removals from office, with a view to bestow the office upon a dependant or favorite, is an impeachable offence."

Fortified in our positions by this array of authority, we have felt no hesitation in asserting that the act of removal attempted to be exercised in

this case, is a clear abuse of power, if the authority indeed exists; is a palpable violation of duty, and subjects the offending party to impeachment, as for a high misdemeanor. If such be the character of the act, it is in vain to contend that it can be valid.

3. Is the remedy by *mandamus* the appropriate legal remedy? In *White's Case*, 6 Mod. 18, an application was made for a *mandamus*, to restore the party to the place of clerk of the company of butchers, and the case of an attorney of an inferior court was cited, in which the *mandamus* had been issued; but HOLT, Chief Justice, said, that case differs. 1. Office of attorney concerns the public, for it is for administration of justice. 2. He has no other remedy. The case thus recognised bears a strong and complete analogy to that at bar. The office of clerk nearly concerns the administration of justice, and the party has no other remedy. If any writ of *quo warranto* would lie in Louisiana, it must be brought in the same court, before the same judge who has committed the wrong in the original case. An assize is equally out of the question, and is not only obsolete in England, but utterly impracticable here. *Mandamus* was awarded to restore one to the office of steward of a court leet, but from which he had been displaced for his affection to the king. T. Raym. 18. On motion for a *mandamus* to restore an attorney, the court was at first equally divided (Ibid. 57); but it was subsequently allowed; Ibid. 94. In *Dighton's Case*, T. Raym. 188; 1 Vent. 77; a *mandamus* *was [*243
prayed to restore a town clerk, but refused; because by the terms of the charter, the town possesses the absolute power of turning him out. This however, was thought so monstrous a grievance, that the court advised to have the patent repealed. In *Dew* v. *Judges of the Sweetspring District Court*, 3 Hen. & Munf. 1, *mandamus* was held, after full argument, to be the appropriate remedy to restore a clerk who had been superseded by an irregular appointment. In 3 Devereux, the same point was solemnly adjudged.

If the remedy be appropriate, this is the only tribunal by which it can be awarded. By the provisions of the judiciary act, the clerk of the district court becomes the clerk of the circuit court. The record shows that the associate judge of this court who presides in the Louisiana circuit court, refused to recognise the validity of the act of the district judge, or to receive the clerk whom he had attempted to appoint. In consequence of the disagreement of the two judges, there is no clerk. No business is or has been transacted in the circuit court; the government and individual suitors are unable to proceed in their causes; no case can be brought up to this tribunal, and the whole appellate jurisdiction of this court is suspended during this extraordinary state of affairs. Unless this court interpose, such a state of things must remain; a *mandamus* is prayed to both courts, and we consider each as a necessary exercise of the appellate power of this tribunal, and in accordance with the former practice of this court. *Ex parte Burr*, 9 Wheat. 529; *Ex parte Crane*, 5 Pet. 190.

Gilpin opposed the rule to show cause.—This rule ought not to be granted: 1. Because the petitioner is not entitled to the office. 2. Because, if he is entitled to it, a *mandamus* commanding the judges of the district and circuit courts of Louisiana to restore him to it, is not the proper mode

of ascertaining his right. 3. Because, if he is entitled to it, and if a *mandamus* is a proper remedy; yet this court, under the limitation of its powers by the constitution and laws, has no authority to issue that writ, in such a case and for such a purpose.

I. The office of clerk of a district court of the United States, is a public office, created by law, for a public benefit; its duties are defined by law; and the mode in which the incumbent is to be appointed, is expressly designated by law. It does not depend on usage or custom. The Constitution requires (art. 2, § 2) the mode of appointment to inferior offices to be designated by law. By the third section of the act of the 24th September 1789 (1 U. S. Stat. 73) there is to be a district court of the United States in each district, the judge of which is to be called the district judge. By the seventh section of the same law (Ibid. 76), the district courts are to appoint clerks for their respective courts; the clerk for each district court is to be clerk of the *circuit court in the same district; and the clerk is to take oath and give bond before he enters on his office. By the eighth section of the act of 26th March 1804 (2 U. S. Stat. 285), a district court was established in the territory of Orleans, to consist of one judge, "who shall appoint a clerk." By the third section of the act of 8th April 1812 (Ibid. 703), the state of Louisiana was formed into a district, and a district court established there, the judge of which "shall appoint a clerk." By the act of 3d March 1823 (3 Ibid. 774), Louisiana was divided into an eastern and western district, with a district court for each; though the same person was to be judge of both. By the act of 3d March 1837 (5 Ibid. 176), the eastern district of Louisiana is made part of the 9th circuit; and it is provided that "the circuit court, and the judges thereof, and the district court, and the judges thereof, are to have like powers as in other circuits and districts."

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In the year 1837, Judge Lawrence was duly appointed and commissioned as district judge for the eastern district of Louisiana. On the 18th May 1838, he did, as district judge, appoint John Winthrop clerk of the district court for that district, by a commission under his hand. On the 19th March 1838, Mr. Winthrop took the oath and gave the bond required by law, and entered upon the duties of the office. Thus, according to all the provisions of law, Mr. Winthrop is now clerk of the district court; and under the seventh section of the act of 24th September 1789, is also, *ipso facto*, clerk of the circuit court in the same district.

On what ground, then, does the petitioner claim this office? It is this, that on 21st February 1834, Judge Harper, at that time district judge, appointed the petitioner clerk of the court. Now, as it is admitted, that no person but a district judge can appoint a clerk of the district court, and as the appointment made by the present judge is asserted to be illegal; the conclusion must be, that the appointment of a clerk once made cannot be revoked or superseded by the court making it. This is the only ground on which the petitioner can sustain his right to this office. This position is denied, because the express words of the law vest in the district court the power of appointing a clerk at any time; because this appointment is similar in character to others which are unquestionably superseded by new appointments; and because every ministerial or executive office, is, *ipso facto*, terminated by a new appointment, legally made, of a competent officer; unless otherwise provided by express law.

1. By the words of the several acts of congress, this power of appointment is vested in the court, and the judge for the time being. There is no restriction or limitation to it; it is neither greater nor less than other powers vested in the court or the judge. He "has power" to appoint a clerk, as he "has power," by the words of the law, to order books to be produced, to grant new trials, to punish contempts, or to make rules and regulations. Cannot acts done by *virtue of those powers be revoked or superseded by a new exercise of the same power? That will not [*245 be denied. These powers are discretionary; to be exercised by the court and the judge, according to such discretion, at any time; and they may, therefore, be so exercised, even though they should operate to revoke or supersede previous acts. There is nothing which limits or restricts the present judge, because a former one has acted under the same power.

2. Nor is there anything in the nature or character of this power of appointing a clerk, as vested by law in the district judge, which makes it different from the appointing power vested in other persons; and in whose case, it is not denied, that its exercise supersedes a previous appointment. The acts of 1804, 1812 and 1823, which authorize the district judge to appoint a clerk, also authorize the president to appoint an attorney and a marshal. It will not be contended, that the latter are irrevocable; yet there is no distinction whatever in the grant of power. An appointment of an attorney, by a former president, does not take from the present executive the power to appoint a new one; why then should the act of a former judge restrict the actual incumbent? Either both are perpetual, or both may be superseded. In an act passed on the 3d March 1831 (4 U. S. Stat. 492), the district judge of Louisiana is "authorized to appoint an interpreter to the district court." It will hardly be contended, that such an appointment cannot be superseded by the court; yet the power given in that case is no broader than in regard to a clerk.

3. There is nothing in the act of congress conferring this power of appointment, which in terms, forbids its termination within a limited time; and it is a settled principle, arising out of the constitution and laws of the United States, that unless there be such a prohibition, every ministerial or executive office is, *ipso facto*, terminated by a new appointment, legally made. The constitution prescribes the several modes by which appointments to all offices are to be made; these are by elections, by the president and senate, by the president, by the courts of justice, and by the heads of departments. It also designates out of all officers whose appointment is thus provided for, but five classes whose terms shall be of a certain duration, which cannot be lessened, unless by the death, voluntary resignation or impeachment of the incumbents. These are representatives in congress, who shall hold their office for a term of two years; the president and vice-president for four; the senators for six; and the judges "during good behavior." The irresistible inference from this is, that by designating certain officers of whose terms it absolutely fixes the duration, it meant to lay down no such rule in regard to any others.

An ambassador to a foreign government, or a secretary of one of the executive departments, holds his office under the same general power of appointment, when vested in the president, as a clerk of court does, when it is vested in the court. The constitution has not *made the [*246

term of one more or less independent of the appointing power than the other. It has annexed to the power of appointment the same rights in one case as in the other. More properly speaking, it annexes the same duties. The power of appointment is a trust to be exercised for the public welfare; it is the duty of the appointing power to select, at any time, the person best qualified to fill the office; he has no right to avoid its exercise, if he believes it to be essential to the general good. The fitness of the officer may depend on other circumstances than his own merits, as is strikingly the case with ambassadors or foreign diplomatic agents; with whom it may often happen, that at particular conjunctures, public expediency may require the selection of one man in preference to another, without contrasting their individual merits. The appointing power is bound to act upon these causes, so as justly to perform his trust. If, in so doing, he supersedes a previous appointment, or removes a previous incumbent, that is an unavoidable result; but it would afford no excuse for the neglect of a high trust.

Nor does this view of the constitutional duty of the appointing power go to pardon or excuse any impropriety in its exercise. On the contrary, by imposing the duty of selecting the proper person, at every time, it places the performance of that duty under more strict supervision. Wrongfully, or corruptly, or improperly, to exercise it, becomes, in this light, an official misdemeanor. Unquestionably, a judge who should be governed by favoritism or corrupt motives in performing one branch of his constitutional functions, would be equally amenable to the laws, as if he were so in discharging another. His responsibility is the same, whether he exercises the power to appoint an officer, or the power to punish a contempt; to grant a new trial; or to do any other act which under the laws he "has power" to do. Misdemeanor in one case would afford as good ground for impeachment as in the other.

If these positions be true, it then follows, that, under a fair construction of the constitution, the appointing power, when not limited, is to perform its duties at the time and manner deemed best for the public good; but strictly responsible to the highest tribunal for an honest discharge of those duties; and strictly responsible also to private individuals, for so using it, as not to interfere with their legal rights. And such has been the uninterrupted practice under the constitution, for fifty years. Has it ever been doubted, that the president may recall an ambassador, when he chooses, or change the heads of departments? Is it denied, that the heads of departments may remove or supersede the clerks in their respective offices? By what reasoning, then, could a different practice be sustained in regard to the courts of law; when the constitution confers in the same sentence, the same powers upon them as upon the president and the heads of departments?

So generally has this principle been admitted, and so uniform has the practice been, that out of the innumerable cases in which public *officers have been superseded or removed by a new exercise of the *247] appointing power, very few have become subjects of judicial examination. Whenever they have been so, this exercise of the appointing power has been judicially recognised. In the case of the *Commonwealth* v. *Sutherland* 3 Serg. & Rawle 148, and in that of the *Commonwealth* v. *Bussier*, 5 Ibid. 451, the supreme court of Pennsylvania decided, that the general power of

appointment, vested in the governor, authorized him to remove an incumbent, wherever the time for the continuance of the office was not fixed. In the case of *Bowerbank* v. *Morris*, Wall. C. C. 119, it is held, that such removal may be made, either by express notification, or simply by appointing another person to the same office. The case of *Avery* v. *Inhabitants of Tyringham*, 3 Mass. 160, cited to sustain a different doctrine, arose out of the long-established usage in New England, which regards the relation between the minister and parish in the light of a contract, to be limited by express agreement, or if not, only to be dissolved for some good cause, or by consent of both parties. Even at common law, a custom for the appointing power to remove *ad libitum*, where the term was not fixed, or the incumbent held at will, was always held to be a good custom. *Rex* v. *Mayor of Coventry*, 2 Salk. 430; *Rex* v. *Wardens of Thame*, 1 Str. 115; *Rex* v. *Mayor of Cambridge*, 2 Show. 70.

If a full expression of the legislature of the Union, on this important part of the American constitution, is to be regarded by courts of justice as an authority, we have that also, deliberately given, fully sustaining the right of the appointing power to remove, where no express provision exists; and declaring that right to be incidental to the power of appointment. The debate in the house of representatives, on the bill "to establish the department of foreign affairs," and the vote on 22d June 1789 (1 Journals of Congress 50), have always been regarded as conclusive in regard to the opinions of those who framed the constitution. The result, then, is, that Mr. Winthrop being duly appointed, the petitioner is superseded and removed. He has, therefore, no legal right to the office to which he asks to be restored.

II. But if he has a right to the office, a *mandamus* is not the proper mode of ascertaining it. This is not a case for a *mandamus*, according to the principles and usages of law.

1. A *mandamus* can only be issued to a person or inferior tribunal, which the court issuing it has a right to control, in the particular instance. It is a high prerogative writ. It is an order from a superior to an inferior tribunal, when the inferior neglects a duty which the superior is bound to see performed. It is never granted against a judge of the court that issues it; as would be the case here, were this rule allowed against the judge of the circuit court of Louisiana. It is never granted against a judge of the higher courts of common law. In the case of *Audley* v. *Joyce*, Poph. 176, it is spoken of as a flower of prerogative, vested in the king's bench, to be used in controlling municipal corporations. In *Rex* v. *Barker*, 3 Burr. 1265, 1267, it is said, that it is to be exercised only when [*248 absolutely necessary; and then in virtue of a general supervising power. In the *Rioters' Case*, 1 Vern. 175, and again, in *Lawlor* v. *Murray*, 1 Sch. & Lef. 75, 79, the court of chancery declared, they would not presume to issue it to the chief justice of the king's bench. In *Bridgman* v. *Holt*, 1 Show. P. C. 117, the judges of the king's bench remonstrated against a mandatory process from the house of lords, as trenching upon their rights; since it was compelling the action of those who, by the law of the land, had a right to exercise their own judgment. In some instances, it has been issued by a higher court of record to an inferior one, directing it to perform some strictly ministerial act; but even these instances are few in

number: and its exercise in common-law cases is found to be chiefly confined to municipal corporations, courts of sessions, and such tribunals. *Brooke* v. *Ewers*, 1 Str. 113; *Ex parte Amherst*, T. Raym. 214; *Ex parte Morgan*, 2 Chit. 250.

In Pennsylvania, the supreme court, which is one of general appellate jurisdiction, has refused to say whether it will, in any case, issue a *mandamus* to a court of common pleas. *Commonwealth* v. *Court of Com. Pleas*, 3 Binn. 273; *Commonwealth* v. *Court of Com. Pleas*, 1 Serg. & Rawle 195; *Morris* v. *Buckley*, 8 Ibid. 211. In New York, the supreme court has indeed assumed a general supervisory power over other courts, similar to that of the king's bench in England; but even they have seldom, if ever, exercised this power of *mandamus*, except in cases of clear ministerial duty, and chiefly against town officers, &c. *Sikes* v. *Ransom*, 6 Johns. 279.

Upon these principles, this is no case for a *mandamus*. There is neither the high superiority in the one tribunal, nor inferiority in the other; nor the evident right of control, in the particular case, which is necessary to justify it. There is no precedent for it in the judicial decisions of courts in England, or any of the states; and, as was said by the court of king's bench, in *Rex* v. *Newcastle*, 3 Barn. & Ad. 252, it ought to be refused, where there is no precedent for the exercise of such a power.

2. A *mandamus* can only be issued to a person, or inferior tribunal, when the act ordered to be done is ministerial, not discretionary. In *Foot* v. *Prowse*, 1 Str. 625, the court of king's bench refused a *mandamus* to compel a corporation to proceed to an election, because it was discretionary with the corporation. In *Giles's Case*, 2 Ibid. 881, they said, that where justices of sessions had a discretionary power, a *mandamus* would not be granted. In *Rex* v. *Gray's Inn*, 1 Doug. 353, a *mandamus* to compel the benchers to admit a barrister was refused. In *Rex* v. *Exeter*, 2 East 462, a *mandamus* to compel the archbishop to admit an advocate of the arches court was refused. In *Rex* v. *Gloucester*, 2 Barn. & Ad. 163, where the bishop refused to confirm a deputy registrar, who *then applied for a *mandamus*, the court of king's bench said, "there was no mode of forcing a person, who has a discretionary power, to exercise it;" and they added, "suppose, the bishop returned reasons which we thought insufficient, what course could we take?" And the cases of *Rex* v. *Flockwold*, 2 Chit. 251, *Ex parte Morgan*, Ibid. 250, and *Rex* v. *Wilts*, Ibid. 257, all show that the court of king's bench will never control inferior courts in matters of judgment.

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The supreme court of New York, in *Wilson* v. *Albany*, 12 Johns. 414, said, that, "wherever a discretionary power was vested in an officer, and he had exercised that discretion, they would not interfere; because they could not control, and ought not to coerce, that discretion." In *Gilbert's Case*, 3 Cow. 59, the same court refused a *mandamus* to require the court of common pleas to strike out certain conditions which it had thought proper to annex to one of its orders. In *Ex parte Johnson*, Ibid. 371, the same court refused to compel the court of common pleas to hear charges against a justice of the peace. The supreme court of Pennsylvania, in *Commonwealth* v. *Common Pleas*, 3 Binn. 273, said, that, "they could not compel an inferior court to decide according to the dictates of any judgment but its own. In *Commonwealth* v. *Cochran*, 5 Ibid. 103, they said,

they could only direct an inferior court to act according to the best of its judgment. In *Commonwealth* v. *County Commissioners*, Ibid. 536, they refused to direct the commissioners to allow an account. In *Commonwealth* v. *Clarkson*, 1 Yeates 48, they refused to direct the commissioners of bankruptcy to give the bankrupt a certificate, although they thought him entitled to it. In *Commonwealth* v. *Common Pleas*, 1 Serg. & Rawle 187, they refused a *mandamus* to compel the common pleas to admit an attorney. And in *Austin's Case*, 5 Rawle 203, where a court of common pleas had stricken several attorneys from the rolls, it was necessary to obtain an act of assembly to give the supreme court jurisdiction over the case. The supreme court of Virginia do not establish a different principle in *Dew* v. *Sweetspring's Court*, 3 Hen. & Munf. 1, cited by the opposite counsel; fo there the appointment of the clerk did not belong at all to the inferior court. The appointment was vested entirely in the superior court; and all the inferior court had to do, was to take the security—a duty clearly ministerial.

In Louisiana, there are eight district courts, from which there is an appeal to the supreme court. The district courts appoint their own clerks; and the supreme court "has power" to issue all mandates necessary for the exercise of its jurisdiction over inferior tribunals. (1 Dig. La. Laws 295.) In the case of *Winn* v. *Scott*, 2 La. 89, the supreme court said, they could not issue a *mandamus*, except to aid their appellate jurisdiction. In *Louisiana College* v. *State Treasurer*, Ibid. 395, they refused to direct a public officer to do an act relative to which he was invested with discretionary *power. In *State* v. *Dunlap*, 5 Mart. 271, they refused to direct a district judge, by *mandamus*, to restore to office a clerk of the district court, whom he had removed, though they disapproved of the removal The supreme court of the United States, in *United States* v. *Lawrence*, 3 Dall. 45, said, they would not compel a district judge to decide according to any judgment but his own. In *Marbury* v. *Madison*, 1 Cranch 171, they said, that where an officer was to exercise executive discretion, any application to control his conduct would be rejected, without hesitation. In *McClung* v. *Silliman*, 6 Wheat. 598, they refused to interfere with a register of a land-office, acting within the limits of his office. [*250

The principle, therefore, is settled, beyond question, that where the inferior tribunal has a discretion, and it is to exercise its judgment in the act to be done, there a *mandamus* cannot be issued. In the present case, the duty is clearly discretionary; it is one requiring the exercise of judgment; it is, in no sense, ministerial; it is either judicial, if regarded as an act of the court: or it is executive, if considered as the act of an officer, vested by the constitution and law with the power of appointment.

3. A *mandamus* cannot be issued, to restore a person to an office which is not a permanent one—never to an office determinable at pleasure. In *Draper* v. *Blany*, 1 Lev. 291; *Peppis's Case*, Vent. 342; and *Dighton's Case*, Ibid. 82; a *mandamus* was refused to restore a town-clerk, who had been removed—the corporation being vested with the power to appoint, without any limitation as to the tenure of the office.

4. A *mandamus* cannot be issued, unless the petitioner has no other legal remedy. In *Rex* v. *Street*, 8 Mod. 98, the court of king's bench refused a *mandamus*, to direct the old churchwardens to deliver up the parish books

to their successors, because the latter might try their right to them at law on a feigned issue. In *Rex* v. *Chester*, 1 Maule & Selw. 103, the same court said, they would not grant a *mandamus*, where another remedy was open to the parties. In *Marbury* v. *Madison*, 1 Cranch 169, this court said, that a party applying for a *mandamus* must be without any legal remedy.

In this case, the petitioner can try his right, either by an information in the nature of a *quo warranto ;* or by an action for money had and received ; or by assize. In the case of the *People* v. *New York*, 3 Johns. Cas. 79, it is held, that a *mandamus* is not to be granted, to admit a person to office, where another is in by color of right. The proper remedy, say the court, is by an information in the nature of a *quo warranto.* In *Rex* v. *Jotham*, 3 T. R. 575, it was held, that a *mandamus* was not to be granted, even to restore to office a person previously admitted, because he could try his right by an action for money had and received. And the cases of *Harcourt* v. *Fox*, 1 Show. 516 ; *Smyth* v. *Latham*, 9 Bing. 692 ; and *Avery* v. *Tyringham*, 3 *Mass. 160, all show, that an action of *assumpsit* for the fees or salary of an office, is the proper mode of ascertaining the right of the party claiming it. The action of assize, though out of use, is in all respects, consistent with our general practice of introducing (somewhat simplified in form) the direct modes of action established by the common law. It allows to both parties a trial by jury ; gives damage to the injured party ; and restores him to the office, if unjustly deprived of it. The supreme court of New Jersey, in *Farley* v. *Craig*, 3 Green 213, recognise it as the proper mode "to recover seisin of an incorporeal hereditament, and damages for its deprivation." It is invariably so recognised by the courts of common law in England. In *Webb's Case*, 8 Co. 47, it is held, that a man may have an assize of an office, *ut de libero tenemento*, at common law. In *Vaux* v. *Jefferen*, 2 Dyer 114, an assize lies to recover the office of philizer in the court of common pleas. In *Coveney's Case*, Ibid. 209, the prerogative writ was refused, to restore the president of a college to his office, because he could have assize at common law. In *Rex* v. *Westminster*, Comb. 244, a *mandamus* to admit a bailiff was refused, because he could have assize. In *White's Case*, 6 Mod. 18, HOLT said, that the *mandamus* ought not to go, where a party could have assize ; and in *Rex* v. *Barker*, 3 Burr. 1268, the same point was ruled. In *Bridgman* v. *Holt*, Show. P. C. 111, we have a direct case in point, of an assize brought by a person claiming to be lawfully clerk of the court.

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It is, therefore, submitted, that whatever may be the legal right of the petitioner to the office he claims, this is not a case in which a *mandamus* would be granted, according to the principles and usages of law ; because this court has not such a control over the inferior court as to warrant it ; because the act complained of was not ministerial but discretionary ; because the office in question is not a permanent one, to endure for a definite period ; and because the party complaining has other and more appropriate remedies, if he has been unjustly removed.

III. But if the case were one in which a court, vested with unlimited power, would interfere by *mandamus*, still this court, deriving their authority from the express grant of the constitution and the laws founded on it, cannot issue it in such a case.

1. This court has no power to issue a *mandamus* to restore a clerk of the

circuit or district court, by virtue of its original jurisdiction. That jurisdiction is limited by the constitution to cases affecting "ambassadors," "public ministers" and "consuls," and those "wherein a state is party." This case is neither of these. It is true, the 13th section of the act of 24th September 1789 (1 U. S. Stat. 80), did give this court power "to issue writs of *mandamus* in cases warranted by the principles and usages of law; but that enactment was solemnly decided, in *Marbury* v. *Madison*, 1 Cranch 176, and in *Ex parte Crane*, 5 Pet. 193, to be contrary to the constitution, as an exercise of original jurisdiction.

*2. Nor can it be exercised by virtue of its appellate jurisdiction; for the restoration of a clerk to office is in no sense an appellate proceeding. [*252 It is held, in *Marbury* v. *Madison*, 1 Cranch 175, that an appeal is a resort to this court "to revise and correct the proceedings of the court below in a cause already instituted." In *Wiscart* v. *D'Auchy*, 3 Dall. 321, it is said, there are two modes of doing this—a writ of error in common-law cases, to re-examine the decision in point of law; and an appeal in civil law cases, to review the law and fact. In *Davis* v. *Braden*, 10 Pet. 287, it was held, that in order to bring up a division of opinion between the judges of a circuit court, before this court, the point on which they divided must have "arisen on the trial of the case below." The judiciary act (1 U. S. Stat. 81), establishes the same rule: it confines the appellate jurisdiction of this court to appeals and writs of error; and says, too, that these must be from final decrees and judgments. In the present case, there is no cause instituted, of which the proceedings are to be revised and corrected; no decision on a point of law to be re-examined; no law and fact to be reviewed; no division of opinion on the trial of a cause below; no appeal or writ of error from a final decree or judgment. How then can this case come within the appellate jurisdiction of the court?

3. Nor is it in any respect necessary to the exercise of the appellate power of this court, that the petitioner should be restored to the office of clerk. There is no writ of error or appeal waiting below for the want of this officer. There is no allegation that the restoration of the petitioner is required for any such cause. There is a clerk doing all the business. The *mandamus* is not sought for on this ground; but avowedly, for the purpose of trying, in this mode, the title to the office. This court has, in numerous cases, decided where a *mandamus* is or is not necessary to the execution of its appellate powers; in no one of them has it been held to be necessary in such a case as this. Out of the seventeen applications made to this court, since its establishment, to issue writs of *mandamus*, but four have been granted. The decision of the court in these four cases of *United States* v. *Peters*, 5 Cranch 115; *Livingston* v. *Dorgenois*, 7 Ibid. 577; *Ex parte Bradstreet*, 7 Pet. 634; and *New York Insurance Company* v. *Wilson*, 8 Ibid. 291; after elaborate argument, was, that the supreme court would issue a *mandamus* to a district judge, directing him: 1. To execute a decree of his court in an admiralty case, where execution had been delayed on account of the extraneous interposition of a state law. 2. To proceed to a final judgment, and not stay proceedings indefinitely. 3. To reinstate a suit dismissed on motion, after issue joined, so that the parties might have a final judgment. 4. To sign a judgment on the record, where it had been previously recovered and entered, according to the law. The principle

established by these decisions is, that there must be a suit pending in a court below, and that the act which the inferior court is required to perform *must be ministerial in its character, and necessary to the final termination of the cause in that tribunal. *253]

The thirteen cases in which this court refused applications for *mandamus*, are *United States* v. *Lawrence*, 3 Dall. 42 ; *Marbury* v. *Madison*, 1 Cranch 137 ; *McCluny* v. *Silliman*, 2 Wheat. 369 ; *Ex parte Burr*, 9 Ibid. 529 ; *Bank of Columbia* v. *Sweeney*, 1 Pet. 567 ; *Ex parte Crane*, 5 Ibid. 190 ; *Ex parte Roberts*, 6 Ibid. 216 ; *Ex parte Davenport*, Ibid. 661 ; *Ex parte Bradstreet*, 8 Ibid. 588 ; *New York Insurance Company* v. *Adams*, 9 Ibid. 573 ; *Postmaster-General* v. *Trigg*, 11 Ibid. 173 ; *Ex parte Story*, 12 Ibid. 339 ; *Poultney* v. *La Fayette*, Ibid. 472. The principles established in these cases in regard to this writ, are these : the supreme court will never compel an inferior court, in which a suit is pending, to do any act relating either to the practice of the court, or the merits of the case, in regard to which act the inferior court is vested with a judicial discretion ; even if they are of opinion that the court erred in the exercise of their discretion. Nor will the supreme court interfere with an inferior court in the suspension of its attorneys. Nor will it control an executive officer in the discharge of an executive function, unconnected with a pending suit ; even if they are of opinion, that it was improperly exercised.

If the rules thus laid down by the solemn decisions of fifty years, both for allowing and refusing writs of *mandamus* by this court, be applied to the present case ; it will be evident, that the application of the petitioner cannot be granted. It has solemnly decided, when this process is, and when it is not, necessary to aid the appellate jurisdiction of the court ; and these decisions absolutely exclude a case like that now presented. Whatever, therefore, may be the legal rights of the petitioner, or however proper a proceeding by *mandamus* might be, in a court less limited in its duties and constitutional functions, it is submitted, that there is nothing in the laws of the land, or in the established practice of the supreme court of the United States, which will warrant it in compelling a circuit or district judge, by mandatory process, to appoint a particular individual as clerk of his court, or to restore him to that office, after he has been superseded or removed.

Jones, also against the motion, presented the case to the court on the abstract, legal power of the district judge to remove from office a clerk who was the incumbent, and to appoint another person. The right to remove is an incident to the power of appointment. It is essential to the exercise of the power to appoint ; and the power which is given by the law cannot exist without this incident.

If the common law has any bearing on this question, it is very remote. The constitution of the United States, and the laws made in conformity with the provisions of the constitution, are essentially *different from the common law, as to appointment to offices, and as to the tenure by which they are held. 2 Bl. Com. 36–7. The law of the tenure of office in England, is regulated, not by any principles of ethics, or express provision, but by immemorial usage. Office is there an incorporeal hereditament, as a right of way. There is, under the common law, an estate in an office. But in the United States, this is not so. There is, in this country, no estate *254]

in any office; no property in an office. Offices are held for the benefit of the community in which their functions are exercised. As to the tenure and nature of office in England: cited, Co. Litt. 378 *a*; 4 Inst. 117; Co. Litt. 233 *b*; 2 Inst. 388. The position in England is, that unless the statute which creates the office limits its tenure, at the time of the creation, it is an office for life, as at the common law. But here, no such principles prevail. The common law does not apply to offices, which are all created by the constitution, or by express statute.

It is contended by the counsel for the relator, that the power of appointment in the United States is a naked power, as at common law; and that the power is at an end, when it has been executed. This would determine the power, after it had been used; and it could not afterwards be regained. Is it to be held, in the United States, that the power to appoint to office gives the appointing power a right to appoint for life only? The English doctrine on this subject has nothing to do with the laws of the United States, where such powers are given only by special enactments. The case cited from 3 Mass. reports, has no application to the case before the court. That case decided no more than that the local laws of the colony of Massachusetts made a settled minister of a congregation, a minister for life; and the new constitution of the state of Massachusetts had not abrogated that law.

The question whether, when a new office is created by an act of parliament, or a statute of the United States, it is an office for life or not, has never been presented for decision. In this case, the question is presented in its naked simplicity. This question has, resently, been considered in the court of appeals of Virginia. The question there was, on the removal of a district-attorney, who is appointed by the court. The officer was removed, without fault, and the question of the right of removal came before the court of appeals. It was decided, that the power was complete.

The government of the United States was brought into existence, in all its proportions and organization, without any of the relics of the barbarism of the darker ages attached to it. It has many beauties, and some defects; it is a new being, starting into life, in all its regulations and arrangements. It is not like a statute, which is in abrogation of the common law; but it is independent in itself. It is an experiment, to be examined by itself. The constitution provided for the terms of all offices created by it. This has been interpreted, so that the power to appoint has, as incident and inherent in it, the *power to remove, when thought proper; unless a special provision has been made to the contrary. [*255

The question is, what are the incidents to the power of appointment? If the power to appoint is given, it must be a continuing and constantly-existing power; and to be exercised at the will of the person holding it. The term power to appoint, comprehends this, and makes it a continuing power, always in vigor. This has been the course of the government of the United States; and it has always been considered, that an officer is displaced, when a successor to the office is appointed. This places in full existence, and in a simple form, the power to appoint; *non obstante*, that the office is full, at the time of the exercise of the power.

It is contended, that the appointment of a clerk of the district court is not a judicial act, but is like the power which, under the constitution, is given to the president of the United States, and is identical in its char-

acter with that power. The great object and purpose of the counsel for the relators has been, to show that the executive of the United States has the power to appoint by the constitution; and that the appointment in this case is not given by the constitution. Cited, as to the nature of the power of appointment given by the constitution to the president, 5 Marshall's Life of Washington 196.

The discussions in the legislative bodies, soon after the establishment of the government of the United States, did not draw into question the power of removal, as incident to the power of appointment. The only question then examined was, whether, as the senate was a part of the appointing power, the senate should not concur as to removals. The constitution of the United States declares, that the executive power is in the president; and the limitation of appointments is a diminution of that power, and it is to be strictly construed. The president is charged with the execution of the laws; and the grant of executive power gives to the officer all the rights in relation to the execution of the laws that kings or potentates have. This is derived from the nature of the duties enjoined on the office, and the obligation to perform them.

It is now settled and established, and the position is not to be disturbed, that the president of the United States has the power to remove or displace incumbents, as he has the power to appoint to office. This, it is now fully settled, is a portion of the executive power under the constitution; and the right to use and exercise it, in all cases where the tenure of office is not otherwise declared by the constitution and laws, is fully and unquestionably recognised. It is the universal practice, to use the power to appoint, according to the views and wishes of the person who makes the appointment. The motives to appoint do not enter into the question of the validity of the appointment.

Suppose, a judge to give a decision, expressly on the face of it erroneous, as from favor to one of the parties, and stating this as the *inducement to his judgment, and which, according to his opinion, was against the law; would the decision be reversed in this court, because of these reasons of the judge, if the decision was right? If it was according to the law, this court would affirm the judgment. So, the motives for the removal of the relator cannot be inquired into by this court. The court can only look at the question of the power of the judge to remove, without going into a scrutiny of his motives and conduct. If there has been corruption in an appointment, the appointment is not thereby vacated. Suppose, a judge convicted of fraud in the act of appointment, this does not affect its validity. If the president of the United States should be impeached, would his acts as president be avoided by his conviction?

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Thompson, Justice, delivered the opinion of the court.—This is an application for a rule upon the Honorable Philip K. Lawrence, judge of the district court of the United States for the eastern district of Louisiana, to show cause why a *mandamus* should not be issued against him, requiring him to show cause why he should not restore Duncan N. Hennen to the office of clerk of the said district court.

The petition sets forth, that the petitioner, Duncan N. Hennen, on the 21st day of February, in the year 1834, was duly appointed clerk of the said

court, by the Honorable Samuel H. Harper, judge of the said court. That a commission was duly issued, under the hand and seal of the judge ; that he accepted the appointment, and gave the bond, with sureties, required by law, and thereupon entered upon the duties of the office, and continued to discharge the same, methodically, skilfully and uprightly, and to the satisfaction of the district court. That by virtue of said appointment, and of the provisions of the statute in such case made and provided, he was, from the period of the organization of the circuit court of the United States for the said district of Louisiana, in like manner, the clerk of the said circuit court ; and performed all the duties of said office. That he continued to perform the said duties, and receive the emoluments, and in all respects to hold and occupy said offices, until on or about the 18th day of May, in the year 1838, when he received a communication from the Honorable Philip K. Lawrence, then and now the judge of the said district court of the United States for the said eastern district of Louisiana, apprising him of his removal from the said office of clerk, and the appointment of John Winthrop in his place. And in this communication he states, unreservedly, that the business of the office for the last two years had been conducted promptly, skilfully and uprightly, and that, in appointing Mr. Winthrop to succeed him, he had been actuated purely by a sense of duty and feelings of kindness towards one whom he had long known, and between whom and himself the closest friendship had ever subsisted. And that, as his capacity to fill the office cannot be questioned, he felt that he was not exercising *any unjust preference, in bestowing on him the appointment. The petition further states, that Judge Lawrence did, on or about the [*257 18th day of May, in the year 1838, execute and deliver to the said John Winthrop a commission or appointment, as clerk of the said district court for the eastern district of Louisiana ; and that he does to a certain extent execute the duties appertaining to the said office, and is recognised by the said judge as the only legal clerk of the said district court. The petition further states, that on or about the 21st day of May, in the year 1838, the circuit court of the United States for the eastern district of Louisiana, met according to law ; when the Honorable John McKinley, one of the associate justices of the supreme court of the United States, and the said Judge Lawrence, appeared as judges of the said circuit court, and that the petitioner and John Winthrop, severally presented themselves, each claiming to be rightfully and lawfully the clerk of the said circuit court ; that the judges differed in opinion upon the said question of right, and being unable to concur in opinion, neither of said parties was admitted to act as clerk, or recognised by the court as being rightful clerk ; and no business was or could be transacted, and the court adjourned. The petitioner claims that he was legally and in due form appointed clerk of said district court ; and by virtue of said appointment became lawfully the clerk of said circuit court, And that he has never resigned the said offices, nor been legally removed from the same, or either of them. But that he is illegally kept out of the said office of clerk of the said district court, by the illegal acts and conduct of the said Philip K. Lawrence, judge as aforesaid, and the said John Winthrop, claiming to hold the said office under an appointment from the said Judge Lawrence ; which he is advised and believes is illegal and void. And prays that the court will award a writ of *mandamus*, directed

to the said judge of the district court, commanding him forthwith to restore the petitioner to the office of clerk of the said district court of the United States for the eastern district of Louisiana.

The district judge has appeared by counsel, to oppose this motion, and the facts set out in the petition have not been denied. And the question presented to the court is, whether the petitioner has shown enough to entitle him to a rule to show cause why a *mandamus* should not issue. If he has been legally removed from the office of clerk, there are no grounds upon which the present motion can be sustained.

By the constitution of the United States, art. 2, § 2, it is provided, that the president shall nominate, and by and with the advice and consent of the senate, shall appoint, certain officers therein designated, and all other officers of the United States, whose appointments are not therein otherwise provided for, and which shall be established by law; but the congress may by law vest the appointment of such inferior officers, as they shall think proper, in the president alone, in the courts of law, or in the heads of departments.

*258] The appointing *power here designated, in the latter part of the section, was, no doubt, intended to be exercised by the department of the government to which the officer to be appointed most appropriately belonged. The appointment of clerks of courts properly belongs to the courts of law; and that a clerk is one of the inferior officers contemplated by this provision in the constitution cannot be questioned. Congress, in the exercise of the power here given, by the act of the 24th of September 1789, establishing the judicial courts of the United States (1 U. S. Stat. 76, § 7), declare that the supreme court, and the district courts shall have power to appoint clerks of their respective courts; and that the clerk for each district court shall be clerk also of the circuit court in such district.

When this law was passed, Louisiana formed no part of the United States, and, of course, had no district court, to which the act of 1789 would apply. But by the act of the 26th March 1804 (2 U. S. Stat. 283), providing for the temporary government of Louisiana, a district court is established; and the law directs that the judge thereof shall appoint a clerk for the said district, who shall keep the records of the court, and receive the fees provided by law for his services. And a like provision is made by the act of April 8th, 1812 (Ibid. 701), passed for the admission of Louisiana into the Union. And by the act of the 3d March 1837 (5 Ibid. 176), extending the circuit court system, and embracing Louisiana in the ninth circuit, it is declared, that the said circuit court shall be governed by the same laws and regulations as apply to the other circuit courts of the United States; and the clerks of the said courts respectively, shall perform the same duties, and be entitled to receive the same fees and emoluments, which are by law established for the clerks of the other circuit courts of the United States. The clerk of the district court, therefore, in Louisiana, became the clerk of the circuit court; standing upon the same footing in all respects as the clerks of the other district courts. His rights or his duties were in no respect changed by the establishment of a circuit court in that state; except, that the duties of a clerk of that court were superadded to those of a clerk of the district court. And this was by express provision of law; and required no act on the part of the circuit court to constitute him clerk of that court.

Such then being the situation in which the petitioner stood, prior to the 21st of May 1838, the question arises, whether the district judge had the power to remove him, and appoint another clerk in his place? The constitution is silent with respect to the power of removal from office, where the tenure is not fixed. It provides, that the judges, both of the supreme and inferior courts, shall hold their offices during good behavior. But no tenure is fixed for the office of clerks. Congress has by law limited the tenure of certain officers to the term of four years (3 U. S. Stat. 582), but expressly providing that the officers shall, within that term, be removable at pleasure; which, of course, is without requiring any cause for such removal. The clerks of courts are not included within this law, and there is *no express limitation in the constitution, or laws of congress, upon the tenure of the office. [*259

All offices, the tenure of which is not fixed by the constitution, or limited by law, must be held either during good behavior, or (which is the same thing in contemplation of law), during the life of the incumbent; or must be held at the will and discretion of some department of the government, and subject to removal at pleasure. It cannot, for a moment, be admitted, that it was the intention of the constitution, that those offices which are denominated inferior offices should be held during life. And if removable at pleasure, by whom is such removal to be made? In the absence of all constitutional provision or statutory regulation, it would seem to be a sound and necessary rule, to consider the power of removal as incident to the power of appointment. This power of removal from office was a subject much disputed, and upon which a great diversity of opinion was entertained, in the early history of this government. This related, however, to the power of the president to remove officers appointed with the concurrence of the senate; and the great question was, whether the removal was to be by the president alone, or with the concurrence of the senate, both constituting the appointing power. No one denied the power of the president and senate, jointly, to remove, where the tenure of the office was not fixed by the constitution; which was a full recognition of the principle that the power of removal was incident to the power of appointment. But it was very early adopted as the practical construction of the constitution, that this power was vested in the president alone. And such would appear to have been the legislative construction of the constitution. For in the organization of the three great departments of state, war and treasury, in the year 1789, provision is made for the appointment of a subordinate officer, by the head of the department, who should have the charge and custody of the records, books and papers appertaining to the office, when the head of the department should be removed from the office of the president of the United States. (1 U. S. Stat. 28, 49, 65.) When the navy department was established in the year 1798 (Ibid. 553), provision is made for the charge and custody of the books, records and documents of the department, in case of vacancy in the office of secretary, by removal or otherwise. It is not here said, by removal by the president, as is done with respect to the heads of the other departments; and yet there can be no doubt, that he holds his office by the same tenure as the other secretaries, and is removable by the president. The change of phraseology, arose, probably, from its having become the settled and well-understood construction of the constitution,

that the power of removal was vested in the president alone, in such cases; although the appointment of the officer was by the president and senate.

In all these departments, power is given to the secretary, to appoint all necessary clerks (1 U. S. Stat. 68); and although no power to remove is expressly given, yet there can be no doubt, that these clerks hold their *260] office at the will and discretion of the head of the department. *It would be a most extraordinary construction of the law, that all these offices were to be held during life, which must inevitably follow, unless the incumbent was removable at the discretion of the head of the department: the president has certainly no power to remove. These clerks fall under that class of inferior officers, the appointment of which the constitution authorizes congress to vest in the head of the department. The same rule, as to the power of removal, must be applied to offices where the appointment is vested in the president alone. The nature of the power, and the control over the officer appointed, does not at all depend on the source from which it emanates. The execution of the power depends upon the authority of law, and not upon the agent who is to administer it. And the constitution has authorized congress, in certain cases, to vest his power in the president alone, in the courts of law, or in the heads of departments; and all inferior officers appointed under each, by authority of law, must hold their office at the discretion of the appointing power.

Such is the settled usage and practical construction of the constitution and laws, under which these offices are held. The tenure of ancient common-law offices, and the rules and principles by which they are governed, have no application to this case. The tenure in those cases depends, in a great measure, upon ancient usage. But with us, there is no ancient usage which can apply to and govern the tenure of offices created by our constitution and laws. They are of recent origin, and must depend entirely upon a just construction of our constitution and laws. And the like doctrine is held in the English courts, where the office is not an ancient common-law office, but of modern origin, under some act of parliament. In such a case, the tenure of the office is determined by the meaning and intention of the statute. The case of *Smyth* v. *Latham*, 9 Bing. 672, was governed by this rule. The office in question was that of paymaster, appointed under an act of parliament; and the court said, this is not an ancient common-law office, the tenure of which is to be governed by ancient usage; and the question is no more than an inquiry into the meaning and intention of the statute itself: and that by the legal construction of the act of parliament, the tenure of the office was during pleasure; and that the new appointment was of itself a revocation of the first.

And the same rule has governed the decisions of the state courts in this country, whenever the power of appointment and tenure of office has been drawn into discussion. The questions have been governed by the construction given to the constitution and laws of the state where they arose. The case of *Avery* v. *Inhabitants of Tyringham*, 3 Mass. 177, falls within this class of cases. The chief justice there says, it is a general rule, that an office is held at the will of either party; unless a different tenure is expressed in the appointment, or is implied by the nature of the office, or results from ancient usage. The office held by the petitioner clearly falls within neither

of these exceptions, and of course, comes within the general rule, and is held *at the will of either party. The petitioner would doubtless claim the right to resign the clerkship, if he chose so to do. And the [*261 court had a right to put an end to it, at its election. The same principle governed the supreme court of Pennsylvania, in the case of *Commonwealth* v. *Sutherland*, 3 Serg. & Rawle 145. The question there turned upon the construction of the constitution and law of Pennsylvania. By the constitution of 1790, it is provided, that the governor shall appoint all officers, whose office is established by the constitution, or shall be established by law; and whose appointments are not otherwise provided for. And the court said, "the constitution is silent as to the removal of officers; yet it has been generally supposed, that the power of removal rested with the governor, except in those cases where the tenure was during good behavior:" clearly recognising the principle, that the power of removal was incident to, the power of appointment, in the absence of all constitutional or legislative provision on the subject. The case of *Hoke* v. *Henderson*, 4 Dev. 1, decided in the supreme court of North Carolina, is not at all in conflict with the doctrine contained in the cases referred to. That case, like the others turned upon the constitution and laws of North Carolina; and by the express terms of the law, the tenure of the office was during good behavior; and was, of course, governed by very different considerations from those which apply to the case now before the court.

The law giving the district courts the power of appointing their own clerks, does not prescribe any form in which this shall be done. The petitioner alleges, that he has heard and believes that Judge Lawrence did, on the 18th day of May 1838, execute and deliver to John Winthrop, a commission or appointment as clerk of the district court for the eastern district of Louisiana, and that he entered upon the duties of the office, and was recognised by the judge as the only legal clerk of the district court. And in addition to this, notice was given by the judge to the petitioner, of his removal from the office of clerk, and the appointment of Winthrop in his place; all which was amply sufficient, if the office was held at the discretion of the court. The power vested in the court was a continuing power; and the mere appointment of a successor would, *per se*, be a removal of the prior incumbent, so far, at least, as his rights were concerned. How far the rights of third persons may be affected, is unnecessary now to consider. There could not be two clerks, at the same time. The offices would be inconsistent with each other, and could not stand together. If the power to appoint a clerk was vested exclusively in the district court, and the office was held at the discretion of the court, as we think it was; then this court can have no control over the appointment or removal, nor entertain any inquiry into the grounds of removal. If the judge is chargeable with any abuse of his power, this is not the tribunal to which he is amenable; and as we have no right to judge upon this matter, or *power to afford redress, if any [*262 is required, we abstain from expressing any opinion upon that part of the case. The motion is accordingly denied.

On consideration of this motion, and of the arguments of counsel thereupon had, as well in support of, as against, the motion, it is now here con-

sidered, ordered and adjudged by this court, that the said motion be and the same is hereby overruled; and that the said *mandamus* or rule prayed for, be and the same is hereby denied.

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*263] *William B. Bend *v.* Jesse Hoyt.

Duties on merchandise.—Action against collector.

The plaintiff, as the importer of certain merchandise from England, entered the same at the custom-house in New York, on the 29th of March 1837, as cases containing cotton gloves; he gave a bond for the duties, payable on the 27th of June 1838. In 1838, it was discovered that one of the cases, No. 45, contained silk hose, and not cotton gloves; the plaintiff paid the bond to the collector, under protest; and claimed from the comptroller of the treasury to be released from the payment of the duties on No. 45, alleging, that as silk hose, they were not liable to duty, under the act of congress of 14th July 1832. The plaintiff instituted a suit against the collector, to recover back the duties so paid by him: *Held*, that the suit could not be sustained, after so long a time from the entry of the merchandise: also, that silk hose, and all manufactures of silk, of which silk is the component material of chief value coming from this side of the Cape of Good Hope, except sewing silk, are free of duty.[1]

Even courts of equity will not interfere to assist a party to obtain redress for an injury which, he might, by ordinary diligence, have avoided; and, *à fortiori*, a court of law ought not, when the other party has, by his very acts and omissions, lost his own proper rights and advantages.

A collector is generally liable in an action to recover back an excess of duties paid to him as collector, when the duties have been illegally demanded, and a protest of the illegality has been made at the time of payment, or notice given that the party means to contest the claim; nor is there any doubt, that a like action generally lies, where the excess of duties has been paid under a mistake of fact, and notice thereof has been given to the collector, before he has paid over the money to the government.

Certificate of Division from Circuit Court for the Southern District of New York. This suit was originally instituted in the superior court of New York, and was afterwards brought before the circuit court of the southern district of New York, by a *certiorari*.

An action of *assumpsit* was instituted against the collector of the port of New York, to recover the sum of $127, paid to him by the plaintiff, for the importation of silk hose. The duty was levied at the rate of twenty-five per centum *ad valorem*, "as hosiery," under the second article of the second section of the act of congress of 14th July 1832, entitled "an act to alter and amend the several acts imposing duties on imports."

Upon the trial, it was proved, that on the 29th of March 1837, the plaintiff made an entry at the custom-house in New York, of eight cases of cotton gloves, and that the duty was levied on each of the eight packages, of twenty-five per centum *ad valorem*; for which duty, with the duties on other goods, the plaintiff gave a bond for $294, payable on the 27th June 1838. The plaintiff, on making the entry, made the usual affidavit to the truth of the invoice and bill of lading produced by him, and that the invoice produced by him was the true invoice of the cost of the goods, and that if any error was discerned in the invoice or cost of the goods, he would immediately make the same known to the collector. It was proved, that in the year 1838, it
*264] was discovered, that case *No. 45, one of the packages in the invoice, did not contain cotton gloves, but actually contained silk hose, and

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[1] Hardy *v.* Hoyt, *post*, p. 292.

that $127.92, were bonded by the plaintiff, under the belief that the case contained cotton gloves. On the 28th June 1838, the plaintiff served a protest on the collector, against the payment of the bond given to secure the duties. The protest stated, that the bond had been given under a clear misapprehension of the nature of the goods, and claimed a deduction from the bond, of the amount of the estimated duties on box No. 45, supposing the box to contain cotton gloves. The plaintiff had previously requested the comptroller of the treasury to release him from the payment of the duties; and the comptroller in reply, refused to correct "errors in fact."

On the trial of the cause, the collector introduced and read to the jury, to show the habitually loose manner in which the plaintiff transacted his business, an affidavit made by the plaintiff on the 25th of April 1838. The affidavit stated, "that on the 27th day of March 1837, he imported in the ship Roscoe, from Liverpool, eight cases and casks of hosiery and gloves, marked B. 38 to 45, owned by Barker & Adams, manufacturers, of Nottingham, England, and consigned by them to him, the said William B. Bend, for sale; that his clerk not being able to ascertain from the wording of the invoice, which packages contained gloves, and which hosiery, and knowing that cotton gloves and cotton hosiery paid the same duty, he entered them all, upon arrival, at the custom-house, in the port of New York, as cotton gloves; that a duty of twenty-five per centum was charged upon them by the collector of the said port, and that he, the said Bend, gave bonds to the said collector, to pay the said duties; that on examination of the goods contained in one of the aforesaid cases, marked B 45, he found them to be spun silk hoisery, and not cotton gloves, as entered by him at the custom-house; and furthermore, that the goods are called, upon the original invoice, passed at the custom-house, "spun knots;" a term which is well known in the trade to be applied to hosiery of silk only; and that he verily believes the error of entering the said case, and paying duty, arose from the ignorance of his clerk who made the entry; that he, the said Bend, did not, upon this, nor does he, upon any occasion, examine whether the custom-house entries, made by the said clerk, are correct. And the said William B. Bend further maketh oath, that he has never sold any part of the said case, B 45, and that, to the best of his knowledge and belief, nothing has been ever taken from or added to it, but that it is in every respect in the same condition as it was when he received it." It was also proved, that the package No. 45, was never in the custody of the collector, nor subjected to the examination of the public appraisers; and that the first intimation the collector had that it contained silk, was in March or April 1838. It was also proved, that the merchandise contained in the package *No. 45, was silk hose, made of the tow of silk, a coarse quality of silk, but still silk, cometimes called [*265 sponged silk; and that the said merchandise was well known, in commerce, under the denomination of hosiery.

Upon the foregoing evidence, given during the progress of the trial, the following points were presented on the part of the defendant, for the opinion of the judges, on each of which the judges were divided in opinion. 1. Whether, assuming that an excess of duties was paid by mistake, under the facts above stated to the collector, on the before-mentioned package, No. 45, the plaintiff, under the said facts, is entitled to recover back such excess, in a personal action against the collector? 2. Whether the said silk hose

was subject to the payment of the duty imposed on "hosiery" by the second clause of the second section of the act of July 14th, 1832, entitled "an act to alter and amend the several acts imposing duties on imports;" or whether, as manufactures of silk, not being sewing silk, the goods, wares and merchandise, contained in said package, No. 45, were exempted from the payment of duty, by the fourth section of the act of March 2d, 1833, entitled "an act to modify the act of the 14th of July 1832, and all other acts imposing duties on imports;" which declares that all manufactures of silk, or of which silk is the component material of chief value, coming from this side of the Cape of Good Hope, except sewing silk, shall be free? Which said points, upon which the disagreement happened, were stated under the direction of the judges of the said court, at the request of the counsel for the parties in the cause, and ordered to be certified unto the supreme court of the United States, at the next session.

The case was argued by *Raymond* and *Coxe*, for the plaintiff; and by *Grundy*, Attorney-General of the United States, for the defendant.

Story, Justice, delivered the opinion of the court.—This case comes before us upon a certificate of division of opinion of the judges of the circuit court of the southern district of New York. The original suit was *assumpsit*, to recover back from the defendant, who is collector of the port and district of New York, a sum of money paid as duties upon certain imported goods, upon the ground that they were not liable to duty. Upon the trial, it appeared, that on the 29th of March 1837, an entry was made by the plaintiff, as consignee, at the custom-house of New York, of eight cases of cotton gloves, marked B, numbered from 38 to 45, as imported from Liverpool, England. The case, number 43, was designated on the invoice to be examined, and was passed as correct; whereupon, the duty was levied upon each of the eight packages *at 25 per centum *ad valorem*, as being cotton gloves; which duty was secured by a bond, which became due on the 27th of June 1838. Upon making the entry, the invoice of the goods was produced, and the common oath on such occasions taken and subscribed in the form prescribed by law. It was proved, that in the year 1838, it was discovered by the plaintiff, that the case No. 45 did not contain cotton gloves, but actually contained silk hose; and that the plaintiff had paid $127.92 for duties, under the belief that the package contained cotton gloves. On the 25th of April 1838, the plaintiff addressed a letter to the comptroller of the treasury, requesting to be released from the payment of the duty; to which the comptroller replied, on the 27th of the same month, refusing to do so, upon the ground, that whether the goods were composed of silk or of cotton, was clearly a matter of fact, and should have been settled before the removal of the goods from the custom-house; and that he did not feel authorized to make the plaintiff's case an exception to the uniform and long-established rule of the department, by permitting a revision of the entry. On the 26th of June 1838, the plaintiff addressed a letter to the defendant, informing him that no duties were payable on the goods; and that in paying the amount he should do it under protest, reserving his legal rights. It was further proved, that the package No. 45 never was in the custody of the collector, nor subjected to the examination of the public appraisers; and that the first intimation that the collector had, that

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it contained silk hose, was in March or April 1838. The merchandise contained in the package No. 45 was silk hose, made of the tow of silk, a coarse quality of silk, but still silk, sometimes called sponged silk; and was well known in commerce under the denomination of hosiery. An affidavit of the plaintiff was read in evidence by the defendant, to show the habitually loose manner in which the plaintiff transacted his business with the custom-house; and in which, among other things, the plaintiff attributed the error in the entry at the custom-house to the ignorance of his own clerk in making the entry, and not being able to understand, from the wording of the invoice, which packages contained gloves, and which hosiery.

Upon this evidence, the following points were presented by the defendant for the opinion of the judges, on each of which the judges were divided in opinion: 1. Whether, assuming that an excess of duties was paid by mistake, under the facts above stated, to the collector, on the before-mentioned package No. 45, the plaintiff, under the said facts, is entitled to recover back such excess in a personal action against the collector? 2. Whether the said silk hose was subject to the payment of duty imposed on hosiery by the second clause of the second section of the act of the 14th of July 1832, ch. 224, entitled, "an act to alter and amend the several acts imposing duties, on imports;" or whether, as manufactures of silk, not being sewing silk, the same were exempted from the payment of duty by the fourth section of the act of the 2d of March 1833, entitled, &c., ch. 354, which declares that all manufactures of silk, or *of which silk is the component material of chief value, coming from this side of the Cape of Good Hope, [*267 except sewing silk, shall be free?

As to the first question, there is no doubt, that the collector is generally liable in an action to recover back an excess of duties paid to him as collector, where the duties have been illegally demanded, and a protest of the illegality has been made at the time of the payment, or notice then given that the party means to contest the claim; whether he has paid over the money to the government or not. Nor is there any doubt, that a like action generally lies, where the excess of duties has been paid under a mistake of fact, and notice thereof has been given to the collector, before he has paid over the money to the government. Both of these propositions are fully discussed and decided in the case of *Elliot* v. *Swartwout*, 10 Pet. 137; and if the present point involved nothing more, there would be no substantial ground of controversy. But there are other ingredients in the present case.

The goods were actually entered by the plaintiff at the custom-house, by a particular description—that of cotton goods; and he then swore, that the invoice then produced by him was the true invoice received by him, and that the entry contained a just and true account of the same goods; and upon the faith of that entry and oath, the goods were actually delivered to him by the collector, without any examination whatsoever. No notice was given to the collector of any mistake, until nine or ten months afterwards, when the government was no longer in a condition to ascertain the real state of the facts; and when, of course, it was compelled to rely exclusively upon the evidence furnished by the plaintiff. Now, certainly, it was the duty of the plaintiff, before making the entry at the custom-house, to have exercised due diligence in examining his papers, and ascertaining the true

state of the facts, before he undertook to verify them under the solemnity of an oath. That he was grossly negligent in this particular, is plain, from his own showing; and that the loss, if any, has accrued to him, has accrued from his negligence and inattention to his duty, is equally clear.

The question then arises, whether this action is maintainable, not under ordinary circumstances of innocent mistake, but under circumstances of culpable negligence on the part of the plaintiff, and when the government can no longer be replaced in the same situation in which it stood at the time of the original transaction. Upon the best consideration which we can give to the subject, we are of opinion, that the action, under such circumstances, is not maintainable. If a different rule were to prevail, the whole policy of the laws for the collection of duties would be broken in upon; there would be no certainty whatsoever as to the amount or receipt of the revenue; and the grossest evasions and frauds might be practised with perfect impunity. Instead of the invoice or entry, with the accompanying oath of the party, furnishing the just means of ascertaining the nature, and quality, and character of the goods imported, and the amount of duties payable thereon; everything would be *left loose, and open, in case of contest, to the uncertain evidence to be produced before successive juries. The whole system of guards introduced into the revenue laws, for the purpose of ascertaining the nature quality, description and value of imported goods, would, in a short time, amount to little more than forms, as vexatious as they would be inefficacious. The act of 1823, ch. 149, in amendment of the former acts for the collection of duties, manifestly lays great stress on the invoice, produced at the time of the entry of the goods at the custom-house, and the accompanying oath of the importer; as the truest and best means of ascertaining the nature and quality, and value of the goods, and the basis of the duties to be charged thereon; as is apparent from the series of sections from the fourth to the fifteenth sections. Invoices duly verified and authenticated, are deemed a sufficient title to entry; while others, not so verified and authenticated, are declared to be deemed to be suspected, and liable to be treated in the same manner as fraudulent invoices. And the 23d section of the act provides, that when goods are admitted to an entry, upon invoice, the collector shall certify the same, under his official seal; and no other evidence of the value of such goods shall be admitted on the part of the owner, in any court of the United States, except in corroboration on such entry. It seems difficult to resist the conclusion, that though the language of this section is confined in its terms to the invoice value of the goods, because the duties were to be calculated *ad valorem* thereby, yet that, consistently with its professed objects, it ought to be deemed equally conclusive as evidence of the nature, quality and description of the goods. At all events, it would seem to be against the whole policy of the act, as well as of the other acts of congress respecting the collection of the revenue, to permit a man to enter packages of goods, by one description, under his solemn oath, and thus to withdraw them from the custody of the collector, without any examination of the contents of the packages; and afterwards, to insist upon another description, totally different, and thereby to change the rate of duties, or to claim an exemption from all duties. The public inconveniences attendant upon such a practice, would alone be sufficient to repeal any presumption that congress intended to authorize it, unless

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there were some explicit provision in favor of it; and the uniform course of the government to disallow it, furnishes strong evidence that the true construction of the act does not justify the practice. The consignee had his choice, at the time of the entry, either to rely on his invoice, or to have the contents of each package examined. He chose the former; and the latter is, on the part of the government, no longer practicable—at least, not so far as to be satisfactory or certain in its results. The error, if any there has been, has arisen, as we have already stated, from his own culpable negligence; and courts of justice do not sit for the purpose of aiding those who seek redress for supposed mischiefs resulting from such negligence. Even courts of equity will not interfere to assist a party to obtain redress for an injury which he might by ordinary *diligence have avoided; and, *à fortiori*, a court of law ought not, where the other party has, by the very acts or omissions, lost his own proper rights or advantages. [*269

No case has been cited, and none has come to our knowledge, where an action has been maintained at law, under circumstances like the present, where money has been sought to be recovered for a mistake of fact, occasioned by the culpable negligence of the plaintiff, and where the retaining of it on the other side is not unconscientious. The case here cannot be better than it would have been, if the plaintiff had refused to pay the duty bond; and to an action on the bond, he had pleaded in his defence the very matters now insisted on. It would certainly have been difficult to have framed a plea, to sustain such a defence in point of law. If the objection were to be insisted on, that would seem to have been as proper a mode of meeting it as could have been devised; though, looking to the penal consequences of not paying a duty bond, as it withdraws from the party all future credit at the custom-house while it continues, we do not say that the present mode may not also be appropriate. Lord Mansfield, in *Moses* v. *Macferlan*, 2 Burr. 1005, 1012, speaking of an action for money had and received, observed, that it lies for money paid by mistake, or upon a consideration which happens to fail, or for money got through imposition (express or implied), or extortion, or oppression, or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under such circumstances. And he added, in one word, the gist of the action is, that the defendant under the circumstances of the case, is obliged, by the ties of natural justice and equity, to refund the money. In *Bize* v. *Dickason*, 1 T. R. 285, he also said, "the rule has always been, that if a man has actually paid what the law would not have compelled him to pay, but what in equity and conscience he ought, he cannot recover it back again. But where money is paid under a mistake, which there was no ground to claim in conscience, the party may recover it back again by this kind of action." Now, admitting the entire correctness of this doctrine, in its full extent (and no more than general truth can be imputed to it), it leaves the whole matter open upon which the present controversy turns; and that is, whether there is any want of conscience in the collector's retaining this money. And it leaves wholly untouched the ground, what would be the effect if the mistake and the payment consequent thereon, had been the consequence of the culpable negligence or misconduct of the plaintiff himself, without any default on the other side, and where thereby he could not

be placed *in statu quo*. Our opinion, is, that, upon principle, under such circumstances, no such action is or ought to be maintainable.

In *Milnes* v. *Duncan*, 6 Barn. & Cres. 671, the party was allowed to recover back money paid under a mistake of fact, there being no *laches* imputable to him; and that was the very ground of the decision. In that case, Mr. Justice BAYLEY said, "If a party pay money under a mistake of the law, he cannot recover it back; but if he *pay money under a mistake of the real facts, and no *laches* is imputable to him, in respect of his omission to avail himself of the means of knowledge within his power, he may recover back the money;" and he added, "in this case, the question is, whether there was, on the part of the plaintiff, at the time when he made the payment, ignorance of the true state of the facts, or any negligence imputable to him in not availing himself of the means of knowledge within his power." So that, we here see it admitted, that negligence would constitute a good defence to the suit. In *Skyring* v. *Greenwood*, 4 Barn. & Cres. 281, it was held, that money paid by a paymaster to an army officer, could not be recovered back again, or claimed by way of set-off, he having been guilty of a breach of duty and of negligence in not communicating to the officer certain information of the disallowance of the claim of the officer, on which the money was paid by the board of ordnance, at an earlier period, when his conduct might have been influenced by it.

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These cases, although not exactly in point with the present, clearly show, that even in cases of money paid under a mistake of facts, if the party has been guilty of negligence, or of a breach of his proper duty in the transaction, he is not entitled to recover back the money, if paid, or to retain it, it unpaid, against the other party, whose rights or conduct have been affected by such negligence or breach of duty. We think the principle a sound one, and should not hesitate to adopt it, even if there were no authority to support it. Its application to the circumstances of the present case cannot well be questioned. Here, by the conduct, and solemn affirmations, under oath, of the plaintiff, the position of the United States has been entirely changed; the property has been delivered up from the custody of the government, without any search or examination, in the perfect confidence that all was right; and we think the plaintiff is now estopped from setting up his own culpable negligence, to excuse him from the payment of the duties, which, by his own entry and oath, he admitted to be due, and thereby obtained a delivery of the goods.

In this view of the matter, it might not be necessary for the court to answer the other question, upon which the court below was divided, as our answer to the first decides the merits of the plaintiff's case. But as the same question is involved in *Hardy* v. *Hoyt*, which has been argued in connection with the present, we shall now proceed to the consideration of it. The question is, whether silk hose is subject to the payment of the duty imposed on hosiery by the second clause of the second section of the duty act of 1832, ch. 224. That section enacts, that from and after the 3d day of March 1833, on the articles therein after mentioned, there shall be levied collected and paid, the following duties: First, wool, unmanufactured, certain duties specified in the first clause. Second (which is the clause in question), "On all milled and felled cloth, known by the name of plains, kerseys

or kendal cottons, of which wool shall be the only material, the value whereof shall not exceed thirty-five cents a square yard, five per centum *ad valorem;* on worsted stuff *goods, shawls, and other manufactures of silk and worsted, ten per centum *ad valorem;* on worsted yarn, twenty per [*271 centum *ad valorem;* on woollen yarn, four cents per pound, and fifty per centum *ad valorem;* on mits, gloves, bindings, blankets, hosiery, and carpets and carpetings, twenty-five per cent., except Brussels, Wilton, and treble ingrained carpeting, which shall be at sixty-three cents the square yard, all other ingrained and Venetian carpeting at thirty-five cents the square yard; and except blankets, the value whereof at the place whence exported shall not exceed seventy-five cents each, the duty to be lieved upon which shall be five per centum *ad valorem;* on flannels, bockings and baizes, sixteen cents the square yard, on warp laces thirty-five per centum; and upon merino shawls made of wool, all other manufactures of wool, or of which wool is a component part, and on ready-made clothing, fifty per centum *ad valorem.*" Now, looking to the terms of this clause, and the connection in which hosiery stands with the other enumerated articles, the natural construction of it would certainly be, that it was restricted to hosiery *ejusdem generis*, that is to say, hosiery of wool, or of which wool was a component part. It stands in connection with mits, gloves, binding, blankets and carpeting, and the exceptions carved out of it are all articles composed of wool, viz., certain kinds of carpetings and blankets. It is followed by flannels, bockings and baizes, coach laces and merino shawls, and then come the sweeping words, "all other manufactures of wool, or of which wool is a component part;" which certainly seem to pre-suppose that all the preceding enumerated articles were of a kindred nature and fabric. The words "ready-made clothing," follow this enumeration, and therefore, are not necessarily governed by the same interpretation, since they are not inserted as a qualification of the sweeping words already referred to, but stand as an independent descriptive specification, capable of being applied to every variety of ready-made clothing, whatever may be the fabric. No argument, therefore, can properly be derived from this part of the clause respecting ready-made clothing, to control the natural deductions arising from the antecedent language of the same clause.

But the case before us does not turn upon the interpretation of the second clause, standing alone, but it is materially affected by the fifteenth clause of the same section of the act, which prescribes a rate of duty on manufactures of silk, in the following words; "On all manufactures of silk, or of which silk shall be a component part, coming from beyond the Cape of Good Hope, ten per centum *ad valorem*, and on all other manufactures of silk, or of which silk is a component part, five per centum *ad valorem*, except sewing silk, which shall be forty per centum *ad valorem.*" Now, this language, in its positive import, includes all manufactures of silk, except sewing silk; and the very exception of sewing silk, lends additional force to the conclusion, that no other manufactures of silk were intended to be excepted from the operation of the clause, upon the well-known maxim, that an exception in a statute amounts to an *affirmation of the application of its provisions to all other cases not excepted. Upon what [*272 ground, then, can this court say, that silk hose, being a manufacture of silk, is not solely and exclusively liable to the duty imposed by the fifteenth

clause of the section? Upon none, unless it manifestly appears to be repugnant to some other provision of the statute. No such repugnancy exists, if we construe the word "hosiery," in the second clause of the second section, to mean, as in its natural connection it imports, hosiery of wool, or of which wool is a component part. On the other hand, if we construe "hosiery" in this connection, to include silk hose, then all other manufactures of silk, except sewing silk, are not governed by the fifteenth clause; and thus we create a positive repugnancy between the second and fifteenth clauses. Now, it is the duty of courts of justice so to construe all statutes as to give full effect to all the words, in their ordinary sense, if this can be properly done; and thus to preserve the harmony of all the provisions, And besides, if we are to create an implied exception as to hosiery, the same rule might be applied to silk mits, silk gloves and silk bindings; and if there are such articles, to carpetings of silk. Indeed, there would be no end to implied exceptions. If the legislature meant specially to except silk hose, or any other particular manufactures of silk, from the general language, the natural course would have been, to have placed them as exceptions with sewing silk; and the omission is, in our judgment, conclusive to show that none others were intended.

If we look back to the duty act of the 19th of May 1828, ch. 55, which the act of 1832 was designed in a great measure to modify or supersede, and in which, for the first time in our legislature, "hosiery" is mentioned, *eo nomine;* there cannot be a doubt, that the legislative intention, then, was confined to woollen hosiery. The second clause of the second section of that act is in the following words: "On manufactures of wool, or of which wool shall be a component part, except carpeting, blankets, worsted stuff goods, bombazines, hosiery, mits, gloves, caps and bindings, the actual value of which at the place whence imported shall not exceed fifty cents the square yard, shall be deemed to have cost fifty cents the square yard, and be charged with a duty of forty per centum *ad valorem*, &c." The third, fourth, fifth and sixth clauses of the same section lay a particular duty on other manufactures of wool, "except as aforesaid;" and then the seventh, taking up the exception, says, "on woollen blankets, hosiery, mits, gloves, and bindings, twenty-five per cent. *ad valorem.* On clothing ready made, fifty per centum *ad valorem.*" It is impossible, reading these clauses in connection, not to perceive, that the exceptions in the second clause, are wholly of fabrics of wool, or of which wool is a component material; for every exception must be considered in such a case to be of something *ejusdem generis.* Then, follows, in the sixth clause, "On all manufactures of silk, or of which silk is, the component material, coming from beyond the Cape of Good *Hope, a duty of twenty per centum *ad valorem*, &c.; and on all other manufactures of silk, or of which silk shall be a component material, twenty per centum *ad valorem.*" Construing, then, these acts as being *in pari materia*, if we were at liberty to look beyond the act of 1832, to the antecedent state of the law on this subject, the duty on hosiery, as such, was confined to hosiery of wool, or of which wool is a component part.

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But if any doubt could be entertained upon the act of 1832, ch. 224, interpreted by itself, or by the antecedent laws, we think none whatsoever can be entertained as to the true intendment and operation of the act of 21

March 1833, ch. 354. That act, in the fourth section, expressly enacts, that in addition to the articles then exempted from duty by the act of 1832, and other existing laws, from the payment of duties, the following articles, imported from and after the 31st of December 1833, and until the 30th of June 1842, shall also be admitted free from duty; "to wit, bleached and unbleached linens, table linen, linen napkins and linen cambrics, and worsted stuff goods, shawls and other manufactures of silk and worsted, manufactures of silk, or of which silk shall be the component material of chief value, coming from this side of the Cape of Good Hope, except sewing silk." This section, in express terms, declares, that manufactures of silk coming from this side of the Cape of Good Hope (which is the very predicament of the silk hose in question), except sewing silk, shall be free from duty. And it would violate every rule of interpretation, to hold, that where the legislature had declared all manufactures of silk, except one, free from duty, the court should create other exceptions by its own authority, without any express or implied intent on the part of the legislature, manifested in the context, to warrant such exceptions.

Upon the whole, we are of opinion, first, that upon the facts stated, the present action is not maintainable: and secondly, that silk hose is free of duty, under the act of 1833. A certificate will be sent to the circuit court, accordingly.

Thompson, Justice. (*Dissenting.*)—The amount of controversy in this case is too small to attach much importance to it, on that account. But the principle involved in the decision and the practical effect it is to have upon the course of business at the custom-house, between the merchant and collector, must be my excuse for publicly dissenting from the opinion of the court, in a case apparently of so little importance in itself. I fully concur in that part of the opinion which exempts the goods in question (silk hosiery) from the payment of any duty; but dissent from that part which exonerates the collector from an action to recover back the duties received by him, without any authority warranted by law.

The only question presented by the point certified to this court, is, whether the plaintiff is entitled to recover from the collector a sum of money, admitted to have been paid to him by mistake, without *the least color or suspicion of fraud or misconduct on the part of the plaintiff; and [*274 the mistake made known to the collector, before the money was actually paid, and a claim interposed to have it deducted from his bond. The opinion of the court upon the other point certified, settles the question, that the silk hosiery on which the duty was paid, was not subject to duty. The money was, therefore, in the hands of the collector, without any right whatever to hold it, and exacted in violation of law; not a voluntary payment, but demanded under the penalty of a loss of credit at the custom-house, if the bond was not paid. If, under such circumstances, the money cannot be recovered back, it must rest upon some stern and unyielding principles of law or public policy, against the manifest justice of the case. But, in my judgment, there are no principles of law or public policy that can uphold such a course on the part of the collector.

But it may be proper to state, a little more particularly, the circumstances under which the money was paid to the collector. Upon the trial

in the circuit court, an affidavit of the plaintiff was produced and read in evidence by the defendant; and he cannot now be permitted to deny the truth of the facts therein stated. In this affidavit, the plaintiff states, that in March 1837, he imported from Liverpool, in the ship Roscoe, eight cases and casks of hosiery and gloves, owned by Barker & Adams, manufacturers, of Nottingham, in England, and consigned by them to him for sale. That his clerk not being able to ascertain from the wording of the invoice, which packages contained gloves and which hosiery, and knowing that cotton gloves and cotton hosiery paid the same duty; he entered them all at the custom-house as cotton gloves, and a duty of twenty-five per cent. was charged upon them by the collector, and he gave bonds for the payment of the duties. That upon an examination of the goods contained in one of the cases, marked B 45, he found them to be spun silk hosiery, and not cotton gloves, as entered at the custom-house. That the goods are called upon the original invoice passed at the custom-house, "spun knots," a term well known in the trade to be applied to hosiery of silk only; and that he verily believed, that the error of entry of the said case as paying duty, arose from the ignorance of the clerk who made the entry. That he did not, upon this, nor does he, upon any occasion, examine whether the custom-house entries made by his clerk are correct. And he further swears, that he had never sold any part of that case; and that, to the best of his knowledge and belief, nothing had been taken from or added to it, but that it was in every respect in the same condition as it was when he received it.

This deposition establishes, beyond all controversy, that the entry was a pure mistake. And suppose, it arose from the ignorance of the clerk in not understanding the kind of goods called spun knots? It was equally the ignorance of the custom-house officer who received the entry; for not only the oath upon which the entry was made, states that the original invoice was presented to the collector, upon which the article is denominated spun knots; but it is required by *law, that the original invoice should be produced to the collector at the time the entry is made. (1 U. S. Stat. 655, § 36.) He had, therefore, the same means of knowing what the cases contained, as the clerk who made the entry, the cases not having been opened or examined. It was, therefore, a case of mutual error or mutual ignorance. There are no grounds whatever for charging the plaintiff with negligence in this case. He pursued the ordinary course of business. Entries at the custom-house are usually made by clerks. But if no mistake made by a clerk can be corrected, every merchant will be obliged to submit in silence to all losses occasioned by mistakes, or attend in person to make his entries; which will be entirely changing the course of business. But suppose, the plaintiff himself had made the mistake; can it be, that it is beyond the reach of the law, to correct such mistakes. The rule now laid down by the court would equally extend to such a case. If there are any grounds whatever to suspect fraud or imposition, it is open to inquiry. But to close the door against correcting innocent mistakes, on any supposed ground of public policy, is applying a very severe rule to the transaction of business at the custom-house, and one that, in my judgment, is not called for to protect the revenue of the country. And the very form of the oath required by law to be made on the entry, pre-supposes that mistakes may be committed, and provides for the correction of them. The person on whose

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oath the entry is made, swears that the invoice and bill of lading presented to the collector, is the true and only invoice of the goods received, and that the entry contains a just and true account of the goods, according to the invoice and bill of lading, and that nothing, to his knowledge, has been suppressed or concealed, whereby the United States may be defrauded of any part of the duty lawfully due on the said goods; and that if at any time thereafter, he discovers any error in the invoice, or in the account rendered of the goods, &c., he will immediately make the same known to the collector. There is nothing in this case to take it out of the rule of law applicable to ordinary innocent mistakes.

The original invoice was produced and laid before the collector, as by law required, to be examined and compared with the entry; in which invoice, the goods are denominated spun knots. If, therefore, there was any supposed error in the clerk in entering them as gloves, it was the duty of the collector to have corrected the error; and he is as much chargeable with negligence as the clerk. But the reason why no notice was taken of it, doubtless, was, that it was altogether unimportant, in the view of the collector; for he considered the duty chargeable upon the goods as hosiery, and that it was perfectly immaterial, whether it was cotton or silk hosiery.

There is nothing in the case to show that the error or mistake was not immediately made known to the collector, as soon as it was discovered; or that the collector made any objection to correcting it on that account. And it was in proof, that it was made known to him, before the duties were paid. It having been settled by this *court, that according to the true construction of the acts of congress, no duties could be demanded upon [*276 this hosiery, there can be no doubt, that if the plaintiff had not paid the duties, but suffered his bond to be prosecuted, this mistake in the estimate of duties might have been set up by way of defence, and deduction from the bond. The bond is not given for the payment of any sum certain for the duties; but in a penalty sufficient to cover the supposed amount, with a condition to pay the amount of duties to be ascertained upon the goods in the entry referred to (1 U. S. Stat. 673, § 62); and the question is, therefore, open to inquiry, what was the amount due upon the goods contained in such entry, if any error or mistake has occurred. But the obligors in the bond cannot permit themselves to be sued, without forfeiting their credit at the custom-house; for the act of congress declares, that no person whose bond has been received, either as principal or surety, for the payment of duties, and which bond may be due and unsatisfied, shall be allowed a future credit for duties, until such bond shall be fully paid or satisfied. And the merchant had better submit to the imposition of paying illegal duties, especially, if they are of small amount, than to have his credit suspended at the custom-house, until he can try the question in a suit upon the bond. Money exacted under such circumstances, is but little short of duress, if the collector is protected from any suit to recover it back. I cannot believe, that there is any principle of law or public policy, that can be permitted to work such injustice. Due notice was given to the collector, before the bond fell due, of the mistake, and a claim to have the deduction made upon the bond; and no pretence on the part of the collector, that the notice came too late, nor any suggestion of fraud or unfair conduct on the part of the plaintiff. The collector, therefore, acted with full knowledge of all the facts—

and indeed, under an implied admission of the mistake. For he professed to act under the instructions of the comptroller of the treasury, that no errors of fact could be corrected, after the merchandise had passed beyond the control of the officers of the customs. If such be the rule of the custom-house, no errors or mistakes can be corrected, unless every package of goods shall be opened and examined at the public stores, before being delivered to the merchant, which would be contrary to the uniform course of business.

But I trust the instructions of the comptroller are not to be assumed as law. Although instructions from the treasury department may afford an apology for the collector, and exonerate him from any intentional violation of duty, yet it can never be admitted, that they can shield him from all responsibility, when not warranted by the rules and principles of law. If any authority is necessary to support this position, it will be found in the case of *Elliott* v. *Swartwout*, 10 Pet. 153, where it is expressly laid down, that instructions from the treasury department cannot change the law or affect the rights of the parties ; that the collector is not bound to take and adopt such instructions, but is at liberty to judge for himself, and act *accordingly. And in that case, the personal responsibility of the collector is fully examined ; and his liability held to be governed by the fact, whether he has paid over the money to the treasury, before any notice of a claim to have it refunded has been given to him. And it is there settled, that where the money has been paid over to the treasury, without any notice or objection to its being paid over, it is to be considered a purely voluntary payment ; and no suit can be maintained against the collector to recover it back ; but when, at the time of payment, notice is given to the collector, that the duties are charged too high, and accompanied with a declaration, by the party paying the money, that he intends to prosecute him to recover back the amount erroneously paid, in such case, the collector is personally liable. And the court add, that such must necessarily be the rule, unless the broad proposition can be maintained, that no action will lie against a collector, to recover back an excess of duties paid him, but that recourse must be had to the government for redress. Such a principle, say the court, would be extending an exemption to a public officer, beyond any protection sanctioned by any principle of law or sound public policy. And numerous cases in the English courts are referred to, where suits have been maintained against public officers, to recover back money paid to obtain a release and discharge of goods seized, which were not liable to seizure ; the courts observing, that the revenue laws ought not to be made the means of oppressing the subject. And if an action would lie to recover back money paid to obtain possession of goods illegally seized, the same principle will sustain an action to recover back money illegally exacted, under the penalty of forfeiting all credit at the custom-house, due notice having been given to the collector not to pay it over to the treasury. The true doctrine on this subject is laid down in the case of *Bize* v. *Dickason*, 1 T. R. 286. Lord MANSFIELD there said, the rule had always been, that if a man has paid what the law would not have compelled him to pay, but what in equity and conscience he ought to pay, he cannot recover it back, in an action for money had and received ; but where money is paid under a mistake, which there was no ground to claim in conscience, the party may recover it back again in this kind of action." If this be the true rule, of which I think there can

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be no doubt, the plaintiff has a right to recover back the money in this case. It is fully proved, that it was included in his bond by mistake, and was held by the collector, without any right, in law or conscience, to retain it; and payment of the bond was exacted under the penalty of forfeiture of credit at the custom-house. If an action against the collector cannot be maintained to recover back money paid under such circumstances, it is difficult to conceive a case that would sustain an action.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the southern district of New York, and on the points and questions on which the judges *of the said court were opposed in opinion, and which were certified to this court [*278 for its opinion, agreeable to the act of congress in such case made and provided, and was argued by counsel: On consideration whereof, it is the opinion of this court—First, that upon the facts stated in the case, the plaintiff, Bend, is not entitled to recover back the excess of duties paid by him on the package No. 45, as mentioned in the case: And secondly, that silk hose is entitled to be admitted to entry free of duty, under the act of the 2d of March 1833, entitled, "an act to modify the act of the 14th of July 1832, and all other acts imposing duties on imports," which declares, that all manufactures of silk, or of which silk is the component material of chief value, coming from this side of the Cape of Good Hope, except sewing silk, shall be free of duty. Whereupon, it is ordered and adjudged by this court, that it be so certified to the said circuit court; and that this cause be remanded to the said court, that further proceedings may be had therein according to law.

Ex parte Jesse Hoyt, Collector of the Port of New York. [*279

Mandamus.—Seizures.

The supreme court will not issue a *mandamus* to the district judge of the southern district of New York, in a case in which the district judge decided, that the custody of goods, wares and merchandise, proceeded against, after a seizure by the collector of the port of New York, was in the marshal of the district, after process had issued by order of the court against the goods. The *mandamus* was asked for, after an argument before the supreme court, to show that the custody of the goods was to continue in the collector of the port, This is neither more nor less than an application for an order to reverse the solemn judgment of the district judge, in a matter clearly within the jurisdiction of the court; and to substitute another judgment in its stead.

A writ of *mandamus* is not a proper process to correct an erroneous judgment or decree rendered in an inferior court; that is a matter which is properly examinable on a writ of error, or on an appeal to the proper appellate tribunal. Nor can the supreme court issue a *mandamus* to the district court, on the ground that it is necessary for the exercise of its appellate jurisdiction, for if there be any appellate jurisdiction in this case, it is direct and immediate to the circuit court of the southern district of New York. It has been repeatedly declared by this court, that it will not, by *mandamus*, direct a judge to make a particular judgment in a suit, but will only require him to proceed to render judgment.

By the 69th section of the collection act of 1799, ch. 128, the goods or merchandise seized under that act, are to be put into and remain in the custody of the collector, or such other persons as he may appoint for that purpose, no longer than until the proper proceedings are instituted under the 39th section of the same act, to ascertain whether they are forfeited or

not; and as soon as the marshal seizes the goods, under the proper process of the court, the marshal is entitled to the sole and exclusive custody thereof, subject to the future orders of the court.[1]

On the 22d December 1838, an information was filed by the district-attorney, on behalf of the United States, in the District Court of the United States for the southern district of New York, alleging that the goods therein described had been seized by the collector as forfeited to the use of the United States, for violation of the revenue laws, &c.; and prayed the usual process and monition of the court, and the condemnation of the said goods.

By a standing rule of the court, adopted on the 19th of October 1801, it was ordered, "that whenever the attorney of the district shall, in behalf of the United States, file a libel or information with the clerk of this court, against any vessel, goods or property seized as forfeited to the use of the United States, for breach of any act of the said United States, it shall be the duty of the clerk to cause, of course, a monition to issue to the marshal of the district, directing the said marshal to attach the said vessel, goods or property, and to detain the same in his custody, until the further order of the court in the premises; and to cause due notice to be given or published of such seizure." Pursuant to this rule, and the uniform practice of the court since its adoption, the clerk, on filing the information in this cause, issued a monition and warrant directing the marshal to attach the property specifically described in the information, and to detain the same in his custody, until the further order of the court respecting the same, and to give notice, &c.

*280] The collector of New York, Mr. Hoyt, denying the authority of *the marshal to execute such warrants in respect to seizures made by him, or by the officers of the customs, and to prevent the enforcement of the process issued in this case, filed in the district court, the following paper:

The United States *v.* Sundry packages of goods. Motion by Jesse Hoyt, collector of customs for the port of New York, that the clause of the monition issued in this cause, by which the marshal is directed to detain the goods, attached by virtue of said monition, in his custody, until the further order of the court respecting the same, be quashed and stricken out, on the ground, that the said clause is repugnant to the 69th section of the act "to regulate the collection of duties on imports and tonnage," approved March 2d, 1799, and is, therefore, illegal and void; or that the said monition be so reformed and amended, that the said goods, &c., remain in the custody of the said collector, or such person as he shall appoint for that purpose, until the proceedings commenced for the forfeiture of the said goods shall be determined, and it be judicially ascertained, whether the same have been forfeited or not, as required by the said 69th section of the act above named.

By the consent of Mr. Butler, the district-attorney of New York, the motion was submitted to the district court for its decision. The district court, on the 8th of January 1839, denied the motion of the collector.

On the 17th of January 1839, the following agreement was entered into by the collector of New York, and the marshal of the southern district, with the assent and approbation of the district judge: It is agreed, that a motion for a *mandamus*, to be directed to the district judge of the United States, for the southern district of New York, commanding him—1. To

[1] United States *v.* Mayoz, 3 Phila. 517.

vacate the order entered in the said district court on the 8th day of January, instant, denying the motion of the above-named relator, referred to in the said order: and 2. To grant the prayer of said motion, or so much thereof and in such form as this court shall adjudge and direct—be brought on to be argued in the supreme court of the United States, on any motion-day when counsel can be heard; without any rule to show cause, or any application for such rule, on the facts stated in the opinion of the district judge, delivered on the 8th day of January, instant.

Grundy, Attorney-General, stated, that this was, in point of fact, a controversy between the collector of the port of New York, and the marshal of the southern district; and as the United States had no interest in the question involved, except so far as their share of the proceeds of forfeited goods might be affected by it, in common with the parties entitled to the other shares, he would leave it to be *presented by the counsel of the parties, for the consideration of the court. [*281

Gilpin, counsel for Mr. Hoyt, the collector, moved for the *mandamus*, according to the agreement between the parties; and contended, that the district court for the southern district of New York ought to have amended its process, by striking out that part of it which authorizes the marshal to take goods seized for a violation of the revenue laws into his custody, before it is ascertained whether they are forfeited or not.

The question is one of general concern, and the practice ought to be settled by this tribunal, so that uniformity may exist throughout all the ports of the United States; and the duties of two classes of responsible public functionaries be satisfactorily ascertained. But it is also a matter of individual concern to the collector and officers of the revenue. Their share of the proceeds of condemned goods is given to them as the reward of vigilance and fidelity. To guard the rights of the citizen, however, it can only be obtained after litigation; often, protracted and expensive. It is always attended with the risk of incurring damages by improper or over-zealous conduct. Unnecessarily to diminish this share, is, therefore, a hardship to the revenue officer, and contrary to the spirit of the revenue laws. Goods, thus seized, often lie for long periods, before they are condemned. If they remain in the public warehouse, heavy charges are avoided; if delivered to the marshal, the cost of custody will, in many cases exceed or equal the whole value of the property. Again, if the collector seizes the goods without just cause, he must return them to the owner; he is answerable for so doing; to remove them from his custody, is to add to his risk, if not to subject him to actual loss. This question, therefore, is one involving very important private interests; one that the collectors and revenue officers must desire to see settled by a tribunal from which there is no appeal.

It is not a complicated question. It rests entirely on the proper construction of a few acts of congress. It appears to have been the intention of congress, as manifested in these acts, to leave all goods, wares and merchandise in the custody of the revenue officers, until it was ascertained by a judicial judgment, whether they were forfeited or not. By the first collection act of 31st July 1789, § 26 (1 U. S. Stat. 47), the positive duty is imposed on collectors and revenue officers, to seize vessels and goods liable to be forfeited for violating the revenue laws; and this provision is re-

peated in the subsequent laws of the 4th August 1790 (Ibid. 145), and of 2d March 1799 (Ibid. 627), the last of which is now in force. The same acts require the collector to cause suit to be instituted, immediately, in all such cases of seizure, and to have it prosecuted to effect, according to the mode prescribed by law. This mode is pointed out in the 9th section of the judi-
*282] ciary act of 24th September 1789 (Ibid. 76), *which directs all seizures under laws of impost to be included in the admiralty and maritime jurisdiction of the district court; and in the second section of the process act of 29th September 1789 (Ibid. 93), which directs that the forms and modes of proceeding in cases within the admiralty and maritime jurisdiction of the district court, shall be according to the course of the civil law. This course is the filing of a libel, and the issuing, from the court, the proper process for placing the goods under its cognisance; giving notice to claimants; and ascertaining the fact of such a violation of the laws as produces forfeiture. The particular officer in whose custody the goods are placed when under the cognisance of the court, forms no part of the "course of the civil law;" it may be one person or another, as usage, the rules of court, or statute may prescribe. In this case, it is not left to usage or judicial regulation; if it were, they would certainly sustain the right of the collector: for it appears to be unquestioned, that in all ports of the United States, goods seized for forfeiture are, and from the beginning of the government always have been, left in the public warehouse, until condemnation or release; and that, even in New York, where the clause now objected to is found in the process. The actual removal of the goods therefrom has not been required by the court, nor permitted in practice. But it is positively prescribed by law, and always has been a part of the revenue system, "that all goods, wares or merchandise which shall be seized by virtue of the revenue laws, shall be put into and remain in the custody of the collector, or such other person as he shall appoint for that purpose, until the proceedings required by law are had to ascertain whether the same are forfeited or not." This explicit enactment is found in the law of 31st July 1789, in that of 4th August 1790, and finally, in that of 2d March 1799, from which time no provision whatever, in conflict with it, can be found. A point that is thus so clearly established by the positive words of the statute; which is so consonant with the whole revenue system and the interests of parties secured by that system; which is sanctioned by long, general and unquestioned usage; would seem scarcely to need the added weight of judicial interpretation. This, however, is to be found in support of the right of the collector, but never to the contrary. It is decided by the circuit court of Massachusetts, in the case of *Burke* v. *Trevitt*, 1 Mason 100, that "by the act of 2d March 1799, all goods seized under that act are to be put into and remain in the custody of the collector or his agent; that the goods are still, in contemplation of law, in the custody of the court; and that the collector remains as much responsible to the court for the property, and as much bound to obey its decrees and orders, as the marshal is, as to property confided to his care; the collector is, *quoad hoc*, the mere official keeper for the court."

In opposition to this series of statutory regulation, sanctioned by
*283] *judicial decision, nothing is produced to sustain the right of the marshal to take the possession of the goods, immediately after the institution of suit, except the words of the fourth section of the act of

8th May 1792 (1 U. S. Stat. 277), which prescribes the fees and allowances to marshals. It says, that "the marshal shall have the custody of all vessels and goods seized by any officer of the revenue, and shall be allowed such compensation therefor as the court may judge reasonable." Now, not to advert to this section, as having relation to the marshal's compensation, and to the custody of goods, which, as the executive officer of the court, he is entitled to, after it has been "ascertained whether they are forfeited or not;" it is sufficient to remark, that this law was passed in 1792, and that the provision now relied on was made in 1799, and has never been since changed or interfered with. If the act of 1792 ever applied to the custody, before judgment, it is unquestionably repealed.

Wright, for the marshal of the southern district of New York, contended, that the district court of New York had properly decided the question before that court. The 69th section of the act of congress of March 2d, 1799, does not repeal the first clause or the fourth section of the act of the 8th of May 1792. The words of the act of the 8th of May 1792, are, "that the marshal shall have the custody of all vessels and goods seized by any officer of the revenue, and shall be allowed such compensation therefor as the court may judge reasonable." Act for regulating process in the courts of the United States (1 U. S. Stat. 277). The words of the act of 2d March 1799, are, "that all goods, wares or merchandise, which shall be seized by virtue of this act, shall be put into, and remain in, the custody of the collector, or such other person as he shall appoint for that purpose, until such proceedings shall be had, as by this act are required, to ascertain whether the same have been forfeited or not." (Ibid. 678, § 69.)

The custody intended in these two statutes is different; and, properly understood, the one does not conflict with the other. The possession and custody of the marshal is a possession and custody obtained through the power and process of the court, and not otherwise. The possession and custody of the collector is a possession and custody obtained through the power given to him, and the other officers of the revenue, "or persons specially appointed," by the collector, naval officer or surveyor, to seize property imported in violation of the revenue laws. These seizures are always without process, unless it be the process of a search-warrant. The act of 1799 is to regulate the collection of duties, &c. See §§ 68, 70; also, §§ 24, 26, of act of 1789; also, §§ 48, 50, of act of 1790; also § 27 of act of 1793.

The possession and custody of the collector is to continue, "until such proceedings shall be had, as by this act (the act of 1799) are *required, [*284
to ascertain whether the same (the property, whatever it may be) have been forfeited or not." The first of these "proceedings," according to the uniform practice of the court, is the preparation and filing of the libel. The second "proceeding" is the issuing of the monition and warrant of attachment, in pursuance of the prayer of the libel. The third is, the delivery of the monition and warrant to the marshal; and the fourth "proceeding" is, the service of this process by the marshal. And here the possession of the articles, the subject of the information, by the marshal beings, and that of the collector ends.

Are the "proceedings" to be carried to judgment of acquittal or condemnation, before the "custody" of the collector can be discharged? Does

the act itself permit this construction? "And the collector, within whose district the seizure shall be made, or for feiture incurred, is hereby enjoined to cause suits for the same to be commenced without delay, and prosecuted to effect," &c. (1 U. S. Stat. 695, § 89.) Can the collector do this without surrendering the articles proceeded against to the custody of the court, and its officer—the "custody" confided to him by the 69th section of the act of congress? The act declares (§ 89): "And all ships or vessels, goods, wares or merchandise, which shall become forfeited in virtue of this act, shall be seized, libelled and prosecuted as aforesaid, in the proper court having cognisance thereof; which court shall cause fourteen days' notice to be given of such seizure and libel," &c. Will it be contended, that the "seizure" here directed is any other than a seizure by process of law? The court is authorized, at any time after the property has been seized and prosecuted, upon the application of a claimant, to appoint appraisers to value the property; to take from the claimant a bond with surety for the amount of the valuation; and to order the possession and custody of the property to be surrendered to him. This is to be done before judgment of acquittal or forfeiture, and this must terminate the custody of the collector.

Again, the marshal is directed to sell the property at auction, and to pay the proceeds into court, in case it has not been bonded; and judgment of forfeiture and condemnation shall pass against it. If the property is not in the custody of the marshal, during the proceedings, how can he be held responsible for finding it to sell? If perishable property be seized, the power of the court to order a sale *pendente lite*, upon the application of the district-attorney, and of the claimant, if any there be, and on the application of the district-attorney alone, if no claimant appear, cannot be doubted or denied; and yet this could not be done, without putting an end to the custody of the collector. Nor is the collector bound, by a mere order of the court, without notice, and an opportunity to show cause against its being obligatory upon him. He is not an officer of the court. If he is the keeper *pendente lite* of the goods "seized," he is so by the force of the
*285] *statute, not by the order of the court, or by any process issued by it, or under its authority.

Did congress intend, by the passage of the 69th section of the act of 2d March 1799 to repeal the first clause of the fourth section of the act of the 8th of May 1792? The provision of the 25th section of the act of 1789 was identical with that now existing and in force in the 69th section of the act of 1799, except the words, "or such other person as he shall appoint for that purpose." That act read, "that all goods, wares and merchandise, which shall be seized by virtue of this act, shall be put into and remain in the custody of the collector, until," etc. (1 U. S. Stat. 43.) The act to regulate the collection of duties, etc., passed July 31st, 1789. The 25th section of the last-named act was superseded by the 49th section of that of 1790, which is perfectly identical with the 69th section of the act of 1799, which superseded this. Here, the words, "or such other person as he shall appoint for that purpose," are first introduced; and the whole section is literally copied in the 69th section of the act of 1799. (Ibid. 678.) Act of August 4th, 1790, "to provide more effectually for the collection of duties."

Did the first clause of the 4th section of the act of 1792 repeal this 49th section of the act of 4th August 1790? Would congress have so

legislated, intentionally, as to have repealed that section, by this clause, by implication, and then have repealed this clause by implication by the re-enactment of that? Was the marshal to have the custody before process? If the 69th section of the act of 1799 is to be construed as a repeal of the first clause of the 4th section of the act of 1792, who, between that time and the present, has had the right to the "custody" of the "vessels" seized?

If it were necessary to avoid this inconvenient construction, would not the court be justified in saying, that, *quoad* the prosecution, the marshal is the "other person" appointed by the collector to take the custody of the property. The collector is the prosecutor. It is, by the 89th section of this act, made his duty to prosecute "without delay," while the 69th section gives the custody of the property to him, "or such other person as he shall appoint for that purpose." If, then, the course of the "proceedings" requires that the marshal shall have the "custody" of the property, by virtue of process, does he not, by the act of prosecution, *quoad hoc*, make him that "other person? *Burke* v. *Trevitt*, 1 Mason 96–100. Is it policy, further than is necessary, to continue property seized in this summary manner, in the hands, possession and custody of a party in interest? The collector is such a party, he being entitled to a share of the proceeds if the property is forfeited.

Gilpin, in reply:—The argument against this motion does not deny the legal right of the collector to the custody of goods seized, but confines it to *the custody merely incident to the seizure, and makes it expire with the commencement of proceedings for the condemnation. Such a construction is contrary to the plain language of the 69th section of the act of 1799. That act is the latest; subsequent to all others cited; its provisions are the actual law, no matter whether or not they conflict with any that are previous. If they are so clear as to leave no doubt, there is an end of the case. When the whole section is read together, there seems no room for doubt. "All goods, wares and merchandise, which shall be seized by virtue of this act, shall be put into and remain in the custody of the collector, or such other person as he shall appoint for that purpose, until such proceedings shall be had, as by this act are required, to ascertain whether the same are forfeited or not; and if it shall be adjudged that they are not forfeited, they shall be forthwith restored to the owner or owners, claimant or claimants thereof; and if any person or persons shall conceal or buy any goods, wares or merchandise, knowing them to be liable to seizure by this act, such person or persons shall, on conviction thereof, forfeit and pay a sum double the amount or value of the goods, wares or merchandise so concealed or purchased." Is it not evident, that this section is meant to provide for the custody of the goods, from the moment they are seized, as liable for forfeiture, up to that when they are adjudged to be forfeited or restored? Had the law meant that the custody should be changed, during this interval, would it not have been so stated in this section? It provides for their custody, until "proceedings are had to ascertain whether they are forfeited, and if they are adjudged not to be forfeited," they are to be given up. Is it possible to construe the sentence otherwise than as saying that the judgment of the court is the proceeding by which the forfeiture is to be ascertained? If the law of 1792 were not in existence, could any one [*286

doubt, for an instant, that this would be admitted without question? If so, it ought now to be admitted, for this is a subsequent statutory provision, to be ascertained from its express language; not by reference to a previous law, which cannot control or affect it.

But the construction contended for is not only contrary to the language of the 69th section; it is contrary to the whole scope of the law of 1799. That law embraces all proceedings relative to imported goods. It provides for all cases that occur, from the time of their arrival, to the time of their final disposition, whether that be by their delivery to the importer, or by their sale as forfeited. The duties of the collector, of the various revenue officers, and of the court, are particularly set forth. Is it possible, the custody of goods seized and waiting adjudication should not be explicitly provided for? Yet the only provision is that which gives it to the collector. Is it possible, the law intended to give it to the marshal, when there is no provision to that effect? The duties of the collector in making seizure and instituting proceedings are minutely stated; the whole of these proceedings, whether by the court, the clerk, or the claimant, *are prescribed; the
*287] sale, if the goods are condemned, is, by the express words of the law, to be made by the marshal. There is no omission to assign explicitly specific duties to the several officers, in every successive stage, from the moment the goods are imported; or to provide for each contingency that may occur in regard to them. The law of 1799 is elaborately drawn for these purposes. Would it not then be a total violation of its whole scope, so to construe the 69th section as, in the first place, to prevent it from embracing, as its plain tenor would do, the custody of the goods, up to the time of judgment? and then, having done this, to confer that custody on an officer to whom it is never given in the same law, although that law was evidently intended to provide for and assign the specific duties of every officer? Yet to this result the opposite argument necessarily leads.

Nor is the construction contended for more opposed to the express language and general scope of these statutory provisions, than it is to the whole spirit of the revenue system of the United States, as regards imported goods subject to impost duties. The leading and distinct feature of that system is, to leave all goods, subject to duty, in the actual custody of the collector, until the duties are paid or secured. Up to that time, the government, through its revenue officer, keeps its lien—holds its possession. The moment a vessel arrives within the waters of the United States, the collector, or his subordinate officer, takes possession of the goods; he ascertains the impost duties on them; he examines whether they are liable to forfeiture; he provides warehouses for their safe-keeping; if they are seized for forfeiture, he has legal proceedings instituted; if delivered to the claimant on bond, he sees that additional bonds for the duties are taken; he sells them, if the duties are not paid or secured within nine months; his permit is necessary for their delivery. To allow the marshal to take them from the public warehouse, *pendente lite*, is at direct variance with this whole system, and for no corresponding benefit. It deprives the government of its security for the duties; it substitutes an officer, having no connection with the revenue, for him who is expressly charged with that duty, and with the preservation of the best security—the goods themselves—until that revenue is paid. The omission of this law to give to the collector the custody of vessels, as well as

goods, confirms this view. It does not direct him to retain the custody of vessels seized, for they are not liable to impost duties; they are not articles affording a revenue; they do not come within the scope of the revenue system. It is true, they are subject to payments for tonnage, called duties; but these are in fact mere port-charges, in no way resembling impost duties, or requiring the same regulations. The very omission, therefore, to include vessels in the provisions of the act giving the custody of goods to the collector, would seem to show that those provisions were made with reference to the revenue system. If so, they can only be consistent with it, by construing them in the manner contended for by the collector.

*The argument in support of the opposite construction, and which goes to limit the custody of the collector to the mere possession incident to the seizure, does not controvert any of these grounds. It relies solely on an endeavor to show that other provisions of the act of 1799 are inconsistent with the custody of the collector, after the institution of legal proceedings. One point of the opposite argument is, that the suit is to be "prosecuted to effect;" and that this cannot be done, without surrendering the goods to the custody of an officer of the court; and that the collector is not an officer of the court, or bound to obey its order. To this it may be answered, in the first place, that the custody of an officer of the court is not necessary to the effectual prosecution of the proceedings for forfeiture; those proceedings consist in the ascertainment of certain facts, independent entirely of the custody of the goods, until their restoration or sale is decreed by a judgment, when the law provides the officer and the mode of effectuating that judgment, whichever it may be; in the meantime, it is sufficient, if the law provides that the goods are safely kept by any person to answer to the judgment: but in the second place, the collector is an officer of the court, and so constituted by this very law, so long as the proceedings are depending. In the words of the circuit court of Massachusetts, in *Burke* v. *Trevitt*, 1 Mason 100, the collector "is the mere official keeper of the court." Another point of the argument is, that as notice must be given by the court of the seizure of the goods, such seizure must be one made under process of the court; the very words of the law cited to sustain this construction seem to controvert it, for they speak of the seizure of which notice is to be given, as anterior to the libel; when it is admitted, that the only seizure on the process of the court must be subsequent to the libel; for on the allegations of the libel, all its process is founded. Nor is it possible to sustain this distinction, by reference to the words of the statute; it speaks constantly of seizure for forfeiture, but in every instance, treats it as an act of the collector; never of the marshal. Besides, the distinction is unnecessary, to secure the rights of any persons for whose benefit the notice is to be given. Again, it is said, that before judgment, the court may direct the delivery of the goods on bond, or their sale, if perishable; and that either of these acts ends the collector's custody. It is not apparent, how either of these acts of the court conflicts with that custody, either to the injury of the collector, or of the security of the government; because, in the first instance, the act is expressly authorized, and it is provided, that full security both for the value of the goods and the amount of duties shall be previously given; in the other, there is certainly no authority given to the court, by any law, but if it were exercised, doubtless, it would be attended with the same disposi- [*288

tion of the proceeds of the sale. If, therefore, these acts do terminate the collector's custody, before judgment, it is only by the substitution of a security or other property equal in value, and as much under his control; this is not the case, if the custody *be taken from him by the preliminary process of the marshal's attachment. Nor does the provision of the law, which directs the sale, after condemnation, to be made by the marshal, seem to conflict with the construction, contended for by the collector; on the contrary, the express designation of the marshal, in this instance, and of the collector, in the other, would seem to sanction his construction. But the sale is an executive act of the court, and properly done by its executive officer, who is bound to make his return immediately; this is in no respect similar to the custody of the goods before condemnation.

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One point of the opposite argument remains to be noticed. It is said, that if the act of 1799 is construed as a repeal of that of 1792, it will leave no provision for the custody of vessels; and also, that the latter act must have been equally a repeal of those of 1789, and 1790, which would remove all provisions for the custody of goods before process—a construction, it is alleged, so inconvenient, that it would justify the court, if necessary, in order to obviate it, to consider the marshal as one of the "other persons" to whom the collector might himself confide the custody. To this argument, the answer is, that the act of 1799 is not a repeal of the act of 1792, nor was the latter a repeal of those of 1789 and 1790. The act of 1792 is an act generally explaining the duties and regulating the fees of the marshal; the others are acts elaborately arranging the revenue system; the clause in the act of 1792 is subsidiary to the others; it refers to such custody of goods as it may be necessary for the marshal to have, as an executive officer of the court, but not in conflict with the revenue system or arrangements. But even if the act of 1799 were a repeal of that of 1792, it would not, as is contended, leave no provision for the custody of vessels; because they are not included among the articles placed by the former act in charge of the collector, and therefore, as to them, the act of 1792 remains unrepealed, and gives the custody to the marshal.

Story, Justice, delivered the opinion of the court.—This is the case of a motion made by the collector of New York for a *mandamus* to be directed to the district judge of the southern district of New York, under the following circumstances. The collector, on the 26th of December last, made a motion in a certain cause of seizure, then depending before the said judge, that the clause of the common monition, issued in that cause, by which (according to the common practice in such cases) the marshal is directed to detain the goods attached, by virtue of the said monition, in his custody, until the further order of the court, be quashed and stricken out; on the ground, that the said clause is repugnant to the 69th section of the act of 1799, ch. 128, entitled, "an act to regulate the collection of duties on imports and tonnage;" or that the said monition be so reformed and amended, that the said goods remain in the custody of the said collector, or such person as he shall appoint for *that purpose, until the proceedings commenced for the forfeiture of the said goods shall be determined, and it be judicially ascertained, whether the same have been forfeited or not, as required by the said 69th section of the act. The district judge, after a full

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hearing, pronounced an elaborate opinion, reviewing the whole series of laws on the subject, and refused to grant the motion. The present motion is for a *mandamus* to compel him to vacate the order denying the original motion of the collector.

We are of opinion, that this is, in no just sense, a case for a writ of *mandamus*. This court has authority given to it by the 13th section of the judiciary act of 1789, ch. 20, to issue writs of *mandamus*, in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States. The present application is not warranted by any such principles and usages of law. It is neither more nor less than an application for an order to reverse the solemn judgment of the district judge, in a matter clearly within the jurisdiction of the court, and so substitute another judgment in its stead. Now, a writ of *mandamus* is not a proper process to correct an erroneous judgment or decree rendered in an inferior court. That is properly matter which is examinable upon a writ of error or an appeal (as the case may require) to the proper appellate tribunal. Neither can this court issue the writ, upon the ground that it is necessary for the exercise of its own appellate jurisdiction ; for the proper appellate jurisdiction, if any, in this case, is direct and immediate to the circuit court for the southern district of New York. It has been repeatedly declared by this court, that it will not, by *mandamus*, direct a judge what judgment to enter in a suit ; but only will require him to proceed to render judgment. The case of the *Life and Fire Insurance Co. of New York* v. *Adams*, in 8 Pet. 291 ; and 9 Ibid. 573, is directly in point.

But as there appears to have been some diversity of construction in the different districts of the United States, of the laws on this subject, and as it is a matter of general concern throughout all the commercial districts, and applicable to the daily practice of the courts, and the point has been fully argued, we think it right to say, that we are of opinion, that the construction of the laws of the United States, maintained by the district judge in his opinion, is the correct one, to wit, that by the 69th section of the collection act of 1799, ch. 128, the goods, wares and merchandise seized under that act, are to be put into and remain in the custody of the collector, or such other persons as he shall appoint for that purpose, no longer than until the proper proceedings are had under the 89th section of the same act, to ascertain whether they are forfeited or not ; and that as soon as the marshal seizes the same goods, under the proper process of the court, the marshal is entitled to the sole and exclusive custody thereof, subject to the future orders of the court. The motion for the *mandamus* is denied.

*Baldwin, Justice, concurred with the court, in the opinion that this is not a case for a *mandamus*. The result of this is, that the case is *coram non judice*. Any opinion which may be given on other points in the case, cannot be binding in any case. He was not willing to decide a question, when it was not properly before the court. [*291

Motion denied.

*Edward Hardy *v.* Jesse Hoyt.

Duties on imports.

Stockings and half-stockings made entirely of silk, imported from Liverpool, in October 1838, were exempted from the payment of duty, by the act of congress passed March 2d, 1833, entitled "an act to modify the act of the 14th July 1832, and all other acts imposing duties on imports."

Certificate of Division from the Circuit Court for the Southern District of New York. This cause came before the court on a *certiorari* to the superior court of the city of New York, the action being in *assumpsit* to recover from the defendant the sum of $148.29, received by him as collector of the port of New York, for duties on an importation of silk hose. The duty was levied at the rate of 25 per centum *ad valorem*, as "hosiery," under the 2d article of the 2d section of the act of congress, approved July 14th, 1832, entitled "an act to alter and amend the several acts imposing duties on imports." The plea of *non assumpsit* was pleaded by the defendant in bar of the action.

It being proved that the articles imported where stockings and half-stockings, made entirely of silk, and were imported from Liverpool, in England, in the ship St. Andrew, in the month of October, in the year 1838, which port of Liverpool is a port this side of the Cape of Good Hope; the following point was presented, during the progress of the trial, for the opinion of the judges, on which the judges were opposed in opinion, viz: Whether the said silk hose was subject to the payment of the duty imposed on hosiery, by the 2d clause of the 2d section of the act of July 14th, 1832, entitled, "an act to alter and amend the several acts imposing duties on imports?" Or whether, as manufactures of silk, not being sewing silk, they were exempted from the payment of duty, by the 4th section of the act of March 2d, 1833, entitled, "an act to modify the act of the 14th of July 1832, and all other acts imposing duties on imports," which declares, that all manufactures of silk, or of which silk is the component material of chief value, coming from this side of the Cape of Good Hope, except sewing silk, shall be free. Which point, upon which the disagreement had happened, under the direction of the judges of the said court, at the request of the counsel for the parties in the cause, was ordered to be certified unto the supreme court of the United States, at the next session.

The case was submitted to the court, on the argument in the case of *Bend* v. *Hoyt*, by *Raymond* for the plaintiff; and *Grundy*, Attorney-General, for the United States.

*293] *Story, Justice, delivered the opinion of the court.—This case involves the second point only, which has been just decided in the case of *Bend* v. *Hoyt* (*ante*, p. 263), and therefore, it is only necessary to say, that it will be certified to the circuit court for the southern district of New York, that the silk stockings and half-stockings mentioned in the case, were exempted from duty on their importation, under the act of the 2d of March 1833, ch. 384.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the southern district of New York, on

the points and questions on which the judges of the said circuit court were opposed in opinion, and which were certified to this court for its opinion, agreeable to the act of congress in such case made and provided, and was argued by counsel: On consideration whereof, this court is of opinion, that the silk hose, as manufactures of silk, not being sewing silk, were exempted from the payment of duty, by the fourth section of the act of the 2d of March 1833, entitled, "an act to modify the act of the 14th of July 1832, and all other acts imposing duties on imports," which declares, that all manufactures of silk, or of which silk is the component material of chief value, coming from this side of the Cape of Good Hope, except sewing silk, shall be free of duty. Whereupon, it is ordered and adjudged by this court, that it be so certified to the said circuit court, and that this case be remanded to the said court, that further proceedings may be had therein according to law.

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*John P. Van Ness, Appellant, *v.* Alpheus Hyatt and others, [*294
Appellees.

Execution.—Equity of redemption.

The principle of the common law undoubtedly is, that no property but that in which the debtor has a legal title, is liable to be taken in execution; and, accordingly, it is well settled in the English courts, that an equitable interest is not liable to execution. In the United States, different views have been taken of this question, in the courts of the several states; except as against the mortgagee, the mortgagor is regarded as the real owner of the property mortgaged; and this rule has very extensively prevailed in the states of the United States, that an equity of redemption is vendible as real property, on an execution; and that it is also chargeable with the dower of the wife of the mortgagor.

The equity of redemption of a mortgagor of land, in that part of the district of Columbia ceded by the state of Maryland to the United States, cannot be taken in execution under a *fieri facias;* at the time of the cession to the United States, the rule of the common law was the law of Maryland.[1]

It is not necessary to refer to authorities, to sustain a proposition, that a *chose in action* is not liable to be levied on by a *fieri facias.*

Van Ness *v.* Hyatt, 5 Cr. C. C. 127, affirmed.

Appeal from the Circuit Court of the District of Columbia, and county of Washington. In November 1836, the appellant filed a bill in the circuit court, against Alpheus Hyatt and others. The following were the important facts in the case, as sustained by the evidence:

In December 1818, William Cocklin leased to James Shields a lot of ground in the city of Washington, for ten years, from January 1st, 1819, for the rent of $35 per annum. The lessee covenanted to erect and build, within twelve months, a two-story brick house upon the lot; and the parties agreed, that if, at or before the expiration of the lease, the lessee should pay to the lessor the sum of $375, the rent should cease, and so, if a portion or part of the sum of $375 should be paid within the time, the rent should be diminished according to the sum or sums paid. On the payment of the whole of the sum, William Cocklin was to make to the lessee a good and sufficient title in fee-simple to the lot.

James Shields, on the 23d of September 1823, mortgaged the lot and improvements upon it, to John Franks, to secure a debt of $1127; and on

[1] See Smith *v.* McCann, 24 How. 398.

the 7th day of May 1825, the mortgagee assigned all his right and title under the mortgage, to Alpheus Hyatt, one of the appellees; and on the 9th day of May 1825, James Shields released all his interest in the lot to Alpheus Hyatt, for the consideration of $200. Subsequently, in May 1826, Alpheus Hyatt, having paid to the heirs and representatives of William Cocklin the whole sum of $375, and the intermediate rent, they released to him the premises, and conveyed to him in fee-simple, all their right, title and property in the same.

*295] On the 8th day of November 1823, John P. Van Ness, the appellant, obtained, before a magistrate of the county of Washington, a judgment for $30.25, against James Shields, and he caused a *fieri facias* to be issued on the judgment, on the 10th of June 1824, under which a levy was made by the constable having the process, on the right, title, interest, estate and claim of James Shields, in and to the lot originally held by him, under the lease and agreement with William Cocklin. The property levied upon was sold by the constable, under the process, for the sum of $54, on the 10th of July 1824; and John P. Van Ness, the appellant, became the purchaser thereof, on the 19th day of August 1825, the constable conveyed the premises sold by him, to the appellant, by a deed of indenture, which was recorded on the 9th of January 1826.

The appellant having filed his bill, stating all the facts, and alleging the conveyances made by Shields and Franks, and the heirs and representatives of William Cocklin, to have been erroneous and fraudulent, and averring his full readiness to pay the heirs and representatives of William Cocklin, or to the representatives of Franks, all that Shields was bound to pay to them; prayed a decree that the property should be assigned to him, and that he should be quieted in the possession of the same; and for general relief.

There was no evidence to support the allegations of fraud stated in the bill, nor was there any proof given, of notice to the appellees of the same. The answers, so far as they were responsive to the bill, and the several exhibits with the bill and the answers, were the only proofs in the cause. The circuit court, after a hearing of the parties, by their counsel, dismissed the bill, with costs; and the complainant prosecuted this appeal.

The case was argued by *Hoban* and *Coxe*, for the appellant; and by *Key*, for the appellees.

For the *appellant*, it was contended, that the circuit court erred in refusing the prayer contained in the bill. That the sale of the constable conveyed the estate of Shields at the time, to Van Ness. That there was no proof of any other incumbrance on the property, than the purchase-money and rent, when Van Ness purchased. Hoban considered the interest of Shields in the lot, at the time of the sale by the constable, as one liable to execution. The mortgagor in possession is the owner of the property, and his interest may be levied upon and sold. Cited, *McCall* v. *Lenox*, 9 Serg. & Rawle 302; 2 Greenl. 132; 16 Mass. 305; 4 Johns. 41; 10 Ibid. 481; 12 Ibid. 521; 1 Barn. & Ald. 230; 3 Paige 219; 9 Cranch 153.

Coxe, also for the appellant, contended, that the interest of Shields in *296] the land, was such as was the subject of an execution; and that *the deed from the constable to the appellant conveyed that interest. It

was recorded within the time required by law, and was a valid and efficient deed. The mortgagor is the owner of the property mortgaged, against all the world, the mortgagee excepted.

Key, for the appellees :—The appellant acquired no lien on the property of Shields, by the judgment obtained before a magistrate. This is prohibited by the act of congress of March 1822. (2 U. S. Stat. 743.) Nor was any acquired by the levy made under the *fieri facias* issued under the judgment. This is the consequence of the provision of the act of congress against a lien. There is no record of judgments before magistrates, and therefore, no notice of them. The same may be said as to the sale by the constable ; and until the deed of August 1825 was recorded, in January 1826, nothing could be known of the proceedings by which a *bonâ fide* purchaser might protect himself.

Shields had no property which could be made the subject of a levy. In May, previous to the proceeding, he had mortgaged the lot to Franks, who subsequently, before the constable's sale, conveyed the mortgaged interest to Alpheus Hyatt. On the 9th of May 1825, Shields released all his interest in the premises to Mr. Hyatt. But Shields had no interest upon which a levy could be made under the lease from Cocklin ; or if he had an interest under the lease, it expired on the 1st of January 1826. The appellant applied, in 1836, to the heirs of the lessor, to redeem, in 1836, when all the interest under the lease was sure. Shields had nothing but an equity of redemption on the property ; and this, in the district of Columbia, which is regulated by the law of Maryland prevailing when the territory was ceded to the United States, could not be levied upon. 8 East 484 ; 2 Saund. 11 ; Act of Maryland of 1810, ch. 130 ; 9 Cranch 496 ; 2 Har. & McHen. 355 ; 5 Har. & Johns. 315.

Barbour, Justice, delivered the opinion of the court.—This is an appeal from the circuit court for the county of Washington, in a suit in equity brought by the appellant in that court, in which a decree was made, dismissing the bill with costs. The case was this : On the 31st day of December 1818, an agreement was entered into between William Cocklin and James Shields, by which Cocklin leased to Shields part of a lot in the city of Washington, for ten years, from the 1st of January 1819, for the yearly rent of $35. The lessee was to build a two-story brick house on the lot, within twelve months from the date of the lease. And it was agreed between the parties, that if, at the expiration of the lease, Shields should pay to Cocklin $375, then the rent should cease to be paid ; or if all, or any part of the $375 were paid, before the expiration of the lease, then such part *of the rent of $35 should cease, as should bear an equal proportion [*297
to the money so paid. And on the receipt of the whole of the purchase-money, and not before, Cocklin should make to Shields a good and sufficient title in fee-simple, to the lot of ground described in the lease. On the 23d of Septemper 1823, Shields, the lessee, mortgaged the premises to a certain John Franks, to secure a debt of $1127.18. On 7th May 1825, Franks assigned all his right and title to the appellee ; who also, on the 9th of May 1825, procured from Shields a release of his interest ; and from the representatives of Cocklin, a conveyance of all their title, on the 16th of April 1826. On the 8th of November 1823, the appellant obtained, before a magistrate

in Washington county, a judgment against Shields for $30.25, and a *fieri facias* issued thereon, on the 10th of June 1824, which was levied by the constable, upon the right, title, estate, interest and claim of Shields in the lot in question. At the sale of the lot, under this execution, the appellant became the purchaser, at the price of $54; and the constable, by a deed dated the 19th of August 1825, and recorded the 9th of January 1826, conveyed the right and title of Shields in the lot, to the appellant.

The bill was brought by the appellant, against the appellee, Shields, the representatives of Cocklin and of Franks, stating the above facts, which are all that are material to a correct understanding of the case; charging that the mortgage to Franks was fraudulent and covinous, and that all the conveyances to the appellee were made with full knowledge, by all parties, of the appellant's purchase and rights; averring his readiness to pay all that Shields was bound to pay for the property in question, at the time of his purchase, to Cocklin or his heirs, or to the representatives of Franks, then deceased; and praying that all the parties might be compelled to assign their pretended rights and claims to the property in question, to the complainant, and deliver up quiet possession of the premises; and for general relief.

The view which we have taken of the case renders it unnecessary to state the grounds of defence taken in the several answers. It will be sufficient to say, that there is no proof in the cause, except the answers, so far as they are responsive to the bill, and the several exhibits with the bill and answers; that all the facts stated above are contained in the bill itself, and proved by the exhibits; and that there is no evidence to sustain either fraud or notice, as alleged in the bill.

Upon this state of the case, the question arises, whether the appellant is entitled to the relief which he prays for? The only interest which the appellant can claim in the property in question, is derived from the levy made by the officer, under his execution, and the purchase made by him at the sale under that execution, of whatever right, title and claim Shields had in the property. Now, it must be borne in mind, that not only before the sale, but even before the levy, Shields had mortgaged the lot to Franks; *298] and *consequently, his right was only an equity of redemption. Was this such a right or interest, as that a *fieri facias* could be levied upon it? The principle of the common law, undoubtedly, is, that no property but that in which the debtor has a legal title, is liable to be taken by this execution; and accordingly, it is well settled in the English courts, that an equitable interest is not liable to execution. 1 Ves. jr. 431; 8 East 467; 5 Bos. & Pul. 461.

In the United States, different views have been taken on this question, in the courts of the several states. It is said, in 4 Kent's Com. 153–4, that courts of law have, by a gradual and almost insensible progress, adopted the views of a court of equity on the subject of mortgages, which are founded in justice, and accord with the true intent and inherent nature of the transaction; that except as against the mortgagee, the mortgagor, while in possession, and before foreclosure, is regarded as the real owner; and that, in this country, the rule has very extensively prevailed, that an equity of redemption was vendible as real property, on an execution at law, and that it is also chargeable with the dower of the wife of the mortgagor;

and cases are referred to, in New York, Connecticut and other states, in support of the proposition. On the contrary, it has been held in Virginia, that the resulting interest of a grantor in a deed of trust made to secure debts, cannot be reached by execution. 6 Rand. 255. And this principle is not without some strong reasons in its support, independently of mere authority. Amongst others, Lord ELLENBOROUGH very cogently remarks, in 8 East 481, that the sheriff could only sell subject to the trusts; that the execution-creditor, or the vendee, would still be obliged to go into equity, to get an account, or to redeem prior incumbrances, which might be done, in the first instance, by a judgment-creditor, with less expense and delay; besides the destruction of the debtor's estate, which, under so much doubt and difficulty, would sell greatly under value, so that a large equitable interest might be exhausted in satisfaction of a small demand, to the detriment of other creditors.

Whatever may have been the decisions upon this subject, in the courts of some of the states in which the courts of law have, "by a gradual and almost insensible progress, adopted the equitable views of the subject," we must be governed, in deciding this case, by that law which congress enacted for the district of Columbia, on assuming jurisdiction over it. They adopted the laws of Maryland then in force, so far as regards that part of the district in which this question arises. Amongst those laws, was the common law. Now, we have already seen, that by the common law, an equitable interest, such as an equity of redemption, is not liable to execution. This would be decisive of the case, unless there should be found to be some legislation, or some course of authoritative judicial decision, which had so far modified the common law, by engrafting upon it the principles of the court of equity, in relation to mortgages, as to change the rule in this respect. It is not pretended, that any legislative act has produced this effect. Is there any course of *judicial decision which does? Three Maryland cases have been cited for this purpose. As to two of them, viz., [*299
Purl v. *Duvall*, 5 Har. & Johns. 69, 74, and *Ford* v. *Philpott*, Ibid. 312, it would be sufficient to say, that they had been decided many years since the cession by Maryland of that part of the district in which this question arises, was made; and therefore, whatever respect might be due to them, they are not authority. As to the case of *Campbell* v. *Morris*, which was decided in the year 1797, we are informed, that the chief justice had declared, that the covenant for quiet enjoyment in that case was a legal estate, which was attachable; and that the court gave no opinion whether an equity of redemption was liable to attachment. But without examining these cases in detail, or undertaking to say that they would leave the question entirely free from doubt, we think that there is enough, both in the legislation and judicial decisions of Maryland, and in a decision of this court, to show how the law is understood there.

As to legislation. By the act of assembly of 1810, sheriffs, under a *fieri facias*, are authorized to seize and expose to sale any equitable estate or interest which the debtor may have in any lands, tenements or hereditaments. Now, why was this act passed? If such had been considered the principle at common law, the act would have been mere supererogation. It is, therefore, in our opinion, decisive evidence to prove, that the contrary

was considered to be the law before its passage, as it does not profess to be a declaratory act.

But let us, for a moment, examine the judicial decisions of Maryland, and one in this court. In 6 Gill & Johns. 72, it is decided, that a mortgagor cannot maintain trespass against a mortgagee. On the contrary, in 11 Johns. 534, it is decided, that a mortgagor may maintain trespass against the mortgagee. In 4 Kent's Com. 154, it is said, that an equity of redemption is chargeable with the dower of the wife of the mortgagor. On the contrary, this court, in the case of *Stelle* v. *Carroll*, at the last term (12 Pet. 201), professing to follow the law of Maryland, in other words, the common law, decided, that the widow of a mortgagor was not dowable of an equity of redemption. Now, why these contrary decisions upon these two important points, in relation to the nature and character of the interest and title of a mortgagor? There can be but one answer. That in New York and other states, following a similar course, the courts of law had, by a gradual progress, adopted the views of a court of equity in relation to mortgages, and considered the mortgagor, except as against the mortgagee, whilst in possession, and before foreclosure, as the real owner, and even as against the mortgagee having the right of possession; whilst in Maryland, as we learn from the case before referred to, in 6 Gill and Johnson, the legal estate is considered as being vested in the mortgagee; and as soon as the estate in mortgagee is created, the mortgagee may enter into possession, though he seldom avails himself of that right. In these antagonistic *doctrines, we have the clew to the opposing decisions of the courts. Neither dower can be recovered, nor trespass maintained, where there is a mere equity; nor, where that is the case, can a *fieri facias* be levied. The same principle, then, precisely, which, in Maryland, precludes the recovery of dower by the widow of a mortgagor, or the maintenance of an action of trespass by a mortgagor against a mortgagee, exempts also the equity of redemption of a mortgagor from being liable to execution.

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But there is a case decided at the last December term of the court of appeals of Maryland, which, we think, puts an end to all question in this case. From a manuscript record of that case, which has been laid before us, we extract the following language: "The last point raised by the appellants is, that the property taken under the execution was not legally the property of Brady, and that equitable interests in personal property are not the subjects of an execution. With the appellant's premises on this point, as legal propositions, we see no reason to find fault. It cannot be denied, as a legal principle, that a debtor's equitable estate in personal property cannot, at law, be seized and sold under a *fieri facias*." Now, this was the case of personal estate; but it proves, clearly, that but for the act of 1810, before referred to, the same principle would have applied to real estate; for the difficulty does not grow out of the kind of property, but out of the kind of interest in the property, to wit, that it is equitable, and not legal. Upon these grounds, we think that Shield's interest in the lot was not subject to execution, on account of its being an equity of redemption.

There is one ground stated in the manuscript opinion of the court of appeals of Maryland, before referred to, in relation to this subject, which it may be proper to notice. It is there said, that, as in case of equitable interests, a court of equity would, after an execution issued, and a return

showing that there was no available remedy at law, assist the party, by charging the equitable interest ; so the court, if applied to for that purpose, would decree a ratification of a sale of such interest, where it had been made by the officer under the execution. Whatever might be the authority of a court of equity on this subject, as against Shields himself, it could not be done in this case ; because here there are third parties, who have, for a valuable consideration, without notice, acquired a previous equitable right, and gotten in, also, the legal estate. So that they stand upon the great principle, that they have the prior equity, and that equity fortified by the legal title.

But there is another view of this case, which we will present very briefly, which also brings us to the conclusion that Shields's interest in the lot in question would not have been liable to execution, even if it had not been incumbered by a previous mortgage. And it is this : beyond the mere lease for years, Shields had no interest whatsoever in the lot, but the right to purchase, in case he, by a given time, complied with the particular conditions. Now, *this right to purchase, we consider nothing more than a contract by which the party was entitled, if he had elected to have done so, upon certain terms, to secure to himself certain benefits. In other words, at the time of the levy of the appellant's executions, Shields had a conditional right to purchase, which, in effect, was nothing more than a *chose in action*. We do not think it necessary to refer to authorities to sustain a proposition so well settled, as that an execution of *fieri facias* cannot be levied on a *chose in action*. [*301

But even if this could be done, no one could derive a greater benefit under that contract than the party himself ; and Shields could not have claimed the benefit of the election given to him to purchase, because it depended, in its very terms, on particular conditions to be performed by him, at a particular time ; which were not performed. Upon these grounds, we think that Shields had not such an interest in the lot in question as was liable to execution ; that, consequently, the appellant acquired no right by his purchase, which gives him a standing in a court of equity to ask for the right of redemption, or any other relief. The decree of the circuit court is, therefore, right, and is affirmed, with costs.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the county of Washington, and was argued by counsel : On consideration whereof, it is adjudged and decreed by this court, that the decree of the said circuit court in this cause be and the same is hereby affirmed, with costs.

*Thomas P Moore, Plaintiff in error, *v.* The Bank of the Metropolis, Defendants in error.

Power of attorney.—Exceptions.

The defendant in an action in the circuit court had, with others, received the proceeds of a joint and several promissory note discounted for them at the Bank of the Metropolis, and this note was afterwards renewed by their attorney, under a power of attorney authorizing him to give a joint note; but he gave a joint and several note, the proceeds of which the attorney received, and appropriated to pay the note already discounted at the bank; the interest of the sum borrowed was paid out of the money of the parties to the note: *Held*, that although the power of attorney may not have been executed in exact conformity to its terms, and may not have authorized the giving of a joint and several note (a question the court did not decide), yet the receipt of the proceeds of the note by the attorney, and the appropriation thereof to the payment of the former note, was sufficient evidence to sustain the money counts in the declaration.

When an exception is taken, on a trial, to evidence, after it has been given without objection, to the whole matter stated in the exception, if any part of it was admissible, the objection may be properly overruled; it is the duty of a party taking exceptions to evidence, to point out the part excepted to, where the evidence consists of a number of particulars, so that the attention of the court may be drawn to the particular objection.[1]

Bank of the Metropolis *v.* Moore, 5 Cr. C. C. 518, affirmed.

Error to the Circuit Court of the District of Columbia, and county of Washington. The Bank of the Metropolis, on the 27th of September 1837, instituted an action of *assumpsit* against Thomas P. Moore, the plaintiff in error, on a promissory note, dated the 16th day of February 1837, payable sixty days after date; by which the defendant, Thomas P. Moore, P. H. Pope and Richard M. Johnson, by George Thomas, their attorney at Washington, jointly and severally promised to pay to the plaintiffs the sum of $5000, current money of the United States, for value received. The declaration also contained a count on the same note, stating it to be the note of Thomas P. Moore, to the plaintiffs; and also a count for the amount of the same note, as so much money paid, laid out and expended, at the special instance and request of the defendant; and for the same sum had and received by the defendant to the use of the plaintiffs.

The defendant pleaded *non assumpsit*, and the cause was tried before a jury, in November 1838, and a verdict and judgment rendered in favor of the plaintiffs. The defendant filed two bills of exception to the ruling of the court on matters presented on the trial; and he afterwards prosecuted this writ of error.

The first bill of exceptions stated: On the trial of this cause, the plaintiffs, to sustain the action on their part, proved by a competent witness, that on the 27th March 1834, the said defendant, with Richard M. Johnson and P. H. Pope, executed their joint and several note, and on the same day, by their checks, drew from the said plaintiffs the proceeds thereof, which had been carried to their credit; that said note was not paid at maturity, but lay over unpaid, until the 30th January 1836, when it was cancelled; that
*303] on the 30th day of January *1836, the said parties executed and delivered to the said plaintiffs their promissory note, which was discounted by said plaintiffs, and the proceeds thereof carried to the credit of

[1] United States *v.* McMasters, 4 Wall. 680; Burton *v.* Driggs, 20 Id. 125.

said makers, and the interest in arrears paid. That on the 29th of February 1836, the said parties executed and delivered to George Thomas, at that time cashier of the Bank of Metropolis, a power of attorney, which said power of attorney was given for the single purpose of acting for said parties in relation to said last-mentioned note and the renewal thereof; and that the said George Thomas, professing to act by virtue of said power of attorney, under said power of attorney, made and executed the note mentioned and described in the declaration; that the same was then discounted by said bank, the proceeds carried to the credit of the said makers, and the arrears of interest upon the former and last preceding note, together with the discount of this note, paid and credited on said account, and the said note dated 30th January 1836, was cancelled, but witness did not recollect by what person said interest or discount was paid. To the admissibility of which notes, or any of them, or any matter above stated in evidence, the defendant objected; but the court overruled the objection and permitted all of said notes, and the proceedings in regard to them and the matters stated, to be given in evidence to the jury. To which opinion of the court, the defendant excepted.

The second bill of exceptions stated: In addition to the evidence contained in the aforegoing bill of exceptions, the plaintiffs offered evidence tending to prove, that the banks in Washington county, in the district of Columbia, have been in the practice (some banks for less, and some for more than twenty years) of taking and discounting notes in the form of the one now in suit, made directly to the banks or some of the officers for their use, whenever offered, and that the banks preferred to loan upon such paper; that the reason of this practice has been one of mutual convenience to the borrower and the banks, the first being saved from the costs of protest, and the last being saved the risk of a failure to give notice to the indorser; and that it was very usual for the banks to lend money on a pledge of stock, taking in return the single note of the borrower, payable to the banks, or some of their officers, without indorsement. The plaintiffs further gave evidence, by competent testimony, tending to prove that it had been the practice of, and usage of, the various banks in Washington county, in this district, to discount, indiscriminately, paper on which there was an indorser or indorsers, or on which all the parties were makers, and the paper made directly to the bank itself, or some of its officers, acting in behalf of the bank; that both were considered equally the subjects of discount, but that the witness could not recollect at the moment any particular instance, in which, when all the parties were non-residents, as is and was the case with the alleged makers of this note, the bank had discounted on that paper alone, though he had no doubt that such cases existed; but that in all of the said banks, the major part of the accommodation paper discounted *was in the form of notes made by one party in favor of another person, [*304 who indorsed to the bank, and that this particular note in suit was discounted in the usual manner. The defendant then offered evidence tending to prove that on the 27th of March 1834, the plaintiffs discounted the joint and several note of R. M. Johnson, P. H. Pope and the defendant, for the amount of $5000 (being the same note inserted in the first bill of exceptions), and that at the time of discounting said note, the plaintiffs reserved out of the proceeds thereof the sum of $103.33, as interest or discount upon the same,

for four months and four days ; that the said note lay over unpaid, until the 30th day of January 1836, when the sum of $450 was paid on the same, as interest in arrear ; and that on the same day, a second note was given by the same parties to the plaintiffs (the same note which is also inserted in the first bill of exceptions), in renewal of the first-described note, payable in six months from its date, which was discounted by the plaintiffs, who, at the time of said last-mentioned discounting, received the sum of $153.33, as interest on the same, for six months and four days ; that the said second note also lay over, until the 16th day of February 1837, when the sum of $166.67, was paid on it, as interest in arrear, from the 30th July 1836, to 16th February 1837, and on the same day, the note in suit was given in renewal of the last-described note, which said note in suit was discounted on the day of its date, by the plaintiffs, who received on said day of its date, the sum of $53.33, as the interest in advance, for 64 days. Whereupon, the defendant prayed the court to instruct the jury as follows :

1. If the jury believe from the evidence, that the note in suit was given in renewal of other notes, previously given by the same parties to the plaintiffs, and that the plaintiffs received or reserved in advance, as discount, the interest, at the rate of six per centum per annum, on the amount of debt mentioned in said notes, or any of them, for the times they, or any of them, had to run, then the receipt or reservation of said interest in advance, is evidence of usury ; and the jury may infer usury from the same.

2. That if the jury believe from the evidence, that the note in suit was given in renewal of other notes, successively given by the same parties to the plaintiffs, for the amount of $5000 loaned to the said parties by the plaintiffs ; and that at the time of the original loan, the plaintiffs reserved the interest on the said sum of $5000, at the rate of six per centum per annum, for the time the original note had to run, or that at the time of renewing or discounting the note in suit, the plaintiffs received of the makers thereof, or any one for them, the interest in advance, for the period of sixty-four days, then said facts are evidence of usury in the transaction, and the jury may infer usury from said facts on the note in suit.

3. That if the jury believe from the evidence, that the note in suit was given to the plaintiff, in renewal of a note for the same amount, drawn by the same parties, directly to the plaintiffs, as *payees, payable six
*305] months after date, which had been previously discounted by the plaintiffs, for the accommodation of the said parties, and that on said note, drawn at six months, the plaintiffs received, at the time of discounting it, the interest in advance for six month and four days, at the rate of six per cent. per annum on the amount of said note, then the said facts are evidence of usury, and it is competent for the jury to infer usury in the note in suit.

4. If the jury believe from the evidence, that the plaintiffs received, on the day of the date of the note in suit, the sum of $166.67, as and for interest alleged to be due from the 30th July 1836, to the 16th February 1837 (six months and seventeen days), on a prior note for $5000, given by the same parties to the plaintiffs, falling due on the said 30th July 1836, and that the note in suit was given in renewal of said note, falling due on the 30th July 1836, then the plaintiffs have taken illegal interest, and it is competent for

the jury to infer that the note in suit was given in pursuance of a usurious agreement.

5. That the written power of attorney, executed to George Thomas by the defendant, together with R. M. Johnson and P. H. Pope, gave no authority to said Thomas to execute a joint and several note in behalf of said parties; and that the defendant cannot be charged in this action, by reason of any joint and several note, purporting to be executed by the said R. M. Johnson, P. H. Pope and this defendant, by the said Thomas, as their attorney, under said written power.

But the court refused to give any of the said instructions to the jury, and the defendant excepted. The power of attorney referred to in the bills of exception was in the following terms:

"Whereas, we have a joint and several note of hand discounted in the Bank of the Metropolis: Now, know all men by these presents, that we, Richard M. Johnson, Thomas P. Moore and P. H. Pope, all of the state of Kentucky, do hereby nominate, constitute and appoint George Thomas, of the city of Washington, our true and lawful attorney in fact, and by these presents do authorize and empower him, for us, and in our names, to sign our joint note to the president and directors of the Bank of the Metropolis, for five thousand dollars, for our accommodation, and the same to renew, from time to time, as it may become due, for the whole or any part thereof: hereby ratifying and confirming all and every the act and acts of our said attorney, in and about the premises, so long as the bank shall continue the accommodation to us. In witness whereof, we have hereunto set our hands and seals, at the city of Washington, the 29th day of February 1836.

RH. M. JOHNSON, [SEAL.]
P. H. POPE, [SEAL.]
T. P. MOORE." [SEAL.]

Witness—SAM. STETTINIUS.

*The case was argued by *Brent, jun.*, for the plaintiff in error; and by *Coxe*, for the defendant. [*306

Brent contended, that the circuit court had erred in refusing to give each instruction prayed for; and it was further insisted on, in behalf of the appellant: 1st. That the usage of the banks, as given in evidence, can have no possible bearing on the questions of law involved in the instructions asked for, but that, being a question of fact, it was incumbent on the appellees to have asked for an instruction as to its effect, if believed by the jury. 2d. That the usage proved is insufficient to exempt the transaction from usury. 3. That no established usage is proved in the case.

The objection of the plaintiff in error is, to the allowance of the court to the plaintiff below, to give a joint and several note in evidence, under a power of attorney authorizing the execution of a joint note only. The power was to give a joint note, and the note on which the suit was brought was a joint and several note. In 2 Johns. 19, it is decided, that an authority to give a note of a particular date, is not an authority to give a note of any other date. A joint note is not the same as a joint and several note; on the former, one writ only can issue, all the parties must be sued together; but on a joint and several note, suit may be brought against each of the

persons who are parties to it. This is material as to costs. Another matter for consideration, and one which is material, is, that the act of the assembly of Maryland gives a right to contribution, in favor of those who are sureties, from co-sureties; and a surety paying may have an assignment of the judgment when he pays it. This makes it most important that the power of attorney should be strictly pursued. When the attorney departs from the authority given to him by his principal, although for his benefit, his acts do not bind the principal. 7 Barn. & Cres. 278; Ambl. 498.

It was argued in the circuit court, that the word "several," in a power of attorney, may be rejected as surplusage, and the joint powers given retained. This position cannot be sustained. Cited, Sugden on Powers 210; to show how important and essential, an adherence to forms is deemed. Admitting that the execution of a power may be sustained, where there is surplusage in the terms of it, yet this exists only when the acts to be done, or done under it, are divisible. But this set-off can only be obtained by the aid of a court of chancery. In this case, the action was brought on the note, as "joint and several." Then the election was to treat the note as "joint and several;" and yet, when the objection was made, the note was set up as a joint note. A power of attorney to three persons to execute the powers granted, cannot be executed by two. An authority to *do a *307] thing in one way, cannot be performed by executing it in another way. The note should not, therefore, have been given in evidence. Cited, 1 Pet. 29; 1 Roll. Abr. 529, L. pl. 15.

As to the ratification of the act of an attorney, by the receipt of the money, and its appropriation to pay a prior note for the same sum, then due, it must be considered as not having been the act of the defendant. He was absent, and ignorant of the transaction. It may be said, that there was evidence to support the money counts in the declaration. But this cannot affect the right of the plaintiff to have the judgment of the circuit court reversed. Cited, *Greenleaf* v. *Birth*, 5 Pet. 135.

The counsel was proceeding to argue the question of usury, raised by the second bill of exceptions; but the court would not permit the argument the point being considered settled.

Coxe, for the defendant:—The discounting of the note by the bank was a continuation of a former loan. Cited, *Barry* v. *Foyles*, 1 Pet. 316; *Minor* v. *Mechanics' Bank of Alexandria*, Ibid. 47. If parties to a joint note are sued severally, they should plead the matter in abatement. It is not regular to make the objection under a plea to the general issue. But the verdict of the jury was upon the whole matter; and the evidence given was legal, and sufficient to sustain the money counts in the declaration.

Brent stated, that the object of the plaintiff in error was to get rid of the verdict for $5000. He is perfectly willing to pay his portion of the debt.

Thompson, Justice, delivered the opinion of the court.—This case comes up on a writ of error to the circuit court of the United States for the district of Columbia, in the county of Washington. It is an action of *assumpsit*, upon a promissory note, purporting to have been made by the defendant, and Richard M. Johnson and P. H. Pope, by their attorney, George Thomas; the note bearing date the 16th of February 1837; by which the makers,

jointly and severally, promise to pay to the president and directors of the Bank of the Metropolis, or order, sixty days after date, the sum of $5000. The declaration also contains the common money counts : and upon the trial of the cause, the plaintiffs offered in evidence, to sustain the action, sundry matters set out in the following bill of exceptions :

On the trial of this cause the plaintiffs, to sustain the action on their part, proved, by a competent witness, that on the 27th March *1834, the said defendant, with Richard M. Johnson and P. H. Pope, executed their joint and several note as follows :— [*308

"$5000. Washington City, March 27th, 1834.

"Four months after date, we jointly and severally promise to pay to the President, Directors and Co. of the Bank of the Metropolis, or order, five thousand dollars, without defalcation, value received, payable at said bank.

Rh. M. Johnson,
T. P. Moore.
P. H. Pope."

And on the same day, by their checks, drew from the said plaintiffs the proceeds thereof, which had been carried to their credit :—

"Washington City, March 27th, 1834.

"Cashier of the Bank of the Metropolis, pay to bearer forty-eight hundred and ninety-six 67–100 dollars.

P. H. Pope,
Rh. M. Johnson,
T. P. Moore."

That said note was not paid at maturity, but lay over unpaid, until the 30th January 1836, when it was cancelled ; that on the 30th day of January 1836, the said parties executed and delivered to the said plaintiffs their promissory note, as follows :

"Six months after date, we jointly and severally promise to pay to the president and directors of the Bank of the Metropolis, or order, five thousand dollars, without defalcation, value received, this 30th day of January 1836.

$5000.

Rh. M. Johnson,
P. H. Pope,
T. P. Moore."

"Cr. of R. M. Johnson, and others, to renew a note of same amount."

Which was discounted by said plaintiffs, and the proceeds thereof carried to the credit of said makers, and the interest in arrears paid. That on the 29th of February 1836, the said parties executed and delivered to George Thomas, at that time cashier of said Bank of the Metropolis, a power of attorney, in the words and figures following, that is to say :

"Whereas, we have a joint and several note of hand discounted in the Bank of the Metropolis : Now, known all men by these presents, that we, Richard M. Johnson, Thomas P. Moore and P. H. Pope, all of the state of Kentucky, do hereby nominate, constitute and appoint George Thomas, of the city of Washington, our true and lawful attorney in fact, and by these presents do authorize and empower him, for us, and in our names, to sign our joint note to the president and directors of the *Bank of the Metropolis, for five thousand dollars, for our accommodation, and the [*309

same to renew, from time to time, as it may become due, for the whole or any part thereof; hereby ratifying and confirming all and every the act and acts of our said attorney, in and about the premises, so long as the bank shall continue the accommodation to us. In witness whereof, we have hereunto set our hands and seals, at the city of Washington, the 29th day of February 1836.

"District of Columbia, Washington County, to wit: On this 29th day of February, in the year 1836, personally appeared Richard M. Johnson, P. H. Pope and T. P. Moore, before me, the subscriber, a justice of the peace in and for the county aforesaid, and acknowledged the above power of attorney to be their act and deed, for the purposes mentioned therein.

SAM'L STETTINIUS, J. Peace."

Which said power of attorney was given for the single purpose of acting for said parties in relation to said last-mentioned note and the renewal thereof; and that the said George Thomas, professing to act by virtue of said power of attorney, under said power of attorney made and executed the note mentioned and described in the declaration, to wit:

"$5000. Washington, 16th Feb. 1837.

"Sixty days after date, we jointly and severally promise to pay the president and directors of the Bank of the Metropolis, or order, at the said bank, five thousand dollars, for value received.

RICHARD M. JOHNSON, THOS. P. MOORE, P. H. POPE,
By their attorney, GEO. THOMAS."

That the same was then discounted by said bank, the proceeds carried to the credit of the said makers, and the arrears of interest upon the former and last preceding note, together with the discount of this note, paid and credited on said account, and the said note dated 30th January 1836, was cancelled, but witness does not recollect by what person said interest or discount was paid. To the admissibility of which notes, or any of them, or any matter above stated in evidence, the defendant objected; but the court overruled the objection, and permitted all of said notes, and the proceedings in regard to them, and the matters stated, to be given in evidence to the jury. To which opinion of the court, the defendant excepted.

There was another bill of exceptions taken at the trial, growing out of the refusal of the court to give certain instructions prayed, touching the alleged usury in the note, by reason of the interest having been taken in advance on discounting the note. But it is unnecessary to notice these instructions. For all exceptions on this account were abandoned at the argument, as raising a question too well settled to be now drawn into dis-
*310] cussion. The last prayer contained *in this bill of exception, which raised the question whether the power of attorney given to George Thomas authorized him to sign the note upon which this suit is brought, will be noticed under the first bill of exceptions, where the power is set out at length, so far as is necessary for the decision of this case; so that the second bill of exceptions may be laid entirely out of view.

The general questions arising under the first bill of exceptions are, whether the evidence offered was admissible, and if so, whether it was sufficient to maintain the action, either upon the count on the note signed by

George Thomas, or on the money counts. The exception was taken, after the evidence had been given (without objection), to the whole matter stated in the exception; and if any part of it was admissible, the objection was properly overruled. It is the duty of a party taking exception to the admissibility of evidence, to point out the part excepted to, when the evidence consists of a number of particulars, so that the attentation of the court may be drawn to the particular objection. The objection here taken, was, in the broadest possible manner, to all the matter stated in the bill of exceptions. That some part of this evidence was admissible under the money counts, cannot be doubted. One of the notes to which the objection extended, is the one upon which the first count in the declaration is founded. And whether that was admissible or not, depends upon the power of attorney to George Thomas, set out in the exception, under and by virtue of which he made the note in question.

That power, it will be seen, authorized him to sign a joint note; whereas, the one he gave was a joint and several note. If it was necessary to decide this question, in order to maintain the action, it may well be questioned, whether the power did not authorize the making a joint and several note. There is some diversity of opinion on the bench upon that point. The object of the power, as appears upon its face, clearly was, to make a note as the renewal of a joint and several note, which the parties had running in the bank. It recites as follows: "Whereas, we have a joint and several note of hand discounted in the Bank of the Metropolis," and then proceeds to empower George Thomas to renew the same, from time to time, as it fell due. But there may have existed some reason why they preferred changing the form, by giving a joint instead of a joint and several note. The power is certainly not strictly pursued, though probably according to the intention of the parties. But as the cause does not turn entirely on this point, we pass it by. The action is clearly maintainable on the money counts. If the note was properly given under the power, it was admissible under the first count, or under the money counts. If signed by the attorney, without sufficient authority, it was void, and to be laid out of view, and the cause stands upon the other evidence given at the trial; which shows the original loan by the bank, to Richard M. Johnson, T. P. Moore and P. H. Pope, upon their note, dated 27th March 1834, by which they jointly and severally promised to pay the bank $5000, *in four months after date. By [*311
their joint check, of the same date, they drew out of the bank $4896.67, the proceeds of the note, deducting the discount. That note not being paid, another joint and several note was given by them, bearing date the 30th of January 1836, for $5000, payable six months after date; which was discounted by the bank, and the proceeds carried to the credit of the makers, deducting the discount and arrears of interest. And the power of attorney was afterwards given to George Thomas, authorizing him to make another note, as a renewal of the one last mentioned; and under which authority, he made the note now in question, which was discounted, and the proceeds carried to the credit of the makers; and the arrears of interest on the note then in bank, and the discount upon the note now in question, was paid, and credited in account with the makers, and the note of 30th of January 1836, was cancelled. This evidence is amply sufficient to show, $5000 was originally advanced to the makers of these notes, and that upon

the several renewals, they have been credited with the proceeds, and all the notes given up and cancelled, without payment in any way, except by the note made by George Thomas, under the power of attorney; and if that note is void, the bank is without a remedy, except upon the money counts, to recover the money paid upon the check of P. H. Pope, R. M. Johnson and T. P. Moore. This money has gone to the joint use of the three, who might all have been joined in the action. But if any objection could be made to the suit against Moore alone, by reason of the non-joinder of the other two, it should have been pleaded in abatement, and cannot be taken advantage of upon the general issue. This is a well-settled rule in pleading; and is fully recognised by this court, in the case of *Barry* v. *Foyles*, 1 Pet. 316. The judgment of the court below is accordingly affirmed, with costs.

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

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*312] *William McElmoyle, for the use of Isaac S. Bailey, *v.* John J. Cohen, Administrator of Levy Florence.

Constitutional law.—Judgments of courts of other states.—Statutes of limitation.

Although a judgment in the court of a state is not to be regarded in the courts of her sister states as a foreign judgment, or as merely *primâ facie* evidence of a debt, to sustain an action of debt upon the judgment, it is to be considered only distinguishable from a foreign judgment in this; that by the first section of the fourth article of the constitution, and by the act of May 26th, 1790, § 1, the judgment is conclusive on the merits, to which full faith and credit shall be given, when authenticated as the act of congress has prescribed.

When the constitution declares that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state, and provides that congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof, the latter clause, as it relates to judgments, was intended to provide the means of giving to them the conclusiveness of judgments upon the merits, when it is sought to carry them into judgments, by suits in the tribunals of another state. The authenticity of the judgment, and its effect, depend upon the law made in pursuance of the constitution; the faith and credit due to it as the judicial proceeding of a state, is given by the constitution, independently of all legislation.

By the law of congress of May 26th, 1790, the judgment is made a debt of record, not examinable upon its merits; but it does not carry with it into another state, the efficacy of the judgment upon property, or upon persons, to be enforced by execution. To give it the force of a judgment in another state, it must be made a judgment there, and can only be executed in the latter as its laws may permit.

The plea of the statute of limitations, in an action instituted in one state on a judgment obtained in another state, is a plea to the remedy; and consequently, the *lex fori* must prevail in such a suit.

Prescription is a thing of policy growing out of the experience of its necessity; and the time after which suits or actions shall be barred, has been, from a remote antiquity, fixed by every nation, in virtue of that sovereignty by which it exercises its legislation for all persons and property within its jurisdiction.

There is no constitutional inhibition on the states, nor any clause in the constitution, from which

it can be even plausibly inferred, that the states may not legislate upon the remedy, in suits on the judgments of other states, exclusive of all interference with their merits.

A suit in a state of the United States, on a judgment obtained in the courts of another state must be brought within the period prescribed by the local law, the *lex fori*, or the suit will be barred. The statute of limitations of Georgia can be pleaded to an action in that state, founded upon a judgment rendered in the state court of the state of South Carolina.[1]

In the payment of the debts of a testator, or intestate, in Georgia, the judgment of another state, whatever may have been the subject-matter of the suit, cannot be put upon the footing of judgments rendered in the state; it can only rank as a simple-contract debt, in the appropriation of the assets of the estate of a deceased person to the payment of debts.

CERTIFICATE of Division from the Circuit Court of Georgia. William McElmoyle, a citizen of the state of South Carolina, suing for the use of Isaac S. Bailey, also a citizen of that state, presented a petition, in 1835, to the circuit court of the United States for the district of Georgia, stating, that Levy Florence had died intestate; and having before his death resided in the state of South Carolina, he had obtained a judgment against him in the court of common pleas for the city of Charleston, for $9687, on a promissory note, on the 16th day of February 1822, which remained *unsatisfied; an exemplification of which judgment in due form was exhibited to the court with the petition. *[313

The defendant, a citizen of Georgia, to which state Levy Florence removed, after seven years from the rendition of the judgment, and in which state he resided at the time of his death, pleaded the statute of limitations of the state of Georgia; which, the plea alleged, limited such actions to five years from the cause of action; and he afterwards pleaded that there was no statute of the state of South Carolina which limited suits upon judgments therein to any particular time, nor was there any statute of limitations in that state, applicable to judgments, but that a statute was passed by the legislature of Georgia, on the 7th day of December 1805, which provided and declared, that all actions of debts on judgments obtained in courts other than the courts of Georgia, should be commenced and prosecuted within five years from the rendition of such judgments, and not afterwards; and that for seven years after the rendition of the judgment on which the suit is brought, Levy Florence was a resident and citizen of the state of Georgia, and no suit on the judgment was commenced against him, nor for two years after the defendant, John J. Cohen, had been the duly qualified administrator of the said Levy Florence. The defendant, for further plea, stated that he had not funds of the estate of Levy Florence sufficient to pay the whole of the judgment, and to pay the other debts claimed as due from the estate.

Upon the trial of the cause, the following questions occurred, upon which the opinions of the judges were opposed; and the same were certified to the supreme court. 1st. Whether the statute of limitations of Georgia can be pleaded to an action in that state, founded upon a judgment rendered in the state of South Carolina? 2d. Whether in the administration of assets in Georgia, a judgment rendered in South Carolina, upon a promissory note, against the intestate, when in life, should be paid in preference to simple-contract debts?

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[1] Bank of Alabama *v.* Dalton, 9 How. 522; Bacon *v.* Howard, 20 Id. 22; Randolph *v.* King, 2 Bond 104.

The case was submitted to the court, on printed arguments, by *Longstreet*, for the plaintiff; and by *King*, for the defendant.

Longstreet, for the plaintiff.—Two questions are raised in this case: 1. Can the statute of limitations of Georgia be pleaded to an action founded on a judgment in South Carolina? 2. If it cannot be, is that judgment a debt of higher dignity, in the administration of assets in Georgia, than a simple-contract debt? Both questions seem to have been virtually decided by the supreme court of the United States.

The first was certainly settled by the case of *Mills* v. *Duryee*, 7 Cranch 481. It was there ruled, that no plea could be urged against a judgment from a state court, duly authenticated, but the *plea of *nul tiel record*. If this be true, it is but changing the terms of the same proposition, to say, that the statute of limitations cannot be pleaded to an action founded upon such a judgment. The question there was, as it is here, a question of pleading. Mr. Justice STORY, in delivering the opinion of the court in that case, says, "Congress have declared the effect of the record, by declaring what faith and credit shall be given to it. It remains only, then, to inquire, in every case, what is the effect of a judgment in the state where it is rendered? Let us make the inquiry, and the answer will be found in the concessions of the parties, that the effect of this judgment, in South Carolina, would be to silence the plea of the statute of limitations. The doctrine of *Mills* v. *Duryee* was afterwards confirmed by *Hampton* v. *McConnell*, 3 Wheat. 234. Mr. Chief Justice MARSHALL there says, "The judgment of a state court should have the same credit, validity and effect, in every other court of the United States, which it had in the state where it was pronounced; and whatever pleas would be good to a suit thereon in such state, and none others, could be pleaded in any other court in the United States." Accordingly, it was again decided, that *nil debet* could not be pleaded to the suit then in question. The same decision had been long before made in the circuit court of the United States for the district of Pennsylvania, *Armstrong* v. *Carson's Executors*, 2 Dall. 302; and it has been repeated by the judges of the highest courts in each of the several states. In *Morton* v. *Naylor*, 1 Hill (S. C.) 439, the very question now before the court was adjudicated. It was ruled in that case, that the statute of limitations of South Carolina was not a good plea to an action upon a judgment from a sister state. It cannot be necessary to multiply authorities upon this head.

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What, then, is the doctrine of these cases? It is, that the judgment of a state court carries with it into every state all its original attributes, ene gies and incidents; that it goes forth armed with the powers of the court that pronounced it, and clothed with the authority of the laws under which it was pronounced; that it is at home, whithersoever it goes, through the whole length and breadth of the Union; that in relation to judicial proceedings, the states are not foreign to each other. Less than this cannot be extracted from the fourth article, first section, of the constitution, and the act of congress made in pursuance of it. By that article, the states reciprocally pledged themselves to each other, that they would repose implicit faith in the records of every state; that they would accredit them, receive them, admit them, acknowledge them to be true. There is hardly a

court in the Union (it is believed not one) that has as high authority as this, for pronouncing its own judgments conclusive. The states have generally contented themselves with organizing their several departments of government, allotting to each its respective powers, and leaving the consequences of this *allotment to the deductions of common sense or common law. Thus, to ascertain the force and effect of a judgment of a state court, within the limits of that state, we appeal to the common law; and there we find, that such a judgment imports absolute verity. But in order to ascertain the force and effect of judgment of one state, when carried into another, we appeal to the *lex scripta*—the paramount law; and there we learn, that it is entitled to "full faith and credit." Are these terms less comprehensive or less impressive than "absolute verity?" Proceed they from a fountain less sacred? Is it possible, then, to urge anything against such judgments, which will not apply with equal force to all judgments? [*315

The letter of the constitution is not more pointed to the purpose of this argument, than the reason and spirit of it. The framers of that instrument foresaw that there would be a perpetual change and interchange of citizens between the several states. They had confederated a number of bodies politic; they had secured to each a similar form of government; they had placed over all, in some respects, a controlling, and, in all respects, a protecting power. They had, therefore, sundered some of the strongest ties that bind man to his native land, and left him free to choose a climate congenial to his constitution, and an occupation suited to his taste or habits, without forfeiting the protection of his own laws. To have incorporated no provision in the constitution which would prevent men, thus circumstanced, from eluding the operation of a judgment, by a simple change of residence, would have argued a blindness in the sages who framed that instrument, that might be better imputed to any other body of men that ever lived. And if they have done no more than authorize suits to be instituted upon the judgments in question, subject to all defences that might have been set up to the original action, the fourth article and first section of the constitution is but a deathless memorial of their folly; for all this might have been done, and would have been done, from a principle of comity between the states, without any law to that effect. It is done by all civilized nations. If they have only authorized suits to be instituted upon such judgments, leaving it with the states to regulate the defences to such suits, they have done no more, in effect, than to declare that suits may be prosecuted in the several states, if the states choose to permit them to be prosecuted. Very different the conduct of those profound statesmen. They declared, that "full faith and credit should be given in each state to the records, &c., of every state." To obviate all difficulties, the constitution proceeds: "And congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof." This makes perfect the law upon this subject. Now, no one can withhold from the judgment of a state court unlimited credence, without violating the constitution; no one can resist its operation, without becoming instantaneously impotent. All must give the judgment a helping hand, to the accomplishment of its ends; and those who will not, immediately lose all power over it, and *hither it comes, to more impartial guardians. There can be no impairing its force, by embarrassing restrictions and limi- [*316

tations; no overriding it by state legislation; no degrading it by lowering its dignity, or elevating the character of conflicting claims. It continues unchangeably the same, until it is satisfied. It is, therefore, just as secure as human power could make it; and it is wonderful, that human wisdom could have provided for it such admirable safeguards.

But it is said, that the states may prescribe the time within which their own judgments shall be enforced; and surely, they may do as much in relation to the judgments of another state. And to this, *Gulick* v. *Loger*, 1 Green (N. J.) 70, and *Jones* v. *Hook's Administrator*, 2 Rand. 303, are cited. A glance at these cases will satisfy the court, that neither of them called for a serious consideration of the point in question. The plea in both was obviously unsustainable in point of fact; and consequently, it became unnecessary to bestow upon it grave deliberation. It is true, that the judges in both say, that the statute of the state in which the suit is instituted must control the plea; and it is also true, that the suits in those cases were both upon judgments; but the manner in which the point in question was disposed of, and the authorities cited to it, show that the courts had given it no reflection.

To reason from the power of a state over the judgments of its own courts, to its power over the judgments of a sister state, is just as unsafe as it would be, to reason from the power of a state over its own citizens, to its power over foreign ministers; from its power of taxation, to its power of laying tonnage duties; from its power of contracting, to its power of making treaties. In short, it is reasoning from a retained to a renounced power. States may do what they please with their own judgments; simply, because they have retained the right to do so. They cannot do the same thing with judgments of the sister states, because they have relinquished the right to do so. How is it possible to reconcile the power of imposing terms and restrictions upon these judgments by the states, with the power given to and exercised by congress of determining their force and effect in every state? They are absolutely incompatible.

Let us take an analogous case, in which we will not be so apt to be misled by old and familiar rules of pleading. Congress has power to establish uniform bankrupt laws. This power is very analogous to that conferred on congress by the fourth article, first section, of the constitution. The one was given for the protection of the debtor, the other for the protection of the creditor; the one to establish a uniform rule for the recovery of demands, the other to establish a uniform rule for resisting demands; and both, for having a general law that all could know and understand. If congress should exercise its power of regulating bankruptcies, the analogy would be still more striking; for it would certainly place the debtor under the protection of some judgment or decision of a court, or of commissioners, the record of which would be made evidence everywhere. Now, suppose this to be done, would it be competent for *the legislatures of the several *317] states to place the bankrupt under terms, in pleading his discharge? To this question, we have the answer of this court. It was for a long time doubted, whether the mere grant to congress of the power to make bankrupt laws did not exclude the states from the exercise of any power over the same subject. In the case of *Green* v. *Sarmiento*, 3 W. C. C. 17, Judge Washington decided that it did. In the cases of *Sturges* v. *Crowninshield*,

4 Wheat. 122, and *Ogden* v. *Saunders*, 12 Ibid. 213, this court decided, that it did not; but with more dissenting voices than are to be found to any decision ever made by this court, the number of judges considered. But in the first case, the counsel on both sides admitted, and in the last two, all the judges either took it for granted or expressly declared, that if congress had legislated upon the subject, there would have been an end to all state legislation upon it. It is asked, where is the difference in principle between that case and this?

But it is said, that the plea in this case opposes nothing to the record. It admits the original validity of the judgment, but says that by presumption of law it has been satisfied. All this, the plea of *nil debet* admitted, in *Mills* v. *Duryee*. The defendant did not deny that a judgment had been obtained; that it had been fairly obtained; and that it had never been satisfied; but he contended, that it had lost its force, by his change of residence, as it is said this has, by lapse of time. But this court overruled the plea. By "presumption of" what "law" is the judgment satisfied? The law of Georgia. But where does Georgia get the authority to pass a law that shall in any manner affect a judgment of South Carolina? She confided this authority to congress; and congress has said, that the law of South Carolina shall govern it everywhere. It is idle, therefore, to argue from the harmony of two laws, one of which can have no operation, whether good or bad.

Again, it is answered, that the argument would make it the duty of the courts of Georgia to issue execution upon the judgments of South Carolina; would give them a lien upon property in Georgia; and would require administrators to distribute intestates' effects, according to the laws of South Carolina. As to the first branch of the objection, it has been answered by this court in *Mills* v. *Duryee*. As to the second: a judgment which binds property in South Carolina, ought to bind it everywhere. It is thought the law of congress goes thus far. Why do mortgages made in one state, bind property in another? Because the *lex loci* governs the contract, and the states cannot impair the obligation of contracts. Why should not judgments bind property in like manner? Because the *lex loci* (under the act of congress) governs judgments, and the states cannot impair their force. As to the third: the argument leads to no such conclusion. Giving *to the judgment the same force and effect which it would have in South [*318
Carolina, does not involve the consequence that the statute of distributions of that state must be executed in Georgia, for several reasons. 1. That statute could operate only on effects of a deceased person; and Florence was in life, while he remained in South Carolina. It could apply only to the effects of one who died in South Carolina; it could operate only upon the administrator appointed in that state. 2. The judgment could claim no priority in the order of payment by Florence's administrator, because Florence was not dead when the judgment was obtained. 3. The order of distribution is not an effect of the judgment, but is the result of an independent provision of law; which might, or might not, benefit the judgment-creditor upon the contingency of the debtor's dying before the judgment was satisfied.

It is not disputed, that as a general rule, the validity of pleas is to be determined by the law of the place where the suit is brought, and not by

the law of the place where the action originated. But in this instance, the state of Georgia has surrendered her right to control the pleadings to congress, who have forbidden the plea here urged. The law of congress is, therefore, the law of the place where the suit is instituted.

If all the courts of the United States are bound to consider a judgment in one state as conclusive in every other; if, before all courts of justice in the Union, such a judgment is a domestic judgment, and nothing will be heard against it which goes to divest it of that character; surely, an executor or administrator will not be permitted to degrade it. The cases referred to have been generally considered as putting jugdments in one state upon a footing with judgments in every other; as transforming them, in other words, into domestic judgments. 3 Story's Com. 509. Story's Confl. Laws 509. *Clarke's Administrator* v. *Day*, 2 Leigh 172; *Wyman* v. *Mitchell*, 1 Cow. 319. Are they domestic judgments for one purpose, and not for another? Domestic judgments in court, and foreign judgments out of court?

In England, debts take rank, in the course of administration, according to the character which the courts of justice give them. Thus, in *Walker* v. *Witter*, 1 Doug. 1, and *Duplein* v. *De Roven*, 2 Vern. 540, it was determined, that foreign judgments were merely simple-contract debts. Accordingly, Williams cites these authorities to show that they are to be so considered in the course of administration. 2 Williams' Ex. 658. The supreme court have decided, that a judgment in one state, is to be considered as a domestic judgment in every other. May not this authority be appealed to, to show what is its rank in the order of administration? Had the legislature of Georgia expressly declared, that judgments in the sister states should, to all intents and purposes, be considered as domestic judgments, there can be no doubt, that they would then be admitted upon a parity with domestic judgments in the distribution of assets. But Georgia has confided to congress
*319] the power of *making this declaration, and congress has made it. Must not the consequences be the same?

By the laws of Georgia, debts of a deceased person are to be paid in the following order: Debts due by him as executor, administrator or guardian (Prince, Dig. p. 161 § 5); funeral expenses, and other expenses of last sickness (Ibid. 157); charges of probate, or letters of administration; judgments, mortgages and executions, the eldest first; rent, bonds, and other obligations; and lastly, open accounts. Promissory notes are not mentioned in these acts; but the act of 1799 (Prince 211), declares, that "all bonds and other specialties and promissory notes, and other liquidated demands, &c., whether for money or other thing, shall be of equal dignity, and shall be negotiable by indorsement," &c. The judges of the state of Georgia have held, without a dissenting voice, it is believed, that this act places promissory notes on a footing with bonds and other specialties, in the order of distribution. The term "equal dignity" could not be satisfied without such a decision. Now, the record in this case shows, and the case stated shows, that the judgment here sued on was founded on a promissory note. Were the note here then alone, it would be considered a debt by specialty. And can it be possible, that it is degraded, by being carried into judgment? If the judgment be considered only a simple-contract debt, this follows as a necessary consequence.

The note, as has been often ruled, has been extinguished by the judgment. It would be a good defence to a suit upon it, that a judgment has been rendered upon it in South Carolina. *Hughes* v. *Blake*, 1 Mason 515; *Green* v. *Sarmiento*, 3 W. C. C. 17; Pet. C. C. 74; *Field* v. *Gibbs*, Ibid. 155; *Denison* v. *Hyde*, 6 Conn. 508. These decisions pre-suppose the judgment to be of higher dignity than the note; but if, as is contended, the judgment actually degrades the note, the position of the plaintiff is peculiarly unfortunate. His note is placed for ever beyond his reach, and his dignified judgment is worthless. In Toller's Law of Executors (4th Am. Edit. with notes by Ingraham) 262, there is a note of a case in point, to this question, though no reference can be made to the book that contains it; indeed, it seems doubtful from the note to the case, whether it has ever been reported. There it was held, that judgments of a sister state stand upon a footing with judgments in Pennsylvania, in the course of administration. In *Andrews* v. *Montgomery*, 19 Johns. 162, it was ruled, that *assumpsit* would not lie in one state, upon a judgment in another, because such a judgment is not a simple-contract debt, but a debt of record. Here, the question is settled in terms, but not more effectually in principle, than by the decisions of the supreme court already cited. It can hardly be considered as settled, even in England, that a foreign judgment is not conclusive between the parties to it and privies. *Martin* v. *Nichols*, 3 Simons 453, and note to that case; Story's Confl. Laws 506.

*To have one rule of pleading for citizens of Georgia, and another for citizens of other states; to give creditors of the state an advantage over creditors of another state in the distribution of assets, is to violate the second section of the 4th article of the constitution, which declares that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." "The intention of this clause was to confer on the citizens of each state a general citizenship; and to communicate all the privileges and immunities which the citizens of the same state would be entitled to under like circumstances." 3 Story's Com. 675. [*320

King, for the defendant:—The plaintiff's counsel evidently mistakes the force and application of the authorities upon which he relies. The case of *Mills* v. *Duryee*, 7 Cranch 481, decided nothing but a question of pleading, which depended on the "faith and credit" to be attached to the judgment, as evidence. *Nil debet* was a bad plea, because it contradicted the record, against which nothing could be averred. The defendant did owe, unless he could avoid the debt by some special plea perfectly consistent with the original debt. The plea of limitation admits the truth of the record. The case of *Hampton* v. *McConnell*, 3 Wheat. 334, is only a short confirmance of the principle of the case cited. Though the language of the judge is more general, he clearly intended to decide nothing but the case before him, which was precisely similar to *Mills* v. *Duryee*, and involved no other question but the "faith and credit" due to the judgment as evidence, which decided the validity of the plea. The case in 2 Dallas is a similar one; and though the authority of all these cases, and others to the same point, is fully admitted, yet their application to this case is denied. We propose to make no issue with the plaintiff that would falsify this record. We give to that all the faith and credit to which it is entitled in the

courts of Carolina. We give to it the dignity of the highest record proof. The plaintiff would have a right to insist on the same favor for his record, if barred with limitation laws in both states.

The case most in point, cited by the plaintiff, is that of *Morton* v. *Naylor*, 1 Hill (S. C.) 439. This is the only case of the kind to be found; and its authority is much weakened, from the fact, that the point decided (so far as authority in this case) was not necessarily before the court. The only question there was, as to the character of the debt; on that depended the application of the statute of limitations of South Carolina to it. In giving it its proper dignity, it was decided, that there was no statute of limitations of South Carolina which, in terms, applied to it. The decision was right in its results, but too general in its reasoning on points not necessarily embraced in it. The judge says, "it would seem, that, when authenticated, a recovery in another state should be regarded, for all purposes of evidence, as if the case were trying in the court where the judgment was recovered." But when the *judge, from such premises, came to the conclusion that no defence or plea could be insisted on, which would not have been good in the state where the judgment was rendered, he contradicted the decision in 4 McCord 278, to which he referred with approbation; a great variety of decisions on the subject of lien, distribution, judgments of discharge under local insolvent laws; and, in fact, overturned the fundamental principles governing the application of the *lex fori*, not only recognised by this court, but in the tribunals of nearly or quite all the states of the Union. It is a singular fact, that after this broad position laid down by the judge, he does not dissent from the decision in 4 McCord; which in the distribution of assets, places such judgments on a footing with simple-contract debts. If, after a distribution on such principles, the defendant were to plead *plene administravit* to an action on the judgment, would the only question be, whether such a plea would be good in the courts of the state where the judgment was rendered? It would be a waste of time to point out, by references and illustrations, wherein the broad position, unnecessarily assumed in this case, is inconsistent with established principles and adjudged cases. Judge Harper, in concurring, showed his usual sagacity, in saying, "I concur in the result." Under the judiciary act of 1789 the acts of limitations of the several states form a rule of decision in this court (3 Pet. 277), and the statute of limitations is clearly a law of the *forum*. Ibid. And Story's Conflict of Laws, 468, 482, &c.

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In the case of the *Bank of the United States* v. *Donnally*, 8 Pet. 372, the court says; "Remedies are to be governed by the laws of the country where the suit is brought." "The nature, validity, &c., of the contract may be admitted to be the same in both states; but the mode by which the remedy is to be pursued, and the time within which to be brought, may essentially differ." "The laws of Virginia must govern the limitation of suits in its own courts." The same principle is established and enforced with much clearness by the court, in 2 Mass. 84, and 17 Ibid. 55; where it is shown, that the encroachment upon the *lex fori* insisted on, is altogether inconsistent with the necessity and convenience of every state, in controlling remedies in its own courts. It is there decided, that though the statute of limitations of New York, where the parties resided, and where the debt was contracted, had barred the remedy, yet, when resort was made to the

courts of Massachusetts, the statutes of the latter state govern the remedy. Here, the remedy is enlarged by a change; in other cases, it may be contracted: but no other principle can be admitted, "otherwise great confusion and irregularity would be introduced in judicial proceedings," as properly remarked by Mr. Chief Justice PARKER, in 13 Mass. 4.

It was never the intention, nor, fairly interpreted, is it the effect of the constitution, materially to interfere with the essential attributes *of the *lex fori*, so necessary to the administration of justice in every [*322 state. By one clause, no law can be passed impairing the obligation of contracts; yet, if the validity of the contract be recognised, according to a fair interpretation of it, the good faith intended to be enforced by this clause is secured; and an act of limitation of the state where the action is brought, governs the remedy, though in that state the obligation, in one sense, may be much impaired by it; so the benefits of the clause securing full faith and credit in each state, to the records of every other state, are fully enforced, when we admit them as incontrovertibly true, or allow them to sustain all the averments proved by them in the courts where obtained. This may be done, without infringing upon the right of every state to regulate the remedy by any limitations, not inconsistent with this deference for the record of a sister state.

There can be no difference whatever in the application of the *lex fori* to actions brought on judgments, and actions brought on any other demand, except upon the mere question of proof. The record proves itself, instead of requiring other aids to verify it; but when thus established, the state in which a remedy is pursued on it, is released from all further constitutional obligation to respect it, and the *lex fori* fully applies to it. Accordingly, in *Gulick* v. *Lodges*, 1 Green (N. J.) 70, in an action upon a judgment obtained in Pennsylvania, Justice EWING says, "We need make no inquiry into the rules for the limitation of actions in the state of Pennsylvania, where this judgment was obtained, since remedies are to be pursued," etc. Yet this judge sustained throughout the decisions cited by the plaintiff's counsel, that the judgment was conclusive of everything verified by it. In the case of *Jones* v. *Hook's Administrator*, 2 Rand. 303, the court of appeals of Virginia held, that, in action of debt on a judgment obtained in North Carolina, the statute of limitations of North Carolina was no bar; but that the act of limitation of Virginia, if applicable, governed the remedy. The case receives additional weight by being cited with approbation by the court, in the case of the *United States Bank* v. *Donnally*, above cited.

It cannot be necessary to pursue this branch of the subject. The doctrines of the plaintiff's counsel would truly introduce "confusion and irregularity into judicial proceedings," altogether intolerable, and force upon the state courts as many different measures of justice as there are states in the Union. No representative of an estate could ever safely settle an estate and obtain letters dismissory. The state law limiting the time within which all claims should be presented, would amount to nothing, unless there should be a similar law applicable to said judgments in other states, which would justify a similar protection against the judgment in the courts in the states where the judgment was obtained. To the authorities before cited, the decision of Judge HOLT, judge of the superior court

for the middle circuit of Georgia, on this very claim, sustaining the defend-
*323] ant *fully on both pleas, will only be added. The record copy of this decision, provided for this court, has become mislaid.

Confidence in the first plea will induce but limited attention to the second. If the plea be good, there is an end of the case. If the plea be bad, the principle which condemns it would send the plaintiff to Carolina for his law of priority; for no pleas, upon the laws of priority in the state of Georgia, would be good, "unless a similar plea could be pleaded in Carolina." The absurdity of such a proposition needs no comment. "The right of priority is extrinsic, and rather a personal privilege, dependent on the law of the place where the property lies, and where the court sits which is to decide the cause. Mr. Chief Justice MARSHALL, 5 Cranch 289. The plaintiff's counsel seems sensible of this, and, therefore, repudiates the laws of Georgia in the one case, but adopts them in the other, though both are equally *leges fori.*

The authorities cited by plaintiff's counsel on the second plea, are not applicable. If the debt were not barred, it should claim under the laws of Georgia; and the question is, what rank it would hold. Does it rank as a domestic judgment? The courts of Georgia have uniformly held not; and so did the circuit court, as will be seen from the statement of Judge CUYLER. The same decision has been made in South Carolina. *Cameron* v. *Wurtz*, 4 McCord 277. The plaintiff's counsel says this decison is inconsistent with the cases in 7 Cranch and 3 Wheaton. Judge NOTT did not think so, for he expressly recognises those decisions. He also says, that the decision in Carolina would now be different, as it is virtually overruled by the case of *Morton* v. *Naylor.* Judge O'NEALE did not think so, for he seems to agree with it; and says, "that case does not touch the question to be decided in this;" and seems to think it also consistent with the decisions in 7 Cranch and 3 Wheaton. The plaintiff's counsel, then, in sustaining himself on the second plea, has to discredit the only authority that sustains him on the first.

If, in the marshaling of assets and payment of debts in Georgia, under the laws of that state, this claim rank as a domestic judgment, it must be on the principle of lien, and would claim priority according to age. Thus, a demand discredited by the strongest presumptions, not upon the records of the state, and of which the people of the state could have no notice, would take precedence of judgments and mortgages recovered and recorded according to its own laws. The constitution never imposed such absurdity and injustice upon the states. The most that can be, possibly, claimed for a judgment not barred under the laws of Georgia, is to rank it as a "liquidated demand," that will require no other proof than an authentication under the act of congress. The second section of the fourth article of the constitution has no application. The limitation acts on the subject-matter of the suit, without regard to the citizenship of the parties interested.

*There is no hardship in allowing each state to control remedies
*324] in its own courts, with the admitted modifications; whilst endless confusion and justice would arise from a refusal of this power. The *lex loci contractûs*, and *lex fori*, for ever remain with the contracting parties, in the state where the contract was made. *Bank of the United States* v. *Donnally.* But if they resort to the courts of other states, they must sub-

ject themselves to the laws of the *forum*, which may extend or contract their remedy. The framers of the constitution had confidence in the judgments of all the state tribunals, and therefore, they extended to them "full faith and credit." They had confidence also, that the remedies provided in each state would be reasonable, and they, therefore, mainly left them as they were. But the construction insisted on by the plaintiff's counsel would overrule the *lex fori* of one state, by the *lex fori* of another; for his argument would have been the same, if all the parties had lived in Georgia, and the debt had been contracted there.

WAYNE, Justice, delivered the opinion of the court.—This cause has been brought to this court, upon a certificate of division of opinion between the judges of the sixth circuit court, upon the following points. 1. Whether the statute of limitations of Georgia can be pleaded to an action in that state, founded upon a judgment rendered in the state of South Carolina? 2. Whether, in the administraton of assets in Georgia, a judgment rendered in South Carolina, upon a promissory note against the intestate, when in life, should be paid in preference to simple-contract debts? Upon neither of these points, does the court entertain a doubt.

Upon the first of them, we observe, though a judgment obtained in the court of a state is not to be regarded in the courts of her sister states, as a foreign judgment, or as merely *primâ facie* evidence of a debt to sustain an action upon the judgment, it is to be considered only distinguishable from a foreign judgment in this, that by the first section of the fourth article of the constitution, and by the act of May 26th, 1790, § 1, the judgment is a record, conclusive upon the merits, to which full faith and credit shall be given, when authenticated as the act of congress has prescribed. It must be obvious, when the constitution declared that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state, and provides that congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof, that the latter clause, as it relates to judgments, was intended to provide the means of giving to them the conclusiveness of judgments upon the merits, when it is sought to carry them into judgments by suits in the tribunals of another state. The authenticity of a judgment, and its effect, depend upon the law made in pursuance *of the constitution; the faith and credit due to it as the judicial proceeding of a [*325 state, is given by the constitution, independently of all legislation. By the law of the 26th of May 1790, the judgment is made a debt of record, not examinable upon its merits; but it does not carry with it, into another state, the efficacy of a judgment upon property or persons, to be enforced by execution. To give it the force of a judgment in another state, it must be made a judgment there; and can only be executed in the latter as its laws may permit. It must be conceded, that the judgment of a state court cannot be enforced, out of the state, by an execution issued within it. This concession admits the conclusion, that under the first section of the fourth article of the constitution, judgments out of the state in which they are rendered, are only evidence in a sister state, that the subject-matter of the suit has become a debt of record, which cannot be avoided but by the plea of *nul tiel record*. But we need not doubt, what the framers of the constitution intended

to accomplish by that section, if we reflect how unsettled the doctrine was upon the effect of foreign judgments, or the effect, *rei judicatæ*, throughout Europe, in England, and in these states, when our first confederation was formed. On the continent, it was then, and continues to be, a vexed question, determined by each nation, according to its estimate of the weight of authority to which different civilians and writers upon the laws of nations are entitled. In England, it was an open question, having on both sides her eminent equity, common-law, and ecclesiastical jurists. It may still be considered, in England, a controverted question, so far as jurists and elementary writers on the common law are concerned; though the adjudications of the English courts have now established the rule to be, that foreign judgments are *primâ facie* evidence of the right and matter they purport to decide.

In these states, when colonies, the same uncertainty existed. When our revolution began, and independence was declared, and the confederation was being formed, it was seen by the wise men of that day, that the powers necessary to be given to the confederacy, and the rights to be given to the citizens of each state, in all the states, would produce such intimate relations between the states and persons, that the former would no longer be foreign to each other, in the sense that they had been, as dependent provinces; and that, for the prosecution of rights in courts, it was proper to put an end to the uncertainty upon the subject of the effect of judgments obtained in the different states. Accordingly, in the articles of confederation, there was this clause: "Full faith and credit shall be given in each of these states to the records, acts and judicial proceedings of the courts and magistrates of every other state." Now, though this does not declare what was to be the effect of a judgment obtained in one state in another state; what was meant by the clause may be considered as conclusively determined, almost by contemporaneous exposition. For when the present constitution was formed, we find the same clause introduced into it, with but a slight *variation, making it more comprehensive; and adding, "congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof:" thus providing in the constitution for the deficiency which experience had shown to be in the provisions of the confederation; as the congress under it could not legislate upon what should be the effect of a judgment obtained in one state in the other states. Whatever difference of opinion there may have been as to the interpretation of this article of the constitution in another respect, there has been none as to the power of congress under it, to declare what shall be the effect of a judgment of a state court in another state of the Union. Here again, we have contemporaneous legislative interpretation of the first section of the fourth article of the constitution; for by the act of May 26th, 1790, it was declared, "That the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken. What faith and credit, then, is given in the states to the judgments of their courts? They are record evidence of a debt, or judgments of record, to be contested only in such way as judgments of record may be; and consequently, are conclusive upon the defendant in every state, except for such causes as would be sufficient to set aside the judgment in the courts of the state in which it

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was rendered. In other words, as has been said by a commentator upon the constitution; "If a judgment is conclusive in the state where it is pronounced, it is equally conclusive, everywhere, in the states of the Union. If re-examinable there, it is open to the same inquiries in every other state." Story's Com. 183. It is, therefore, put upon the footing of a domestic judgment; by which is meant, not having the operation and force of a domestic judgment beyond the jurisdiction declaring it to be a judgment, but a domestic judgment as to the merits of the claim, or subject-matter of the suit. When, therefore, this court said, in *Mills* v. *Duryee*, 7 Cranch 481, "If it be a record, conclusive between the parties, it cannot be denied, but by the plea of *nul tiel record*;" this language does not admit of the interpretation, that a plea not denying the judgment, but which resists it upon the ground of a release, payment, or a presumption of payment from the lapse of time, whether such presumption be raised by the common-law prescription, or by a statute of limitation, may not be pleaded, any more than where this court, in *Hampton* v. *McConnell*, 3 Wheat. 234, says, "The judgment of a state court should have the same credit, validity and effect, in every other court of the United States, which it had in the state court where it was pronounced; and that whatever pleas would be good to a suit thereon in such state, and none others, could be pleaded in any court in the United States," is intended to exclude such defences as have just been stated, or such as inquire into the jurisdiction of the court in which the jndgment was given, to pronounce, it as the right of the *state itself to exercise authority over the persons or the subject-matter. [*327
It has been well said, "the constitution did not mean to confer a new power of jurisdiction, but simply to regulate the effect of the acknowledged jurisdiction over persons and things within the state." Story's Com. 183.

Such being the faith, credit and effect to be given to a judgment of one state in another, by the constitution and the act of congress, the point under consideration will be determined, by settling what is the nature of a plea of the statute of limitations. Is it a plea that settles the right of a party on a contract or judgment, or one that bars the remedy? Whatever diversity of opinion there may be among jurists upon this point, we think it well settled, to be a plea to the remedy; and consequently, that the *lex fori* must prevail. *Higgins* v. *Scott*, 2 Barn. & Ad. 413; 4 Cow. 528, note 10; Ibid. 530; *Van Reimsdyk* v. *Kane*, 1 Gallis. 371; *Le Roy* v. *Crowninshield*, 2 Mason 151; *British Linen Co.* v. *Drummond*, 10 Barn. & Cres. 903; *De la Vega* v. *Veanna*, 1 Barn. & Ad. 284; *De Couche* v. *Savatier*, 3 Johns. Ch. 190; *Lincoln* v. *Battelle*, 6 Wend. 475; *Gulick* v. *Loder*, 1 Green (N. J.) 68; 3 Burge's Com. on Col. and For. Laws 883. The statute of Georgia is, "that actions of debt on judgments obtained in courts, other than the courts of this state, must be brought within five years after the judgment obtained." It would be strange, if in the now well-understood rights of nations to organize their judicial tribunals, according to their notions of policy, it should be conceded to them in every other respect than that of prescribing the time within which suits shall be litigated in their courts. Prescription is a thing of policy, growing out of the experience of its necessity; and the time after which suits or actions shall be barred, has been, from a remote antiquity, fixed by every nation, in virtue of that sovereignty by which it exercises its legislation for all persons and property

within its jurisdiction. This being the foundation of the right to pass statutes of prescription or limitation, may not our states, under our system, exercise this right, in virtue of their sovereignty? or is it to be conceded to them in every other particular, than that of barring the remedy upon judgments of other states, by the lapse of time? The states use this right upon judgments rendered in their own courts; and the common law raises the presumption of the payment of a judgment, after the lapse of twenty years. May they not, then, limit the time for remedies upon the judgments of other states, and alter the common law by statute, fixing a less or larger time for such presumption, and altogether barring suits upon such judgments, if they shall not be brought within the time stated in the statute? It certainly will not be contended, that judgment-creditors of other states shall be put upon a better footing, in regard to a state's right to legislate in this particular, than the judgment-creditors of the state in which the judgment was obtained. And if this right so exists, may it not be exercised, by a state's restraining the remedy upon the *judgment of another state, leaving
*328] those of its own courts unaffected by a statute of limitations, but subject to the common-law presumption of payment, after the lapse of twenty years? In other words, may not the law of a state fix different times for barring the remedy in a suit upon a judgment of another state, and for those of its own tribunals? We use this mode of argument, to show the unreasonableness of a contrary doctrine. But the point might have been shortly dismissed, with this safe declaration, that there is no direct constitutional inhibition upon the states, nor any clause in the constitution from which it can be even plausibly inferred, that the states may not legislate upon the remedy in suits upon the judgments of other states, exclusive of all interference with their merits. It being settled, that the statute of limitations may bar recoveries upon foreign judgments; that the effect intended to be given, under our constitution, to judgments, is, that they are conclusive only as regards the merits; the common-law principle then applies to suits upon them, that they must be brought within the period prescribed by the local law, the *lex fori*, or the suit will be barred. Counsel have relied, to establish a contrary doctrine, upon *Morton* v. *Naylor*, 1 Hill (S. C.) 439. But that case was obviously decided upon a misconception of the learned judges of the decision of this court in the case of *Mills* v. *Duryee*, 7 Cranch 481. It is, therefore, our opinion, that the statute of limitations of Georgia can be pleaded to an action in that state, founded upon a judgment rendered in the state of South Carolina.

The second question upon which the judges were divided in this case is, whether a judgment rendered in South Carolina, upon a promissory note, against the intestate, when in life, should be paid in preference to simple-contract debts. The law of Georgia provides, that all debts of an equal decree shall be discharged in equal proportions so far as the assets of an intestate will extend; and that no preference shall be given amongst creditors in equal degree. (Prince's Laws of Georgia, 152, § 8.) And the order prescribed for the payment of debts of any testator or intestate, by executors and administrators, is, "debts due by the deceased as executor, administrator or guardian; funeral and other expenses of the last sickness; charges of probate and will, or of the letters of administration; next, debts due to the public; next, judgments, mortgages and executions, the eldest

first; next, rent; then, bonds or other obligations; and lastly, debts due on open account; but no preference whatever shall be given to creditors in equal degree, where there is deficiency in assets, except in cases of judgments, mortgages that shall be recorded, from the time of recording, and executions lodged in the sheriff's office, the eldest of which shall be first paid; or in those cases where a creditor may have a lien on any part of the estate." We first remark upon this question, that it was decided some years since (as is reported to us by the present district judge), in the circuit court of the United States for the district of Georgia, *the question being, [*329 "whether judgments obtained in other states take precedence of simple-contract debts," that in the administration of insolvent estates in Georgia, such judgments take no precedence. *Ten Eyck* v. *Ten Eyck*. We believe, from inquiry, for we have no published decision in point from the courts of Georgia; that the judges of her superior courts hold the same opinion. In *Cameron* v. *Adm'rs of Wurtz*, 4 McCord 278, it is decided, that in marshalling the assets of an insolvent estate, a judgment recovered in another state only ranks as a simple contract. The decision is correctly placed upon the footing that the first section of the fourth article of the constitution has effected no change in the nature of a judgment. "It only provides, that as matter of evidence, it shall be entitled to full faith and credit." But if the decisions in the cases of *Ten Eyck* v. *Ten Eyck*, and *Cameron* v. *Wurtz*, had not been as they are, and the point was now before us as an original question, we would come to the same conclusion. The legislature of Georgia does not certainly, in terms, put judgments of other states, in the payment of decedents' debts, upon the footing of judgments of her own courts. The term *judgments* is used, and no preference can be given to creditors in equal degree. If, however, equality in the degree of judgment creditorship, is qualified by seniority; and if, of executions lodged in the sheriff's office, the eldest is to be the first satisfied; the law of Georgia gives the order in which judgments shall be paid. That order depends upon date, execution, and the execution having been lodged in the sheriff's office. In case of conflict, then, between judgments or executions, it is to be decided by record evidence, to be obtained from the courts in the state; and so far as a right of seniority can be given by the execution being lodged in the sheriff's office, the judgment of another state can never have this privilege. It can have no right to an execution, in Georgia; and any execution issued upon it, is in the state in which it was rendered. No one will contend, that it could be placed with the sheriff, to be enforced, or to be put in competition with those issued upon domestic judgments. Here, then, is a case in which the judgment of another state would be excluded, by the terms of the law, which we think indicates the intention of the legislature not to place such a judgment upon the footing of domestic judgments in the administration of assets.

But a more conclusive reason against any such extension occurs to us. By the law of Georgia, all the property of the defendant is bound from the signing of the first judgment; all judgments obtained at the same term of the court bearing equal date, if they are entered and signed in the clerk's office, at any time within four days after the adjournment of the court. (Prince's Dig. 211.) If then the judgment of another state is to be brought in upon the footing of a domestic judgment in the administration of the

assets of testators and intestates, then this consequence may ensue; that a judgment of another state, having no lien upon property, may take preference, by the death of a defendant, over domestic judgments, having the first
*330] lien during his life; because the law says the eldest *judgment must be first satisfied. Such a right, and exclusion of right, could never have been intended by the legislature of Georgia to be conferred by the death of an individual. It is not necessary to pursue this inquiry further. We, therefore, think, in the payment of debts of a testator or intestate, in Georgia, that the judgment of another state, whatever may be the subject-matter of the suit, cannot be put upon the footing of judgments rendered in that state, and that it can only rank for that purpose as a simple-contract debt.

As to the wish intimated by counsel, in the conclusion of his reply, that this court would express its opinion, whether the statute limiting the time within which suits are to be brought upon the judgments of another state is in force, we cannot comply with it; as it is a question not comprehended in the division of opinion certified to this court.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Georgia, and on the points and questions on which the judges of the said circuit court were opposed in opinion, and which were certified to this court for its opinion, agreeable to the act of congress in such cases made and provided, and was argued by counsel: On consideration whereof, it is the opinion of this court, first, that the statute of limitations of Georgia can be pleaded to an action in that state, founded upon a judgment rendered in the state of South Carolina; and secondly, that in the administration of assets in Georgia, a judgment rendered in South Carolina, upon a promissory note, against the intestate, when in life, should not be paid in preference to simple-contract debts. Whereupon, it is ordered and adjudged by this court, that it be so certified to the said circuit court.

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*331] *Columbian Insurance Company of Alexandria, Plaintiffs in error, *v.* Ashby & Stribling and others, Defendants in error.

General average.

The brig Hope, with a cargo, bound, from Alexandria, in the district of Columbia, for Barbadoes, insured in Alexandria, was assailed, while standing down the Chesapeake bay, by a storm, which soon after blew almost to a hurricane; the vessel was steered towards a point in the shore, for safety, and was anchored in three fathoms water; the sails were furled, and all efforts were made, by using the cables and anchors, to prevent her going on shore; the gale increased, the brig broke adrift, and dragged three miles; the windlass was ripped up, the chain-cable parted, and the vessel commenced drifting again, the whole scope of both cables being paid out; the brig then brought up, below Craney Island, in two and a half fathoms water; where she thumped or struck on the shoals on a bank, and her head swinging round, brought her broadside to the sea. The master, finding no possible means of saving the vessel and cargo, and preserving the lives of the crew, slipped her cables, and ran her on shore, for the safety of the crew, and preservation of the vessel and cargo; the vessel was run far up on a bank, where, after the storm, she was left high and dry, and it was found impossible to get her off. The lives of all the persons were saved; the whole cargo, of the value of $5335,

insured for $4920, was taken out safely, and the vessel, her tackle, &c., were sold for $256: *Held*, that the insurers of the cargo were liable for general average.[1]

The question of contribution cannot depend upon the amount of the damage sustained by the sacrifice of the property, for that would be to say, that if a man lost all his property, for the common benefit, he should receive nothing; but if he lost a part only, he should receive full compensation; no such principle is applied to the case of goods sacrificed for the common safety; why, then, should it be applied to the total loss of the ship for the like purpose? It is the deliverance from an immediate impending peril, by a common sacrifice, which constitutes the essence of the claim; it is the safety of the property, and not the voyage, which constitutes the foundation of general average.

A consultation by the master with the officers of the vessel, before running her on shore, with a view to her preservation, and that of the passengers and cargo, may be highly proper, in cases which admit of delay and deliberation, to prevent the imputation of rashness and unnecessary stranding by the master; but if the propriety and necessity of the act, are otherwise sufficiently made out, no objection can be made to it.

The freight of a vessel, totally lost, by being run on shore for her preservation and that of the crew and cargo, ought to be allowed to the owner of the vessel, as a subject of general average, the cargo of the vessel having been saved by the stranding.

ERROR to the Circuit Court of the District of Columbia, and county of Alexandria. This was an action instituted in the circuit court of the United States, against the Columbian Insurance Company, for the purpose of ascertaining whether the plaintiffs, Ashby & Stribling, and Peter Hewit, were entitled to recover against the cargo of the brig Hope, for a contribution for an average loss. The Columbian Insurance Company were the underwriters on the cargo; and an agreement was made between the parties to the cause, before the trial, that "without regard to form, the real question between them should be contested." Under this agreement, the cause was tried, and the jury found the following special verdict.

"We, of the jury, find, that on the 27th day of May 1825, the brig Hope sailed from Alexandria, on a voyage to Barbadoes, that *on the said vessel standing down the Chesapeake bay, the weather became [*332 thick and foggy, and that it appearing, in the then state of the weather, imprudent to proceed to sea, the master kept away for Sewall's Point, for the purpose of making a harbor, where he anchored, with the best bower anchor, in three fathoms water; that all sails were furled, and a good scope of cable paid out, the wind then blowing very fresh from the north-east; that at ten o'clock, P. M., on the 3d day of June, he let the small bower anchor under foot, and paid out the best bower anchor, until both cables bore a strain; that the gale still increasing, the kedge anchor was let go; that about midnight, the vessel struck adrift; that then the whole scope of the cables were paid out, till they all bore a strain, when she fetched up; that the gale continued, on the following day, to increase, and the sea being very heavy, at one o'clock, she struck adrift again, and dragged three miles, when she brought up; that the gale then increased to almost a hurricane, she ripped up the windlass, parted the chain-cable, and commenced drifting again, the whole scope of both cables being paid out. That she, then, between eleven and twelve o'clock, brought up, about three quarters of a mile below Craney Island, in two and a half fathoms water, amongst and in sight of a number of other vessels, that she then thumped or struck on the shoals

[1] Barnard *v.* Adams, 10 How. 270; The Star of Hope, 9 Wall. 232; Fowler *v.* Rathbone, 12 Id. 117; Mutual Safety Ins. Co. *v.* Cargo of the George, Olcott 89, 157; Rea *v.* Cutler, 1 Sprague 135.

on a bank, and her head swinging around to the westward, brought her broadside to the wind and heavy sea; that the master, in this situation, finding no possible means of saving the vessel or cargo, and preserving the crew, slipped his cables, and ran her on shore for the safety of the crew and preservation of the vessel and cargo; that the vessel ran far upon the bank, where, after the storm, she was left high and dry, and it was found impracticable to get her off. We find, that the plaintiffs in this action were the owners of the said brig; the value of the said brig was $3000; that one-third part of the brig had been insured by the said Columbian Insurance Company; that no insurance had been effected for the remaining two-thirds. We further find, that the whole of the cargo on board said brig was of the value of $5335, of which the said Columbian Insurance Company insured $4920. We further find, that the cargo was afterwards taken out safely, and that the vessel, her tackle, &c., were sold for the sum of $256.40. If, on the matter aforesaid, the law be for the plaintiffs, then we find for the plaintiffs, and assess their damages to the sum of $1500; and if the law be for the defendants, then we find for the defendants."

In August 1825, the circuit court gave judgment in favor of the plaintiffs, for $1249, and the defendants prosecuted this writ of error.

The cause was argued by *E. J. Lee* and *Jones*, for the plaintiffs in error; and by *Semmes* and *Coxe*, for the defendants.

*333] The counsel for the plaintiffs in error contended:—*1. That the plaintiffs in the circuit court had not shown such a case as authorized any verdict against them. 2. That the special verdict did not find such facts as authorized the judgment of the circuit court. 3. If the defendants were liable at all for an average loss, the plaintiffs had already, in their action on the policy upon the vessel, obtained judgment for $2000; which, including the amount of the sales of the vessel, makes $2256.40, being more than the amount insured on the vessel, and the average loss, as reported by the auditor. 4. That the facts which were proved by the survey and depositions in the suit on the policy on the vessel, formed a part of the special verdict in this case. If they did, then the judgment of the circuit court ought to have been for the plaintiffs in error; or if the evidence in the record of this case was uncertain, then, for this reason, the verdict ought to be set aside.

The court having considered the agreement made before the trial, as excluding all the points presented on the part of the plaintiffs in error from examination, except the question of the liability of the plaintiffs in error, as the insurers on the cargo of the brig Hope, for an average contribution for the loss of the vessel, the arguments on that question are alone given.

Lee and *Jones* contended, that the maritime law imposed on the owners of the cargo no obligation to contribute, unless the vessel was saved. The total loss of the vessel exempted the cargo from contribution. Cited, 9 Johns. 9; Phil. on Ins. 339.

It is admitted, that whatever the master of a vessel, in distress, does for the general benefit of the whole, is binding on all interested, and all are responsible for his acts. Cited, Lex Mercatoria; Stevens on Average; 2 W. C. C. 299; 2 Serg. & Rawle 331. But in this case the acts of the master were not of this character; and a very important part of the duty imposed

upon him by the perils to which he was exposed, was omitted. He did not consult the officers of the vessel, before the vessel was run on shore. There must be shown an inevitable necessity for the stranding of the vessel; and that the same was the sole cause of the saving of the vessel and cargo; to create an obligation by the cargo to contribute; and the special verdict should have found all the facts. The facts are not found, but the evidence of the facts. The verdict only says, that the master, finding the existence of the necessity, ran the vessel on shore. It is denied, that the cases cited by the counsel for the defendants in error are authority in this court. The principle of the maritime law is, that the running the vessel on shore must be for the common benefit of all the property, both the vessel and the cargo; and this cannot be done by the absolute loss of the vessel. The master had no authority to do an act of this kind. The sacrifice cannot be made for the benefit of what is absolutely and totally destroyed by it; the sacrifice must not be for the vessel, the cargo *or the passengers, but for all; and it must be so successful as that part shall be saved by it. [*334

We must look to the Roman code for the principles which are to decide this question. It must be decided by principles of public law. Cited, 9 Johns. 9, and the cases referred to. The authorities are clearly in favor of the case there decided; and a great many of the authorities in the English writers concur on the question. All the law upon this question is derived from the Rhodian law; and by that law, the *salva navi* is indispensable, to create the liability for the contribution by the cargo for the injury done to the vessel. The saving of the vessel is essential. Cited, Holt on Shipping, ch. 7; Consolato de la Mer, by Boucher; Molloy's Commercial Law.

It is all-important, that the question presented by this case shall be decided, and that the law of average shall be uniform in the United States; different rules should not prevail in the states of the United States. A resort to the first principles of the maritime law, and ascending to the fountains of the code, will alone enable the court to come to a decision which will have this influence and effect.

Semmes and *Coxe*, for the defendants, contended, that the special verdict in the case shows, that the running the vessel ashore was a voluntary stranding and loss of the brig for the preservation of the vessel, crew and cargo; and that such stranding and loss of the brig, the cargo being saved, entitles the defendants in error to recover of the owners of the cargo (or of the underwriters, their substitutes) contribution as for a general average.

Semmes, for the defendants in error:—This is the case of a special verdict, finding all the facts in evidence, which are material to the question before this court. The facts found are briefly these: That the brig Hope, on a voyage from Alexandria to Barbadoes, was assailed by a violent storm, while proceeding down Chesapeake bay, in order to get out to sea; that she was for several days pressed by the fury of the winds and waves, and to prevent drifting on a lee shore, all her anchors were, at different times let go, and the cables paid out, until they all bore a strain. That, while in this situation, the violence of the storm increased, until the destruction of the vessel, crew and cargo seemed inevitable. Finding there was no hope, if he remained at anchor, certainly none, if he attempted to breast the fury of the storm, and that nothing remained for him but the last resort of run-

ning the vessel on shore, in order to save all or something, the master resolved on this desperate step. Accordingly, the vessel then riding at anchor, the master slipped his cables and ran her ashore, in the words of the special verdict, "for the safety of the crew, and the preservation of the vessel and cargo." The vessel ran high and dry, and it was found impracticable to get her off. She proved a total loss; and the crew and cargo were saved. *335] The cargo was re-shipped in another *vessel; and the owners of the vessel now are suing the underwriters on the cargo, for contribution to an average loss of the vessel and freight, because of a voluntary sacrifice of that vessel and freight for the benefit of all; the result being the preservation of the cargo. The act was done calmly and voluntarily, for the common safety. The question now to be determined is, whether the part saved (the cargo) shall contribute to the parts lost (the vessel and freight) in general average.

The question presented to this court is one of great importance to the commercial world. It has never been settled by the tribunal of highest resort in any country, and now, for the first time, comes up for final adjudication. The maritime writers of Europe have held opposite and conflicting opinions. Bynkershoek, Jacobsen, Valin, Voet and Browne have maintained the doctrine for which the defendants in error are now contending. Emerigon, Stevens and Huberus stand nearly alone on the opposite side. The marine ordinances of the European states have been uniform in their provisions; those of Antwerp, Königsberg and Friezeland, have been for the doctrine we support. The Ordonanza de Bilboa has embodied the same just and enlightened view taken by Bynkershoek and the other writers and ordinances named; while to the Rhodian law, as handed down to us by the civilians, though containing no express provisions for the case, we look for the foundation and the reason of our rule. The courts have been in conflict likewise. The marine judges of Amsterdam decided against the contribution, in such a case; but the fallacy of their judgment has been ably exposed by Bynkershoek. The question has never come directly before any court under the jurisdiction of Great Britain. In this country, the supreme court of New York have decided against the contribution. The circuit court of the United States for the third circuit, and the supreme court of Pennsylvania, have determined in favor of it. The court below awarded a judgment of contribution on this special verdict; the present writ of error has been prosecuted, and this court are now to pronounce and say, which is the better and the juster rule.

The law of Rhodes, "*De jactu*," established the principle of average, in cases of jettison of part of the cargo for the safety of all. The provision is express in respect to jettison, but no other case is named; the expression of one case will not, however, exclude others from coming within its reason. The case put in the Rhodian law is by way of example or illustration, and not as implying that average is exclusively confined to cases of jettison. To show this clearly, we need only resort to the authority of Emerigon and his followers. With a solitary and almost ludicrous exception, they admit, that if a ship be voluntarily stranded, when in peril at sea, when chased by an enemy, or by pirates, for the common safety, and be subsequently gotten off, and proceed on her voyage, then, that the cost of repairs shall afford a claim to the ship-owners for a general average. If the ship be partially

destroyed, there shall be an average; if the loss be *total, there shall be none. Such is the doctrine of Emerigon, and of the supreme court of New York.

Stevens, in his work on Average, p. 36, has gone further, and denies the average, in cases of partial damage to the ship, as well as of total loss. He admits the law to be against him; he admits the uniform practice at Lloyds to be against him, as well as the opinion of eminent members of the English bar. We may pass him by, and content ourselves with those who admit the contribution in cases of partial loss. Now, it is from the Rhodian law, that the advocates of this latter doctrine draw their authority. Let us go back to the great and fundamental principle of average established by that law, and see if it does not support a broader and more equitable construction.

To afford a case for applying the doctrine of average, the loss sustained must be a voluntary loss, for the common safety, when all are in imminent peril; and there must be a saving of some part thereby. The part saved shall contribute to the part lost. If goods are thrown overboard in a storm, for the purpose of lightening the vessel, and she and the remaining goods are saved, all shall come into contribution for the part lost; *nemo debet locupletari aliena jactura.* If damage be done voluntarily to a ship, to effect a jettison, as by cutting her sides, or the masts or rigging are cut away in a storm, to lighten the ship, these losses are subjects of a general average contribution. So, the doctrine of our opponents, in cases of a voluntary stranding, where the ship is got off, with partial damage. But if the ship is totally lost, they say, there shall be no contribution. Do not the reason and the equity of the rule as to avarage, apply as clearly and forcibly to cases of a total loss, as to cases of a partial loss? Where is the ground for drawing a distinction? If a distinction be drawn, as contended for, it involves its advocates in this glaring inconsistency and injustice; that where a party has suffered a voluntary minor evil, for the benefit of another, that other shall contribute to his loss out of the benefit resulting; but if, perchance, the voluntary suffering encountered should reach beyond a certain limit, and the sufferer should lose everything he risked, then he is unworthy of any compensation. Where there is a small equity, there shall be relief; where the equity is increased ten-fold, there shall be none. Such is the doctrine of the plaintiffs in error. It remains for those who draw the distinction, to show the necessity and the reason of it.

It is contended, that the master should have consulted with his officers and crew, before stranding the vessel, and that the special verdict does not find this fact. It has long since been conclusively settled, that such previous consultation and deliberation are not necessary. *Sims* v. *Gurney*, 4 Binn. 513.

It is likewise held on the other side, that even if there should be contribution for the vessel in this case, there should be none for the freight. There is no foundation for this objection. The freight follows the fate of the vessel; if the vessel be lost, the freight is also *lost. If there was any merit in the voluntary stranding of the vessel, whereby she [*337 was lost, the same merit attaches in respect to freight; for that was destroyed by the self-same voluntary act.

Mr. Semmes referred to the following authorities: 2 Kent's Com. 191.

Marsh. on Ins. 535, *et seq.*; *Da Costa* v. *Newnham*, 2 T. R. 407; *The Copenhagen*, 1 Rob. 289; *Walden* v. *Leroy*, 2 Caines 263; *Henshaw* v. *Marine Ins. Co.*, Ibid. 274. Jacobson's Sea Laws 346, 348, 350; 2 Bro. Civ. and Adm. Law 199; Bynk. Quæst. Juris. Priv. b. 4, ch. 24, tit. *de jactu*, p. 424; 2 Magens 200; Voet, Com. ad. Pand. 690; Valin 168; 1 Emerigon 602, 612, 615; *Sims* v. *Gurney*, 4 Binn. 513; *Gray* v. *Waln*, 2 Serg. & Rawle 229; *Caze* v. *Reilly*, 3 W. C. C. 298; Story's Abbott 342, 349, note; *Bradhurst* v. *Columbian Ins. Co.*, 9 Johns. 9; 3 Kent's Com. 233; Stevens on Average 36; *Eppes* v. *Tucker*, 4 Call 346; 4 Pet. 139; 11 Serg. & Rawle 69.

STORY, Justice, delivered the opinion of the court.—This is the case of a writ of error to the circuit court of the district of Columbia, for the county of Alexandria. There are many irregularities in the proceedings on the record; but as, in our judgment, they are all waived or cured by the agreement of the counsel, spread upon the record, which is, as to the matters in controversy in the suit, conclusive upon the parties, and constituted the basis of the proceedings at the trial and of the special verdict on which the judgment was given for the original plaintiffs in the court below, it is unnecessary to discuss their intrinsic force or validity. The main question in the case is, whether the voluntary stranding of a ship, in a case of imminent peril, for the preservation of the crew, the ship and cargo, followed by a total loss of the ship, constitutes a general average, for which the property saved is bound to contribution. We say, that this is the main question, because the special verdict finds that there was a voluntary running on shore of the brig Hope; that there was no other possible means of preserving the crew, the ship and cargo; that the running ashore was for this express object; and that, after the storm was over, the brig was left high and dry, and it was found impracticable to get her off: so that the facts are sufficiently precise and full, to present the question of general average, in its most simple and comprehensive form. Accordingly, our attention will, in the first instance, be addressed to the consideration of it.

Upon this question, the maritime jurists of continental Europe are not entirely agreed in opinion; and our own jurisprudence presents conflicting adjudications. It becomes the duty of this court, therefore, to examine and weigh these opposing opinions, and to ascertain, as far as it may, the true principle which ought to govern us on the present occasion. It is admitted on all sides, that the rule as to general average is derived to us
*338] from the Rhodian law, as promulgated and adopted in *the Roman jurisprudence. The Digest states it thus: If goods are thrown overboard, in order to lighten a ship, the loss incurred for the sake of all, shall be made good by the contribution of all. *Lege Rhodia cavetur, ut si levandæ navis gratiâ jactus mercium factus est, omnium contributione sarciatur, quod pro omnibus datum est.* Dig. lib. 14, tit. 2, c. 1. That the case of jettison was here understood to be put as a mere illustration of a more general principle, is abundantly clear, from the context of the Roman law, where a ransom paid to pirates to redeem the ship is declared to be governed by the same rule. *Si navis à piratis redempta sit, omnes conferre debere.* Dig. lib. 14, tit. 2, c. 2, § 3. The same rule was applied to the case of cutting away or throwing overboard of the masts or other tackle of the

ship, to avert the impending calamity (Dig. lib. 14, tit. 2, c. 3, c. 5, § 2); and the incidental damage occasioned thereby to other things. Without citing the various passages from the Digest, which authorize this statement, it may be remarked, that the Roman law fully recognised and enforced the leading limitations and conditions to justify a general contribution, which have been ever since steadily adhered to by all maritime nations. First, that the ship and cargo should be placed in a common imminent peril; secondly, that there should be a voluntary sacrifice of property to avert that peril; and thirdly, that by that sacrifice, the safety of the other property should be presently and successfully attained. Hence, if there was no imminent danger or necessity for the sacrifice, as if the jettison was merely to lighten a ship too heavily laden, by the fault of the master, in a tranquil sea, no contribution was due. See Abbott on Ship. pt. 3, ch. 8, § 1; 1 Emerig. Assur. ch. 12, § 39, art. 7, p. 604; Ibid. § 40, p. 605. So, if the ship was injured or disabled in a storm, without any voluntary sacrifice; or if she foundered or was shipwrecked, without design, the goods saved were not bound to contribution. Dig. lib. 14, tit. 2, c. 2, § 1; Ibid. c. 7; 1 Emerig. on Assur. ch. 12, § 39, p. 601–3. On the other hand, if the object of the sacrifice was not attained; as if there was a jettison to prevent shipwreck, or to get the ship off the strand, and in either case, it was not attained, as there was no deliverance from the common peril, no contribution was due. Dig. lib. 14, tit. 3, c. 5, c. 7; 1 Emerig. on Assur. ch. 12, § 41, p. 612, 616. The language of the Digest upon this last point is very expressive. *Amissæ navis damnum collationis consortio non sarcitur per eos, qui merces suas naufragio liberarunt—nam hujus æquitatem tunc admitti placuit, cum jactus remedio cæteris in commune periculo, salvâ nave, consultum est.* It is this language which seems in a great measure to have created the only doubt among the commentators as to the extent and operation of the rule; some of them having supposed, that the safety of the ship (*salvâ nave*) for the voyage, was, in all cases, indispensable, to found a claim to contribution; whereas, others, with far more accuracy and justness of interpretation, have held it to apply as a mere illustration of the general doctrine, to a jettison, made in the particular case, for the very purpose of saving the ship *and the residue of the cargo. In truth, the Roman law does not proceed upon any distinction as to the property sacrified, whether it [*339 be ship or cargo, a part or the whole; but solely upon the ground, that the sacrifice is voluntary, to avert an imminent peril; and that it is in the event successful, by accomplishing that purpose. And therefore, Bynkershoek has not hesitated to declare the general principle to be, that whatever damage is done for the common benefit of all is to be contributed for by all; and that as this obtains in a variety of cases, so especially, by the Rhodian law, it obtains in cases of jettison. *Generaliter placere potest, damnum pro utilitate communi factum, commune esse, utque in variis speciebus id obtinere aliunde constat, sic ex lege Rhodia, cum maxime obtinet in jactu.* Bynker. Quest. Priv. Juris. lib. 4, ch. 24, Introd.

These remarks seem proper to be made, in order to meet the suggestions thrown out at the argument, with reference to the actual bearings of the Roman law on the question before the court; and they may also serve in some measure to explain the true principles by which the question ought to be decided. In examining the foreign jnrists, it will be found, that there

is far less disagreement among them than has been generally supposed. All of them that have come within our own researches, or those of counsel, admit, that a voluntary stranding of the ship constitutes a case of general average, if there is not a total loss of the ship. Emerigon, in one passage, lays down the doctrine in the following broad language. "It sometimes happens, that to escape from an enemy, or to avoid an absolute shipwreck, the ship is run on shore in a place which appears the least dangerous. The damage suffered on this account is a general average, because it has been done for the common safety." 1 Emerigon Assur. ch. 12, § 13, p. 408. And for this he relies upon the Consolato del Mare, upon Roccus, Targa, Casaregis and Valin. It is true, that in another place, he says, "The damages which happen by stranding are a simple average for the account of the proprietors," citing the French ordinance; and then adds, "but it will be a general average, if the stranding has been voluntarily made, for the common safety, provided always that the ship be again set afloat; for if the stranding be followed by shipwreck, then it is, save who can." 1 Emerigon Assur. ch. 12, § 13, p. 614. And he then refers to the case of jettison, where the ship is not saved thereby, in which case, there is no contribution. Emerigon Assur. ch. 12, § 13, p. 616. Now, the analogy between the two cases is far from being so clear or so close as Emerigon has supposed. In the case of the jettison, to avoid foundering or shipwreck, if the calamity occurs, the object is not attained. But in the case of the stranding, whatever is saved, is saved by the common sacrifice of the ship, although the damage to her may have been greater than was expected. Surely, the question of contribution cannot depend upon the amount of the damage sustained by the sacrifice; for that would be to say, that if a man lost all his property for the common benefit, he should receive nothing; but if he *lost a part only, he should receive full compensation. No such principle is applied to the total loss of goods sacrificed for the common safety; why then should it be applied to the total loss of the ship for the like purpose? It may be said, that unless the ship is gotten off, the voyage cannot be performed for the cargo; and the safety and prosecution of the voyage are essential, to entitle the owner to a contribution. But this principle is nowhere laid down in the foreign authorities; and certainly, it has no foundation in the Roman law. It is the deliverance from an immediate impending peril, by a common sacrifice, which constitutes the essence of the claim. The Roman law clearly shows this; for by that law, it was expressly declared, that if, by a jettison in a tempest, the ship was saved from the impending peril, and afterwards, was submerged in another place, still contribution was due from all the property which might be fished up, and saved from the calamity. *Sed si navis, quæ in tempestate jactio mercium unius mercatoris, levata est, in alio loco submersa est, et aliquorum merces per urinatores extractæ sunt, data mercede, rationem haberi debere ejus, cujus merces in navigatione levandæ navis causa jactæ sunt ab his, qui postea sua per urinatores servaverunt.* Digest, lib. 14, tit. 2, l. 4, § 1; Boucher, Instit. au Droit Maritime (1805), p. 449; Abbott on Ship. part. 3, ch. 8, § 13. And besides, in a case like that now before us, the cargo might be transshipped in another vessel, and the voyage be successfully performed. But, in truth, it is the safety of the property, and not of the voyage, which constitutes the true foundation of general average. If the whole cargo

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were thrown overboard, to insure the safety of the ship, the voyage might be lost; but nevertheless, the ship must contribute to the jettison. Why, then, if the ship is totally sacrificed for the safety of the cargo, should not the same rule apply? Suppose, a ship, with a cargo of cotton on board, is struck by lightning and set on fire, and it becomes indispensable, for the salvation of the cargo, to sink the ship on a rocky bottom, and she is thereby totally lost—would not this constitute a case of contribution? Suppose, a cargo of lime were accidentally to take fire in port, and it became necessary, in order to save the ship, that she should be submerged, and the cargo was thereby totally lost, but the ship was saved, with but a trifling injury; would it not be a case of contribution?

So far as we know, Emerigon stands alone among the foreign jurists, in maintaining the qualification, that it is necessary to a general average, that the ship should be got afloat again, after a voluntary stranding. Valin certainly does not support it; for he only states, that if, to avoid a total loss, by shipwreck or capture, the master runs his vessel ashore, the damage which he shall suffer on that account, and the expenses and the charge of putting her afloat again, are general average; and he gives the reason, because all has been done for the common safety. 2 Valin, Com. 168; Ibid. 205, 207, 209. See also, 2 Bell. Com. p. 589 (5th edit. 1826). Beyond all doubt, Valin is correct in this statement; but then he was merely discussing the *point, whether the expenses of getting the ship afloat was, when she was gotten off, a subject of general average; and not the point, whether, if the ship was totally lost, the whole loss was not a general average; his reasoning was *diverso intuitû*. [*341

On the other hand, the Consolato del Mare, one of the earliest and most venerable collections of maritime law, lays down the general rule, without any such qualification. Consolato del Mare, ch. 192–3; Boucher, Consulato de la Mer, ch. 195–6, § 487–94; as also does Roccus, in his Treatise *de Navibus et Naut.* Roccus *de Nav. et Naut.* n. 60. Indeed, it may be found stated in the same general form, in the Roman law, where it is said, without referring to the manner and extent of the damage, that the whole damage voluntarily done to the ship for the common good, must be borne by a common contribution. *Sed si voluntate vectorum, vel propter aliquem metum id detrimentum factum sit, hoc ipsum sarciri oportet.* Dig. lib. 14, tit. 2, c. 2, § 1, c. 3, l. 5, § 1. And Vinnius, in his commentary, after speaking of an involuntary shipwreck, in which case there shall be no contribution, adds, that the damage suffered by a sacrifice made for the good of all, to avoid a common danger, is to be made good by the contribution of all. Vinnius *Packium ad Legem Rhodiam*, c. 5. Voet, in his commentary on the Digest, is far more explicit, and asserts, that if the ship is voluntarily run on shore for the common safety, and thus has perished, the goods being saved, contribution is due. Voet ad Pand. lib. 14, tit. 2, § 5. Bynkershoek has treated the very question in his usual clear and luminous manner. After citing a decision of certain maritime judges of Amsterdam, who held, that if a cable of the ship was voluntarily cut to avert a peril, and thereby the anchor as well as the cable was lost, contribution should not be made for the anchor, because there could not be said to be a voluntary jettison; and who also, for the like reason, held, that if the ship was run on shore and lost, the goods should not contribute, because there could be no contribution

unless the ship was saved (*quia nihil contribuitur, nisi salvâ nave*); he expressed his pointed disapprobation of the decision, saying, that it exhibited very little acuteness, for in all such cases the goods cannot otherwise be saved, and the peril compels us to the act; and the safety of the ship, in case of a jettison, is not otherwise sought, than, the ship being saved, the goods may thereby be saved; and therefore, the goods saved, and the damage occasioned thereby, ought to be subject to contribution. And he accordingly holds, that the loss of the ship, like the loss of her tackle, is to be deemed a general average, wherever she is sacrificed, by a voluntary stranding, for the general safety; insisting, that this doctrine is fully supported by other authorities cited by him. The doctrine of the Amsterdam judges upon the principal point before them, has been utterly repudiated by all maritime nations, in later times, as it seems to have had no foundation in any antecedent adjudications. See Cleirac, *Us et Coutumes de la Mer*, art. 21–3. Indeed, there are early positive ordinances
*342] of some of the maritime states, which positively provide *for the very case of a total loss of the ship, by a voluntary stranding, as a general average (as, for example, the ordinance of Königsburg); and others, in which it is usually, if not necessarily, implied. See 2 Magens 200, &c. It deserves consideration, also, that the modern maritime writers, Jacobsen, Benecke and Stevens, all admit this is to be the result of the foreign jurisprudence and ordinances. Jacobsen's Sea Laws, by Frick, b. 4, ch. 2, p. 358; Benecke on Insur. 219–21; Stevens on Average 33–4 (edit. 1824). See 2 Bell's Com. p. 589 (5th edit. 1826). Stevens also, notwithstanding his own opposition to the rule, admits that it appears to have been the practice at Lloyd's, as far back as the time of Mr. Weskett; and that recent opinions of eminent counsel in England, taken on the very point, fully admit and confirm it. Stevens on Average 33–5 (edit. 1824). Dr. Browne, in his Treatise on the Civil and Admiralty Law, adopts the same opinion, saying, "It has been disputed, whether, when a ship was voluntarily run ashore and lost, but the cargo saved, it should contribute, because the rule was, that no contribution took place when the ship was lost. But it was truly held, that the rule would be absurdly applied to a case where the ship was grounded purposely to save the merchandise, and that with success." 2 Browne's Civil and Adm. Laws 199.

From this review of some of the leading opinions in foreign jurisprudence, brief and imperfect as it is, it seems to us, that the weight of authority is decidedly in favor of the present claim for general average.

In respect to domestic authorities, we have already had occasion to intimate that there are conflicting adjudications. In *Bradhurst* v. *Columbian Insurance Company*, 9 Johns. 9, the supreme court of New York held, that where a ship is voluntarily run ashore, for the common good, and she is afterwards recovered, and performs the voyage, the damages resulting from this sacrifice are to be borne as a general average; but that where the ship is totally lost, it is not a general average. The ground of this opinion, as pronounced by Mr. Chief Justice KENT, seems mainly to have been, that this was the just exposition of the Rhodian and Roman law, and that the weight of authority among foreign jurists clearly supported it. With great respect for the learned court, we have felt ourselves compelled to come to an opposite conclusion, as to the true interpretation of the Roman text, and of the continental jurists. We agree with the learned court, that when a

ship is voluntarily run ashore, it does not, of course, follow, that she is to be lost. The intention is not to destroy the ship, but to place her in less peril, if practicable, as well as the cargo. The act is hazardous to the ship and cargo, but it is done to escape from a more pressing danger; such as a storm, or the pursuit of an enemy or pirate. But, then, the act is done for the common safety; and if the salvation of the cargo is accomplished thereby, it is difficult to perceive, why, because from inevitable calamity, the damage has exceeded the intention or expectation of the parties, the whole sacrifice should be borne by *the ship-owner, when it has [*343 thereby accomplished the safety of the cargo. If one mast is cut away, and thereby another mast is unexpectedly and unintentionally also carried away, by the falling of the former, it has never been supposed, that both did not come into the common contribution. If, in the opening of the hatches, and the jettison of some goods to lighten the ship, other goods are, unexpectedly and unintentionally, but accidentally, injured or destroyed, it has never been doubted, that the latter were to be brought into contribution, to the extent of the loss or damage done to them. It is not like the case of saving from a fire, *tamquam ex incendio*, save who can. But it is like the saving of the cargo from destruction by fire, by the scuttling and submersion of the ship. Upon principle, therefore, we cannot say that we are satisfied that the doctrine of the supreme court of New York can be maintained; for the general principle certainly is, that whatever is sacrificed voluntarily, for the common good, is to be recompensed by the common contribution of the property benefited thereby.

But the same question has come before other American courts, and has there, with the full authority of the New York decision before them, received a directly opposite adjudication. Our late brother, Mr. Justice Washington, than whom few judges had a clearer judgment, or more patient spirit of inquiry, had the very point before him in *Caze* v. *Reilly*, 3 W. C. C. 298; and after the fullest argument, and the most extensive research into foreign jurisprudence, he pronounced an opinion that there was no difference between the case of a partial and that of a total loss of the ship, by a voluntary stranding, and that both constituted equally a case of general average. The supreme court of Pennsylvania had, a short time before, in *Sims* v. *Gurney*, 4 Binn. 513, adopted the same doctrine; and again in *Gray* v. *Waln*, 2 Serg. & Rawle 229, upon a re-argument of the whole matter, with all the subsequent lights which could be brought before it, adhered to that opinion: and this has ever since been the established law of that court. We have examined the reasoning in these opinions, and are bound to say, that it has our unqualified assent: and we follow, without hesitation, the doctrine, as well founded in authority and supported by principle, that a voluntary stranding of the ship, followed by a total loss of the ship, but with a saving of the cargo, constitutes, when designed for the common safety, a clear case of general average.

Having disposed of the main question, it now remains to say a few words as to some minor points suggested at the argument. In the first place, as to the objection, that here the stranding does not appear to have been made, after a consultation with the officers and crew, and with their advice. There is no weight in this objection. A consultation with the officers may be highly proper, in cases which admit of delay and delibera-

tion, to repel the imputation of rashness and unnecessary stranding by the master. But if the propriety and necessity of the act are otherwise sufficiently made out, *there is an end of the substance of the objection. *344] Indeed, in many, if not most, of the acts done on these melancholy occasions, there is little time for deliberation or consultation. What is to be done, must often, in order to be successful, be done promptly and instantly by the master, upon his own judgment and responsibility. The peril usually calls for action, and skill, and intrepid personal decision, without discouraging others by timid doubts or hesitating movements. The very point was decided in *Sims* v. *Gurney*, 4 Binn. 513, upon ground entirely satisfactory. And it has been well remarked, by more than one maritime jurist, that too scrupulous an adherence to forms, on such occasions, has justly a tendency to excite suspicions of fraud. Targa has stated, that in all his experience of sixty years, he never knew of but five cases of regular jettisons, all of which were suspected of fraud, because the forms had been too well observed. Abbott on Ship. pt. 3, ch. 8, § 3 ; 1 Emerig. Assur. ch. 12, § 40, p. 605.

The only other remaining point is, whether freight ought to have been brought into the account, either as a part of the loss, or of the contributory value. The auditor's report, which was adopted by the court, allowed the freight as a part of the loss, and also of the contributory value. It is perfectly clear, that if a part of the loss, the freight ought also to contribute. And it seems to us, that as, by the loss of the ship, the freight was totally lost for the voyage, it was properly included in the loss, and as a sacrifice by the ship-owner for the common benefit. The goods, if reshipped in another vessel, must be presumed to be so for a new and correspondent freight, to be borne by the ship-owner or the shipper, according as the one or the other should seek to perform the entire voyage for his own benefit. The ship-owner could only earn the original freight, by a transshipment ; and if he abandoned that intent, the shipper must enter into a new contract and enterprise with others. In the case of *Caze* v. *Reilly*, 3 W. C. C. 298, although the objection as to freight was saved, it was abandoned at the argument. In the case of *Gray* v. *Waln*, 2 Serg. & Rawle 229, the freight lost was expressly allowed in the general average. No other objections have been taken to the auditor's report, or his adjustment thereof ; and therefore, upon the other particulars of that adjustment we give no opinion.

Upon the whole, our opinion is, that the judgment of the circuit court ought to be affirmed, with costs.

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

*Richard C. L. Moncure and Walter P. Conway, Executors of Mary James, Plaintiffs in error, *v.* Ann R. Dermott, Defendant in error.

Usury.

An action of covenant was instituted by the executors of M. J., upon an obligation executed by A. R. D., under seal, to M. J., by which she agreed to pay a certain note or bond, loaned by M. J. to A. R. D., which had been sold by A. R. D. at a usurious discount and on a usurious contract, the bond or note of M. J. had been given to enable A. R. D. to raise money to pay a debt due by her, and for which the note of M. J. had been previously loaned to her. It was denied by the executors of M. J. that she had knowledge of the usurious dealing in which the bond or note of M. J. was sold; the executors of M. J. were obliged to pay a large portion of the note or bond, and the action was instituted to recover so much as they had paid; A. R. D. set up the usury between her and the person to whom she had sold the note or bond, as a defence to the suit of the executors of M. J. It was *held*, that the action on the covenant of A. R. D. could be maintained; and that the usurious dealing between A. R. D. and the purchaser of the note or bond of M. J., did not render the covenant of A. R. D., to pay the bond or note, invalid; the court said, the contract between the defendant and the purchaser of the bond, if embracing no other person than themselves, could affect no contract between other parties, previously made; and whether that contract was usurious, depended on the intention of the parties to it. If it was made, *bonâ fide*, for the sale and purchase of the bond, although at a discount which would insure to the purchaser twelve per cent. a year for the money advanced, it would not be usurious; if, on the other hand, the sale of the bond was a mere cover for avoiding the statutes against usury, and the real intention of the parties was to make a contract for the loan of money, at a higher rate than the legal interest, then the contract was usurious; but to involve M. J. in the usury, and to extend its taint to the covenant of A. R. D. it must be shown by proof, that M. J. executed the bond or note sold, for the purpose of aiding A. R. D. to borrow money at usurious interest, and not to enable A. R. D. to raise money by selling it in the market. When the holder of M. J.'s note threatened proceedings on it, it was not necessary that the executors of M. J. should give notice thereof.

No subsequent confirmation of a usurious contract, nor any new contract, stipulating to pay the debt, with the usurious interest, will make it valid.

It is the settled law of Virginia, that the *bonâ fide* purchaser of a bond or note may take it at any rate or discount, however great, without violating the statute.

Moncure *v.* Dermott, 5 Cr. C. C. 445, affirmed.

Error to the Circuit Court of the District of Columbia, and county of Washington. The plaintiffs in error, executors of Mary James, instituted an action of covenant against the defendant, on the following instrument of writing:

"Whereas, Mary James has executed her bond or note, dated the 28th day of November 1828, payable to me, on demand, for the sum of $2620, which said bond or note was merely loaned to me for the purpose of raising money upon, and whereas, I have, since the execution of the said bond or note as aforesaid, assigned it to Philip Alexander, of Fredericksburg, for value received of him, I do, therefore, hereby bind myself, my heirs, executors and administrators, to pay or discharge the said bond or note, with all interest that may accrue thereon, when the same shall become due and payable. Given under my hand and seal, this 12th day of August 1829.

Ann R. Dermott." [seal.]

*The evidence showed, that the note of Mary James, which had been assigned to Philip Alexander, was not fully paid by Ann R. Dermott, and that a large portion of the same remained unpaid at the death of Mary James, who had executed a deed of trust to secure the payment of [*346

it ; and that her executors (Philip Alexander having ordered the deed of trust to be enforced by the sale of the land and negroes conveyed by the deed), paid the same out of the funds of the estate in their hands. The defendant alleged usury in the transaction for the loan of the money ; and by an agreement between the counsel for the plaintiff ; and the defendant, usury was allowed to be given in evidence, as if specially pleaded.

On the trial of the cause, certain bills of exception to the ruling of the court were filed by the counsel for the plaintiff and the jury, under the charge of the court, gave a verdict for the defendant ; upon which the circuit court gave judgment. The plaintiffs prosecuted this writ of error. The case, and the whole of the plaintiffs' bills of exception, are fully stated in the opinion of the court.

The case was argued by *Moncure* and *Key*, for the plaintiffs in error ; and by *Hoban* and *Jones*, for the defendant.

Key, for the plaintiffs, contended, that admitting usury to have taken place between Ann R. Dermott and Philip Alexander, in the original loan of the money, this could not affect the transaction between Ann R. Dermott and Mary James, the testatrix of the plaintiffs in error. This usury was unknown to Mary James, and the executors have been obliged to pay to Philip Alexander the balance of the debt. To affect the covenant on which suit is brought, it must be shown to have been a contract for a usurious loan of money, or a security for such a loan. Laws of Virginia ; Statutes of 12 Car. II. c. 13 ; 12 Ann. c. 16 ; 13 Eliz. The suit is brought on a contract between Ann R. Dermott and Mary James. It is not a suit to recover money loaned, nor is the obligation given as a security for a loan.

Mary James had loaned her note to the defendant, to enable her to raise money on it, by selling it for her own use. This had been done, long before the execution of the obligation on which this suit is brought. The instrument is manifestly a covenant to secure Mary James from liability for the loaned note. The covenant is to discharge the note, when due, and she is to be secured from the payment of the note. 14 Johns. 177 ; *Offley* v. *Warde*, 1 Lev. 235. The covenant is not to Alexander, nor is it given to pay usurious interest. Alexander is not a party to it ; and it was never delivered to him, nor made for his benefit. Had it been made and delivered to Alexander, it would have been *nudum pactum*. The defendant was already fully liable to him, on her assignment to him of the note of Mary James, and there would, therefore, have been no consideration for it.

*347] *What law avoids such an instrument ? Suppose, Mary James, instead of lending her note to the defendant, had loaned the money to pay the usurious debt, and had taken a note for its repayment ; it is settled, that usury in the original loan would be no defence to such a note ; nor is it a defence, in any case, where a subsequent contract is made with a third party who is a stranger to the usury. 1 Mass. 138 ; 9 Ibid. 45 ; Cro. Eliz. 588, 642 ; 2 Madd. 279 ; 4 Johns. 322, 333 ; 10 Ibid. 185, 195 ; Story's Conflict of Laws 206–7 ; *De Wolf* v. *Johnson*, 10 Wheat. 367.

It was said, in the circuit court, that the plaintiffs should have given notice of Alexander's claim upon Mary James's note, and should have called on Ann R. Dermott to defend against the claim. But the obligation is exactly otherwise. The defendant should have given the executors of Mary

James notice not to pay the note, and set up the usury. 8 Wend. 458–9. The plaintiffs were not bound to make defence. They had no proof of usury. The defendant stood by, and saw the executors pay the debt, and afterwards set up the usury between herself and Alexander, against the executors, who had paid her debt, ignorant of any defence that could be made to the claim of payment from the estate of Mary James.

Moncure, for the plaintiffs in error, said :—The three instructions prayed for by the plaintiffs and refused by the court below, present for the decision of this court the three following propositions. 1. That a surety paying a usurious debt, without being notified by the principal of the existence of the usury, and instructed, on that ground, to resist the payment, is entitled to recover from the principal, the money paid. 2. That a surety paying a usurious debt, without any knowledge of the usury, or of any other objection to the validity of the debt, and under the belief that the same is *bonâ fide* due, is entitled to recover from the principal the money paid. 3. That the executors of a surety paying a usurious debt, without any knowledge of the usury, and after the principal had waived and abandoned all objection to the validity of the debt, and assented that the same should be considered as valid and legal, are entitled to recover from the principal, the money paid.

The affirmative of these three popositions is maintained by the counsel for the plaintiffs, on the following authorities. *Robinson* v. *May*, Cro. Eliz. 588 ; *Button* v. *Downham*, Ibid. 643 ; *Basset and Prowe's Case*, 2 Leon. 166 ; Comyn on Usury, 186–96 ; *Ford* v. *Keith*, 1 Mass. 139 ; *Bearce* v. *Barstow*, 9 Ibid. 45 ; *Parker* v. *Rochester*, 4 Johns. Ch. 332 ; 1 Tuck. Bl. Com. 379 ; *Merchant* v. *Dodgin*, 2 M. & Scott 633 ; *Cuthbert* v. *Haley*, 8 T. R. 390 ; *Jackson* v. *Henry*, 10 Johns. 185 ; *Chadbourn* v. *Watts*, 10 Mass. 121 ; *Stone* v. *Ware*, 6 Munf. 541 ; *Ellis* v. *Warnes*, Cro. Jac. 33 ; *De Wolf* v. *Johnson*, 10 Wheat. 367 ; *Crenshaw* v. *Clark*, 5 Leigh 65 ; *Spangler* v. *Snapp*, Ibid. 478 ; **Turner* v. *Hume*, 4 Esp. 11 ; [*348
Scott v. *Lewis*, 2 Conn. 132 ; *Green* v. *Kemp*, 13 Mass. 515.

The covenant upon which this suit was brought is, in effect, a covenant of indemnity ; and the plaintiffs having paid the supposed usurious debt, without any knowledge or suspicion of the usury, are entitled to recover on the covenant, the money paid by them, though they made the payment without suit and without notice to the defendant. Such would be the case, on general principles, but it is especially so here, where the principal had removed from the state, and where payment by the plaintiffs was necessary to save the property of their testatrix from sale under the deed of trust. *Douglass* v. *Clark*, 14 Johns. 177 ; *Chace* v. *Hinman*, 8 Wend. 452 ; *Ken* v. *Mitchell*, 2 Chit. 487.

The plaintiffs also contend, that there is error in the judgment of the court below, in granting the instruction prayed for by the defendant.

1. The hypothetical case stated in that instruction is not a case of usury. Usury will not be presumed ; and if, upon any rational hypothesis, the transaction could have been legal, it will not be presumed to have been usurious. The statute of usury is highly penal in its character, and should not be applied without strong and clear proof of the usury. *Crenshaw* v. *Clark*, 5 Leigh 65 ; *Whitworth* v. *Adams*, 5 Rand. 404–25. The contract in this

case having been made in Virginia, must be governed by the law, and the decisions of that state. It has been there decided, that the *bonâ fide* purchase of a bond, made for sale, at a greater discount than legal interest is not usurious. *Hansborough* v. *Baylor*, 2 Munf. 36 ; also, *Taylor* v. *Bruce*, Gilm. 42 ; *Whitworth* v. *Adams*, 5 Rand. 333. There is nothing in the facts stated in the defendant's instruction, inconsistent with a *bonâ fide* purchase of the bond from the defendant. The purchaser may well have supposed, that Mary James was indebted to the defendant in a sum equal to, or exceeding, the amount of the bond ; and that the defendant was willing to sell so much of the debts as would raise the sum which she needed, and no more. Or he may have well supposed, that Mary James, being a maiden aunt of the defendant, and warmly attached to her, had given her the bond which was offered to him for sale. In either case, the transaction would have been perfectly legal ; and knowledge of it on the part of the purchaser, would not have made the purchase usurious.

2. The court in giving the instruction, weighed the evidence and decided upon the facts which should have been left exclusively to the jury. 5 Rand. 397, 407 ; 6 Leigh 517 ; 4 Maule & Selw. 192 ; 3 Eng. Com. Law 97 ; Ibid. 109 ; 5 Ibid. 417. Where the facts found in a special verdict, or stated hypothetically in an instruction, show a loan or forbearance of money, at more than legal interest, the corrupt agreement is an intendment of law, and need not be expressly found or stated ; but where the transaction presents itself in *the form of a sale of a bond, or in any other form which may be used as a shift or device to evade the statute, the corrupt intent to evade the statute is a question of fact, which must be left to the jury. The case of *Roberts* v. *Trenayne*, Cro. Jac. 507, is in accordance with this distinction.

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Hoban and *Jones*, for the defendant, contended, that as to so much of the plaintiffs' exceptions to the decision of the circuit court as went to the refusal of the instructions to the jury, moved on the part of the plaintiffs, all the said instructions were properly refused, as being erroneous on the general principles of law assumed in them ; or, even if correct in their principles, yet they were propounded with such qualifications and adjuncts, as were wholly inadmissible, and vitiated the instructions throughout their entire frame.

As to the instruction finally granted, at the instance of the defendant, upon the hypothetical state of facts therein set forth, it is contended, that the facts assumed are fairly deduced from the evidence ; not only sufficiently pertinent to the conclusions of fact assumed, but going to the clearest proof of those conclusions ; that the circuit court has, nevertheless, fairly left every fact, and every conclusion of fact, to the free and unbiassed judgment of the jury ; that such facts, being found true, do amount, in every circumstance, both of act and intent, to technical usury, in both the forms stated by the court ; and that the legal conclusion of usury would follow from such facts found in a special verdict ; yet the court has left all the conclusions and presumptions of usury from the facts, equally as the facts themselves, to the judgment and discretion of the jury.

Mary James was acquainted with the whole transaction for procuring the money from Philip Alexander, and she cannot be excluded from the

influence of the law on the subject of usury, by coming forward as a suitor on the obligation of guaranty, given by the defendant error. The original note, for the payment of which the money was procured from Alexander, was the note of Mary James. She was the debtor on that note, and originally liable for its payment. It was to relieve her from this liability, the money was procured by the usurious dealing between the defendant and Alexander; of all the circumstances, she was fully cognisant.

How is the law settled with regard to principal and surety, when the surety is collaterally liable for a usurious contract? It is claimed, that notice of the nature of the transaction is not necessary. If the contract was originally usurious, the guarantee is void. Comyn on Usury 133. A new contract made by the parties, with a stranger, ignorant of the usury, is not affected by it, and is valid. But if the old contract is continued, and is usurious, no recovery can be had. But on a new contract it is different. Comyn on Usury 196; 1 Mass. 137. The obligation of the defendant, on which this suit is brought, could have been enforced against her in a court of chancery, by *Alexander; it was, therefore, a direct obligation to sustain a usurious contract. [*350

McKinley, Justice, delivered the opinion of the court.—This cause is brought before this court upon a writ of error to the circuit court of Washington county, in the district of Columbia. The plaintiffs brought suit against the defendant, in the court below, upon a covenant executed by the defendant as follows:

"Whereas, Mary James has executed her bond or note, dated the 28th day of November 1828, payable to me, on demand, for the sum of $2620, which said bond or note was merely loaned to me for the purpose of raising money upon; and whereas, I have, since the execution of said bond or note, assigned it to Philip Alexander, of Fredericksburg, for value received of him; I do, therefore, hereby bind myself, my heirs, executors and administrators, to pay and discharge the said bond or note, with all interest that may accrue thereon, when the same shall become due and payable. Given under my hand and seal, this 12th day of August 1829.

Ann R. Dermott." [seal.]

To this suit the defendant pleaded *non assumpsit*, with leave to give usury in evidence. At the trial, it was proved, that the testatrix became principal in a bond to Thomas Poultney & Son, of Baltimore, bearing date the 31st day of March 1826, for the sum of $3633; it being for the payment of a debt due by the defendant, who also signed the bond, payable on the 23d day of November 1828; and that the testatrix executed a deed of trust upon her land and negroes, to secure and save harmless William C. Beale, John Moncure and Thomas Ledden, who had become sureties to said bond, at the request of the testatrix; and that the reason why she gave her own bond for the debt of the defendant was, because the defendant could not give satisfactory security to the sureties; that in the spring of the year 1828, the defendant applied to John Moncure, to aid her in borrowing money to pay off the bond to Poultney & Son, who informed her, that he did not believe that money could be borrowed in Fredericksburg, at legal interest; and advised her to procure the note of the testatrix, who was her aunt, and sell it in the market. Several conversations took place, between that time

and the next November, between Moncure, acting as agent of the defendant, and Philip Alexander, of Fredericksburg, in relation to the sale of a bond or note of the testatrix; when, finally, Alexander agreed, that he would buy the bond, provided he could make at the rate of twelve per centum a year upon his money, and obtain security for its final payment by a deed of trust upon the land and negroes of the testatrix. While these negotiations were pending, the testatrix addressed a letter to Alexander, dated the 25th
*351] of November 1828, in which she stated, that her *niece, the defendant, had informed her, that she intended selling and assigning to him the bond of the testatrix for $2880, payable on demand, and proposing, if he would give her time for the payment of the money, she would give a deed of trust upon her land and negroes, to secure its payment. These negotiations were protracted until the money to Poultney & Son was so nearly due that there was not time sufficient to complete the arrangements in relation to the bond and security; and Alexander agreed to advance the sum required, $2340, upon an undertaking, on the part of Moncure and Beale, that they would refund the money to him, if the defendant failed to assign the bond, and the testatrix to execute the deed. On the 1st of December 1828, the defendant assigned to Alexander the bond of the testatrix for $2620; and on the 10th day of the same month, the testatrix executed the deed of trust, in which it was stipulated, that the bond was to be paid at the end of two years, with legal interest.

During all this time, the testatrix and the defendant lived together in Virginia, some distance from Fredericksburg. The defendant afterwards removed to Washington, where she resided when this suit was commenced. From the month of April 1831, to the month of May 1832, she made several payments to Alexander on the bond; and by letters to the testatrix, expressed her anxious desire to pay it off, that the testatrix and her property might be released from further responsibility on her account. After the death of the testatrix, Alexander put the bond into the hands of the trustee, with directions to sell the trust property, unless, within a reasonable time, the plaintiffs paid the balance due.

The plaintiffs prayed the court to instruct the jury, that it is not competent for the defendant in this action to deny, by plea or otherwise, the validity of the note of 28th November 1828, recited in the covenant on which this suit is brought, and that she is estopped from setting up, in this action, any alleged usury, as affecting the validity of said note; that the plaintiffs are entitled to recover in this action the sums which the jury are satisfied, from the evidence, were paid by the plaintiffs to Philip Alexander, on the bond dated 28th November 1828; unless the defendant proves to the jury, that before such payments, the plaintiffs were notified that the bond of 28th November 1828 was tainted with usury, and instructed to dispute the same; which the court refused. And then further prayed the court to instruct the jury as follows: that if the jury should believe from the evidence, that the note of Mary James to the defendant, assigned by Alexander, dated 28th November 1828, was made on a usurious agreement entered into between said defendant and said Alexander, but that the plaintiffs had no knowledge of such usury, at the time they were called upon to pay the balance due on the note, nor at any time before, and paid the same, under the belief that the same was *bonâ fide* due, and without any knowledge that there was any

objection to the validity of said note; or without any notification or communication from the defendant, then the plaintiffs *are entitled to recover; unless the jury should be satisfied from the evidence, that [*352 the said Mary James knew of the said usurious agreement, under which the said note was given and assigned as aforesaid; which the court also refused. And further prayed the court as follows: that if the jury should believe from the evidence, that the note of Mary James, the defendant, assigned by her to Alexander, dated 28th November 1828, was made on a usurious agreement, entered into between said defendant and said Alexander, but that the plaintiffs had no knowledge of such usury, at the time they were called upon to pay the balance due on the note, nor at any time before, and paid the same, under the belief that the same was *bonâ fide* due, and without any knowledge that there was any objection to the validity of said note, and without any notification or communication from the defendant; and if the jury believe from the evidence, the defendant waived and abandoned all objection to the validity of said note, and assented that the same should be considered as a valid and legal obligation, then the plaintiffs are entitled to recover; and it is competent for the jury to infer such waiver and assent, if they shall believe from the evidence, that the defendant, after obtaining said money, made payments of interest, as the same became due, and expressed her desire and intention to pay the said note, and her anxiety to save her aunt's property from sale under the said deed of trust; which the court also refused. To all which refusals by the court to give the several instructions as prayed, the plaintiffs excepted.

And the plaintiff's counsel then further prayed the court as follows: that if the jury believe from the evidence, that there was no loan of money from Alexander to defendant, secured by the bond of the 28th November 1828, but that the said bond was *bonâ fide* purchased by said Alexander of defendant, at a discount exceeding the legal rate of interest, the said Alexander not knowing when he purchased said bond, that the same was loaned by Mary James to the defendant solely to raise money on, the transaction is not usurious, and the plaintiffs are entitled to recover in this action the moneys paid by them to Alexander on said bond; and further, if the jury should believe, that Philip Alexander, when he paid the money and took the note as aforesaid, intended to buy the said note for the amount given on it, not knowing that the note was made by Miss James to defendant, in order to raise money on it, and did not mean, by disguising the advance under the form of a purchase, to evade the statute of usury, then such purchase was lawful; which prayers the court gave as prayed, and to which the defendant excepted.

And the defendant's counsel thereupon prayed the court as follows: if the jury find and believe, from the evidence aforesaid, that for several months before the execution and assignment of the bond or note mentioned and described in the covenent on which the suit is brought, there were such negotiations and propositions pending between said John Moncure (acting in behalf of defendant) and *said Philip Alexander, as are mentioned and set forth in said affidavits of Moncure and Alexander, and in the [*353 papers and exhibits therein referred to, that the true and genuine nature and object of such negotiations and propositions, and of the successive arrangements and understandings resulting from them, as really contem-

plated by both parties, were, that said Alexander should make an advance of money to defendant, upon a future bond or note of said Mary James, payable to defendant, and by her to be assigned to said Alexander, under the name and form of a sale of such bond or note at a discount, above legal rate of interest; that such discount from the amount of such bond or note, should be so adjusted, as that the difference between the full amount of the bond or note, and the sum advanced on it, should be equivalent to an interest at the rate of twelve per cent. per annum on the sum actually advanced for the time of forbearance, to be given on such bond or note; that all the said preliminary negotiations, propositions and arrangements were, just before the execution and assignment of the bond or note referred to in the covenant set forth in the plaintiffs' declaration (such bond or note being the same note under seal, or bill obligatory, above given in evidence by plaintiffs, with the said convenant, and annexed to the said original affidavit of said J. Moncure, as aforesaid), terminated in an arrangement so modifying the before pending propositions and arrangements aforesaid, as that said Alexander should immediately advance the defendant $2340, and that defendant should assign to him a note or bond thereafter, to be drawn and executed by said Mary James, for such amount as should make the difference between the sum so advanced, and the sum to be ultimately received by him for the principal and interest of such bond or note, equivalent to an interest of twelve per cent. per annum on the sum so advanced, according to the principle on which said Alexander, in his letter, a copy of which is on the record, to said Moncure, insisted, that the profits of the transaction should be calculated and secured, and that the payment of such bond or note should be collaterally secured by a deed in trust of the land and slaves of said Mary James. That the said Alexander, in pursuance and execution of such arrangement and understanding, did advance the said $2340 to defendant, or for her use; that the said Mary James, in the pursuance and execution of the same arrangement and understanding on her part, did afterwards, on the 28th November 1828, execute and deliver the said note under seal, or bill obligatory, of that date, and afterwards, on the 10th December 1828, duly execute and deliver to said J. Moncure and P. Alexander, the said deed in trust, bearing that date, as above given in evidence by defendants, and annexed to the said cross-examination of said Moncure, a copy of which is on the record, and that the defendant, in the pursuance, and execution of the said arrrangement and understanding, did assign the said bill obligatory to said Alexander, immediately on the execution of the same by said Mary James; that the amount of said securities, and the time with which said Mary James was indulged *by said deed, in trust for payment, were knowingly and designedly calculated and adjusted by and between said Alexander and said Moncure, in behalf of defendant, so as to produce in the end a yearly interest of twelve per cent. on the sum advanced, during such time of indulgence; and that the principal and interest secured by the said instruments, were intended and designed by both parties to amount, and did in fact amount, to greatly more than the sum so advanced with legal interest, for such time of indulgence as aforesaid; and did in fact substantially secure to said Alexander, a yearly interest of twelve per cent. on the sum so advanced by him. Then the jury, if they find such facts as aforesaid satisfactorily proved, and fairly deduc-

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ible from the evidence aforesaid, may properly infer, from such facts, and fairly presume, that the transaction was substantially a loan, within the meaning of the statute against usury; notwithstanding it may appear to have been made in the form and name of a sale of the said Mary James's bond or note; and then the jury may, from the same facts and circumstances, if proved and deduced as aforesaid, also properly infer and well presume, that the sum of money deducted and retained by said Alexander, from the nominal amount of said bond or note, was substantially usurious interest, under another name, for the forbearance of the money so lent or advanced; which the court gave as prayed, to which the plaintiffs excepted; and prayed the court to sign and seal a bill of exceptions, as well as the granting of the said defendant's prayer, as to the refusal to grant the prayer aforesaid of said plaintiffs, which was accordingly done the 24th day of May 1838. And the said defendant, by her said counsel, having excepted, as aforesaid, to the said instructions given by the court at the request of the plaintiff as aforesaid, also prayed the court to sign and seal a bill of exceptions to the said instruction, so given at the request or prayer of the plaintiff, which was also done the 24th May 1838.

Upon the judgment of the circuit court on the several prayers for instruction to the jury, by the plaintiffs and the defendant, these questions arise: 1. Does proof of usury, in the contract between the defendant and Alexander, *per se*, make void the bond assigned to Alexander, and the covenant also upon which the suit in the court below was founded? 2. If the testatrix had no knowledge of the usurious agreement between the defendant and Alexander, and the plaintiffs were also ignorant, and knew nothing of such usurious agreement, when they were called on to pay the balance due on the bond, and they paid it under the belief that it was a *bonâ fide* debt, and without any notice to the contrary from the defendant, were they entitled to recover in the court below?

The contract between the defendant and Alexander for the purchase of the bond, if embracing no other party than themselves, could affect no contract between other parties previously made; and whether that contract was usurious depended on the intention of the parties to it. If it was made *bonâ fide*, for the sale and purchase of the bond, although at a discount which would insure to Alexander *twelve per cent. a year, for the money advanced, it would not be usurious. If, on the other hand, the [*355 sale of the bond was a mere cover for the purpose of evading the statute against usury, and the real intention of the parties was, to make a contract for the loan of money, at a higher rate of interest than six per cent., then the contract was usurious. But to involve the testatrix in the usury, and to extend its taint to the bond, as well as to the assignment, it must have been shown by proof, that she executed the bond for the purpose of aiding the defendant to borrow money at usurious interest, and not to enable her to raise the money by selling it in the market.

As the third prayer of the plaintiffs is materially different from the first and second, we will examine it first. If the first member of it had been presented alone, it would, in our opinion, have been proper for the court below to have granted it; but as it was inseparably connected with the latter member, it presented a very different question. The objectionable part is in these words: "And if the jury believe, from the evidence, the defend-

ant waived and abandoned all objection to the validity of said note; and assented that the same should be considered as a valid and legal obligation, then the plaintiffs are entitled to recover; and it is competent for the jury to infer such waiver and assent, if they shall believe from the evidence, that the defendant, after obtaining said money, made payments of interest, as the same became due, and expressed her desire and intention to pay the said note, and her anxiety to save her aunt's property from sale under the said deed of trust." This reasoning proceeds on the assumption that a bare promise to pay an usurious debt, or a partial payment of it, would take the contract out of the statute against usury. No subsequent confirmation, or new contract stipulating to pay the debt, with the usurious interest, will make it valid. Notwithstanding, therefore, the defendant may have declared her determination to pay the debt, and did actually pay a part of it, she had, nevertheless, a perfect right, afterwards, to avail herself of the plea of usury; therefore, the court below did right in refusing the instruction.

The first and second instructions prayed for by the plaintiffs, and that prayed for by the defendant, may well be considered together. Jointly, they embrace the whole case, and present the two questions before stated. The facts stated in the prayer of the defendant, if found by the jury, taken alone and unconnected with the facts stated in the prayers of the plaintiffs, would oppose no legal bar to the plaintiffs' action; unless, indeed, a usurious contract between the defendant and Alexander could impart its usurious taint to the bond assigned, and the covenant sued on. The court below having decided, by refusing the prayers of the plaintiffs, that knowledge, on the part of the testatrix of the usurious contract, was not necessary to subject the two contracts between her and the defendant to the taint of usury. They, therefore, put the case upon the express ground, that proof
*356] *of usury in the contract between the defendant and Alexander, did, *per se*, make void the bond assigned, and the covenant sued on. If the testatrix had no knowledge of the existence of usury in the contract between the defendant and Alexander, the bond which she gave to the defendant, although without valuable consideration, was not usurious. There must be a loan, and the taking of more than legal interest, or the forbearance of payment of a pre-existing debt, upon a contract for illegal interest, to constitute usury. *Barclay* v. *Walmsley*, 4 East 57. The fact of knowledge in the plaintiff's testatrix, is very material; first, to show whether the bond which she executed to the defendant was usurious; and secondly, to show whether the contract between the defendant and Alexander was usurious. If the bond was free from usury in its inception, no subsequent transaction between other parties could invalidate it. *Nichols* v. *Fearson*, 7 Pet. 106. Although this bond may have been executed without valuable consideration, in the hands of a *bonâ fide* purchaser, without notice of that fact, it would be good against the obligor. It is the settled law in Virginia, that the *bonâ fide* purchaser of a bond or note may take it at any rate of discount, however great, without violating the statute against usury. *Hansborough* v. *Baylor*, 2 Munf. 36; 5 Rand. 33. If the testatrix was neither a party nor privy to the contract between the defendant and Alexander, it was a very material fact for the jury to consider, when inquiring whether there was usury in the agreement between the defendant and Alexander; because, if the testatrix had no knowledge of the usurious

contract between them, it was impossible that she could have been party or privy to it. Suppose, the jury had found, specially, that the testatrix was neither party nor privy to the contract between the defendant and Alexander, and that Alexander had no knowledge of the fact that the bond which he purchased from the defendant had been executed by the testatrix, without valuable consideration; the contract of assignment would have been entirely free from usury, and the testatrix liable upon the bond. But that liability has never been questioned. Viewing the case in this aspect, the defendant would have had no pretext for pleading usury against the plaintiffs in this cause.

But upon what ground is it, that usury is set up by the defendant against her covenant of indemnity? If that covenant had been given to Alexander, and the first contract was usurious, he would have been in no better condition; because the consideration being the same, the taint of usury would have attached to it at once. But the case is very different, between the defendant and the testatrix. The latter had lent her note to the defendant, and conveyed her land and negroes to a trustee, to secure the payment of it. She was no party to the usury; and she had given a full and valuable consideration to the defendant for the covenant of indemnity. The circuit court, by refusing to permit the jury to inquire into the fact of knowledge on the part of the testatrix, in relation to the usury, thereby admitted *her ignorance of that fact. Therefore, as between these parties, the whole transaction was legal, and the covenant free from all taint of usury. *Cuthbert* v. *Haley*, 8 T. R. 390. [*357

Upon the second question, it will only be necessary to examine the point, whether the defendant was bound to give notice to the plaintiffs of her intention to plead the statute against usury, in bar of the debt due to Alexander; the other points having been fully examined on the first question stated. It is obvious, from the evidence in the cause, that the defendant commenced the negotiation with Alexander for the sale of the bond of the testatrix, and conducted it to its final conclusion; and that she was bound to know every fact and circumstance connected with the whole case. In *Ford* v. *Keith*, 1 Mass. 138, the case was of a surety who had paid the debt, knowing at the time that it was founded on an usurious contract. He brought suit against the principal, to recover the amount paid, to which he pleaded the usury between him and the payee of the note. Judge Strong, who delivered the opinion of the court, said: "The defendant says, it is true, the money was borrowed for me; I received it, and had the benefit of it; I requested you to become my surety and sign the note, and you have paid the contents; yet as I had a legal right to avoid the note, you shall not recover of me. Will the law permit the defendant to get rid of the present action on such grounds? He presumed it would not. No man is bound to take advantage of a penal law, and avoid a contract which, in equity, he ought to perform; and nothing could excuse the defendant, but his giving express notice to the plaintiff that he, the defendant, did not mean to pay the note."

The present is a much stronger case for the plaintiffs than the one just quoted. The defendant, as before stated, knew all the facts of the case; she had paid, at different times, parts of the debt; nearly five years had elapsed from the date of the contract till its final payment; there was no evidence that the executors had any knowledge of illegality in the contract;

the suit was not brought on the contract said to be tainted with usury, but upon the covenant of the defendant, stipulating to indemnify the testatrix against the payment of the debt, which the plaintiffs had been compelled to pay under these circumstances. She sets up the alleged usury, between her and Alexander, to defeat her bond of indemnity; and insists that she is entitled to the benefit of it, unless the plaintiffs prove that they gave her notice before they paid the debt. That she was bound to give notice of her intended defence, has already been shown; and to remove all doubt on these points, we refer to 8 Wend. 452, to show that she was not entitled to notice.

To permit the defendant to avail herself of the plea of usury, under the circumstances of this case, would be to encourage the grossest fraud and injustice. The plaintiffs paid the balance of the debt to Alexander, in the regular discharge of their duty as executors, without knowledge or notice of the alleged usury. We, therefore, think, that the circuit court erred in
*358] refusing the first and *second instructions prayed for by the plaintiffs, and in granting the instructions prayed for by the defendant. Wherefore, the judgment of the circuit court is reversed, and the cause remanded for further proceedings to be had therein, not inconsistent with this opinion.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the county of Washington, and was argued by counsel: On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said circuit court in this cause be and the same is hereby reversed, with costs; and that this cause be and the same is hereby remanded to the said circuit court, with directions to a ward a *venire facias de novo*, and for for further proceedings to be had therein, in conformity to the opinion of this court.

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*359] *Benjamin Story, Appellant, *v.* Louisa Livingston, Executrix of Edward Livingston, Appellee.

Chancery practice.—Master's office.—Costs.—Interest.—Mandate. Parties.

Strictly, in chancery practice, though it is different in some of the states of the Union, no exceptions to a master's report can be made, which were not taken before the master; the object being to save time, and to give him an opportunity to correct his errors, or to reconsider his opinions. A party neglecting to bring in exceptions before the master, cannot afterwards except to the report; unless the court, on motion, see reason to be dissatisfied with the report, and refer it to the master to re-examine it, with liberty to the party to make objections to it.[1]

Exceptions to the report of a master must state, article by article, the parts of the report which are intended to be excepted to.[2]

Exceptions to the report of a master, in chancery proceedings, are in the nature of a special demurrer, and the party objecting must point out the errors; otherwise, the parts not excepted to will be taken as admitted.[3]

In a reference to a master for any purpose, the order need not particularly empower him to take testimony, if the subject-matter is only to be ascertained by evidence. And in taking evidence,

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[1] McMicken *v.* Perin, 18 How. 507.
[2] Dexter *v.* Arnold, 2 Sumn. 108.
[3] Gordon *v.* Lewis, 2 Sumn. 143; Memphis *v.* Brown, 20 Wall. 291.

although the better plan is to take the answers in writing, upon written interrogatories, he may examine witnesses *vivâ voce;* the parties to the suit being present, personally, or by counsel, and not objecting to such a course.

The 28th rule prescribed for the practice of courts of equity of the United States, provides for bringing witnesses before the master; for their compensation; for attachments, for a contempt, when witnesses refuse to appear on a *subpœna;* and the last clause allows the examination of witnesses, *vivâ voce*, when produced in open court. The same reasons which allow it to be done in open court, permit it to be done by a master.

The allowance of costs is a matter of practice, which need not be a part of the decree or judgment of the court, although it often is so; as the payment of costs is, in most cases, made to depend upon the rules; and when rules do not apply, upon the court's order in directing the taxation of costs.

If any rule has been made by the district court of Louisiana, abolishing chancery practice in that court, it is a violation of those rules which the supreme court of the United States has passed to regulate the courts of equity of the United States; those rules are as obligatory on the courts of the United States in Louisiana, as they are upon all other courts of the United States; and the only modifications or additions which can be made by the circuit or district courts, are such as shall not be inconsistent with the rules prescribed. When the rules prescribed by the supreme court do not apply, the practice of the circuit and district courts must be regulated by the practice of the high court of chancery in England.

The supreme court has said, upon more than one occasion, after mature deliberation, upon able arguments of distinguished counsel against it, that the courts of the United States in Louisiana possess equity powers, under the constitution and laws of the United States; that if there are any laws in Louisiana directing the mode of procedure in equity causes, they are adopted by the act of 26th May 1829; and will govern the practice in the courts of the United States; but if there are no laws regulating the practice in equity causes, the rules of chancery practice in Louisiana, mean the rules prescribed by the supreme court for the government of the courts of the United States, under the act of congress of May 8th, 1792.

The correct rule as to interest is, that the creditor shall calculate interest, whenever a payment is made; to this extent, the payment is first to be applied, and if it exceed the interest due, the balance is to be applied to diminish the principal. This rule is equally applicable, whether the debt is one which expressly draws interest, or on which interest is given as damages.[1]

The mandate issued by the supreme court, in a case decided by the court, is to be interpreted according the subject-matter; it is in no manner to cause injustice.

The general rule in chancery proceedings is, that all persons materially interested in a suit ought to be parties to it, either as plaintiffs or defendants, that a complete decree may be made between these parties. But there are exceptions to this rule, and one of *them is, when a decree in relation to the subject-matter in litigation can be made, without a person having his interest in any way concluded by the decree. [*360

When a complainant omits to bring before the court persons who are necessary parties, but the objection does not appear on the face of the bill, the proper mode to take advantage of it is by plea and answer. The objection of misjoinder of complainants should be taken either by demurrer, or on the answer of the defendants; it is too late to urge a formal objection of the kind, for the first time, at the hearing.

Appeal from the District Court for the Eastern District of Louisiana. On the 2d of March 1837, the following decree of the supreme court of the United States, was produced in open court, in the district court of the United States for the eastern district of Louisiana. The cause had been taken by Mrs. Livingston, executrix, by appeal, to the supreme court, and the decree of the district court reversed. (11 Pet. 351.)

"This case came on to be heard, on the transcript of the record from the district court of the United States for the eastern district of Louisiana, and was argued by counsel: On consideration whereof, it is ordered adjudged and decreed, that the decree of the said district court, dismissing

[1] Smith *v.* Shaw, 2 W. C. C. 147; Russell *v.* Lucas, Hempst. 92; Dunlop *v.* Alexander, 1 Cr C. C. 498.

the bill of the complainant, be and the same is hereby reversed and annulled, the court being of opinion, that the transaction of the 25th July 1822, between John A. Fort, Benjamin Story and Edward Livingston, was a loan to the said Edward Livingston, secured by a pledge denominated an *antichresis* in the law of Louisiana. And it is hereby further ordered, adjudged and decreed, that the cause be sent back for further proceedings in the court below, with directions that the cause be referred to a master to take an account between the parties. And it is hereby further ordered, adjudged and decreed, that in taking said account, there be allowed to the defendant all advances which shall be shown to have been made by him, or paid on account of a loan made to Edward Livingston, on the 25th day of July, in the year 1822, with the interest which the said Edward Livingston agreed to pay, of eighteen per cent. per annum, to be calculated upon cash advances, from the time it was made, until the 5th of August 1823, and after that time at legal interest; and further, that in taking said account, there be allowed to the defendant all reasonable expenditures made by the defendant and John A. Fort, in building, repairing and safe-keeping of the property pledged by the said Edward Livingston, to secure the loan made to him on the 25th day of July 1822; and that the complainant be credited in such account with all such sums as the defendant, or John A. Fort, or either of them, have received from the said property; and that in taking such account, the rents and profits be applied, first, to the payment of the sums necessarily incurred in building and repairing; secondly, to the payment of the interest on the sums which shall appear to have been advanced on the said loan, or in the improvement of the lot; and thirdly, to the discharge of the principal of the said loan. And if, on taking said account, it shall appear, that there is a balance due from the complainant, *it is
*361] hereby further ordered, adjudged and decreed, that the defendant pay to the complainant such balance, within six months from the time of entering the final decree in the cause, and shall surrender and reconvey the said property to the complainant, or such person or persons as shall be shown to be entitled to the same; and if, upon the taking of said account, it shall be found, that any balance is due from the estate of the said Edward Livingston, deceased, to the defendants, it is hereby further ordered, adjudged and decreed, that on paying, or tendering, to the defendant, the said balance, he shall deliver up the possession, and reconvey to the person or persons who shall appear to be entitled to the same, the property so pledged to secure the aforesaid loan. And it is further ordered, adjudged and decreed, that in case a balance shall be found due to the defendant, and shall not be paid within six months after a final decree of the district court upon the master's report, then the property shall be sold, by order of the district court, at such time and notice as the said court shall direct; and that the proceeds be first applied to the payment of the balance due the defendant; and the residue thereof to be paid to the complainant."

The mandate of the supreme court, conforming to this decree, was filed in the district court, by the counsel for Mrs. Livingston, and by an order of the district court, the case was referred to a master in equity, Duncan N. Hennen, Esq., to examine into and report upon the account, according to the principles and rules established on the judgment of the supreme court.

Various proceedings took place in the district court, after the order of reference to the master for an account.

The counsel for the defendant moved to strike from the docket, the complainant's suit; because, 1. Edward Livingston, the former complainant herein, departed this life on the ——— day of ———, and before the hearing of this cause in this court at the spring term thereof, in 1836. 2. The said Livingston departed this life, before the making or enrolment of the decree herein, at the spring term of the year 1836; consequently, the court could not then entertain any jurisdiction of the cause. 3. This cause has never been regularly revived in the name of the present complainant; nor could it be so revived, by the laws and usages of chancery, the complainant claiming as a devisee. On the 18th of December 1837, the district court, after argument, overruled this motion.

On the same day, the report of the master was filed. This report contained, at large, all the evidence produced before the master; with an account, by which a balance of $32,958.18, was found due by Benjamin Story, to Mrs. Livingston, executrix, on the first of November 1837.

On the second of January 1838, exceptions to the master's report were filed by Mr. Story. *1. Because chancery practice has been abolished by a rule of this court, and such proceeding is unknown to the practice of the court. 2. The master has erred, in not allowing to the defenant the $1000, with interest, paid to Morse, or some part thereof. 3. The master's report does not show that it reports all the evidence taken before the master. 4. The master, in making his estimates and calculations, has not pursued the mandate of the court. 5. It appears, from the master's report, that the stores were rented from November to November; and he erred in assuming the 1st April as the period of payment of annual rent. 6. A reasonable allowance should have been made to Story for the costs and risk of collecting the rents. 7. The master erred in all his charges against the defendant, and failed to allow the defendant his proper credits. These exceptions were overruled by the district court, and the court decreed that Benjamin Story do pay to the complainant the sum of $32,958.18; and that the master's report be, in all other respects, confirmed; and that the defendant conform to the decree of the supreme court in this case. [*362

A petition for a rehearing was afterwards presented to the district court by the counsel for the defendant, which, after argument, was overruled; and the district court made the following decree:

"The petition for a rehearing having been overruled, it is ordered, adjudged and decreed, that the defendant, Benjamin Story, do further surrender and reconvey the property described in the bill of complaint as 'all that parcel of ground situated on the batture of the suburb St. Mary, between Common and Gravier streets, measuring 82 feet fronting Common street; 126 feet, or thereabouts, fronting Tchaptoulas street, 146 feet, or thereabouts, fronting New Levee street, and bounded on the other side by the lot of ground belonging to Messrs. Livermore, Morse, Miller and Pierce, containing 120 feet, or thereabouts; together with the buildings, improvements, and all other appurtenances to the same in any wise belonging or appertaining,' to Louise Livingston, widow and executrix and devisee of Edw. Livingston, deceased, and to Cora Barton, daughter and forced heir of said Edw. Livingston; in conformity to the decree of the supreme court

of the United States, and to the decree heretofore made in pursuance thereof by this court."

The case having been transferred to the circuit court of the United States for the ninth circuit and eastern district of Louisiana; the defendant prosecuted this appeal.

The case was argued by *Crittenden* and *Jones*, for the appellant; and by *Ogden* and *Butler*, with whom was *Key*, for the appellee.

The counsel for the *appellant* stated, that the great object of the *363] *appellant was, to bring before the court of Louisiana, the fact of the decease of Mr. Livingston, before the decree of the court was rendered. They had offered proof of this, and it was rejected. A supplementary bill was filed, for the purpose of introducing this fact, and this was refused a hearing in the district court, then having the cause before it. A *mandamus* was then asked of this court, for the purpose of having the matter presented in the supplementary bill heard, which was refused. (12 Pet. 339.)

It was contended, that the death of Mr. Livingston, before the decree from which the decree was originally taken, had made all the proceedings on that appeal irregular and void; and the case ought now to be open to a re-examination on all of its merits. The right of the executrix, after the decease of the testator, was to revive the suit. This should have been done, but she could not prosecute an appeal, as she had done (11 Pet. 351), without having previously revived the suit. The question is, whether the mandate of this court, in the appeal decided in 1837 (11 Pet. 351), could be executed, without their being proper and legal parties to the case. It is admitted, that the principles of the case have been settled in this court; but it is claimed that Mrs. Livingston was not a proper party to ask for an account, in the circuit court.

Upon the death of Mr. Livingston, there was an entire suspension of the contest; and the executrix had no right to proceed in the mode she had proceeded. She, as executrix, could not have a right to an account of the rents of the estate in controversy, after the decease of the testator. The decree could not have intended this. The report should have stated the amount to which Mr. Livingston was entitled; and the amount which belonged to the devisees under the will. The devisees were Mrs. Livingston and Mrs. Cora Barton. The court have decreed, that the property shall be conveyed to the persons entitled to it, under the will of Mr. Livingston. The only mode by which this could have been done, was by a bill of revivor, showing who the heirs or persons entitled were.

Advantage of the defect of proper parties, can be taken at any time, when discovered. This is clearly a case in which, from want of parties, the court are to decree to the personal representative, the property of the devisees under the will.

Ogden and *Butler*, for the appellee.—1. The merits of this cause having been fully disposed of by the decree of this court, rendered in February 1837, and the mandate issued thereon requiring only the execution of that decree, the court below was bound to carry the decree into effect; and therefore, decided correctly in overruling the motion to strike the cause from the

docket, and in refusing to hear testimony as to the period of the death of Edward Livingston. The right and capacity of Mrs. Livingston, as executrix, to proceed in the cause, and her title *to recover the moneys found due from the defendant, are also settled by the mandate. [*364
2. Independently of the effect of the mandate, the defendant, by proceeding in the reference, and by not objecting to the sufficiency of the revivor of the cause, until after the reference was closed, was estopped from making any such objection. 3. The exceptions to the master's report, embraced in the decree of the 16th of January 1838, were correctly overruled. 4. The petition for a rehearing was properly denied; and the decree thereon is not the subject of an appeal. 5. There is no error in the decree appealed from.

Wayne, Justice, delivered the opinion of the court.—This cause having been before this court, at its term in 1837, it was then decreed, that the decree of the district court, dismissing the bill of the complainant, should be reversed; that the cause should be sent back for further proceedings in the court below, with directions that it should be referred to a master, to take an account between the parties. The mandate then recites the principles upon which the account was to be made; provides the time within which any sum that may be found to be due to either of the parties should be paid, after the entry of a final decree in the court below; directs, if a sum shall be found due to the complainant, a surrender and reconveyance of the property from the defendant to the complainant, or to such person or persons as shall be shown entitled to the same; and further orders, in the event of a sum being found to be due to the defendant, if it shall not be paid within six months after a final decree of the district court upon the master's report, that the property shall be sold, by order of the district court, at such time and notice as the court shall direct; and that the proceeds be first applied to the payment of the balance due the defendant, and that the residue thereof be paid to the complainant.

In pursuance of the mandate, the district court appointed Duncan N. Hennen, master, to examine into and report upon the account, according to the rules and principles established in the judgment of this court. The master was sworn in open court, faithfully to perform the duties of his appointment. On the same day, the master ordered a meeting to be held on the 6th of March, which was adjourned to the 8th; when he commenced the reference, by taking testimony in behalf of the complainant, and it was adjourned to the next day. The meeting was then adjourned to the 24th March, when other testimony was taken; was then adjourned to the 1st April; thence, on the application of the defendant, was adjourned to the 15th April, and the reference was closed the day after. All the meetings were attended by the parties; the complainant being represented by counsel, and the defendant having been personally present, aided by counsel.

After these proceedings were had, the defendant's counsel, in November following, obtained an order from the court upon the complainant, to show cause why the "suit *should not be stricken from the docket, the bill [*365
of the complainant dismissed, or the suit abated;" which rule was returnable on the 1st December. The grounds relied upon to sustain this motion were: 1. That Edward Livingston, the former complainant,

departed this life on —— day of ——, and before the hearing of the cause in this court, at the spring term thereof in 1836. 2. The said Livingston departed this life before the making or enrolment of the decree, at the spring term of the year 1836; consequently, the court could not then entertain any jurisdiction of the cause. 3. This cause has never been regularly revived in the name of the present complainant; nor could it be so revived, by the laws and usages of chancery practice, Mrs. Livingston claiming as a devisee. This rule was continued, from time to time, under sundry orders of the court, until the 18th of December, when the court rejected and overruled the motion.

This motion we have noticed, not only because it was a singular attempt to oust the jurisdiction of the court over the cause, after it had been decided on its merits in the supreme court, and the court below was acting under its mandate; but because from the time when it was made, and when the rule was granted, the defendant not having before objected to the reference to the master, and having joined in all the proceedings under that reference; it cannot be viewed in any other light than an attempt to prevent the master's report from being returned to the court, instead of contesting its conclusion, and the master's proceedings under the mandate, by regular exceptions. It presents an anomaly without any parallel in the history of chancery proceedings; placing an inferior tribunal, acting under the mandate of a superior, in the attitude of reversing the judgment of the latter; calling upon it to disregard the mandate altogether; to revoke its own proceedings under such mandate; and, in effect, to act in contradiction to the sole authority by which the district court was in possession of the cause.

But the motion being overruled, on the same day, the master presented his report to the court, which was read and filed. The following exceptions were then made to the report of the master by the defendant: 1. That chancery practice has been abolished by a rule of the court, and such proceeding is unknown to the practice of the court. 2. The master has erred, in not allowing to the defendant the $1000, with interest, paid to Morse, or some part thereof. 3. The master's report does not show that it reports all the evidence taken before the master. 4. The master, in making his estimates and calculations, has not pursued the mandate of the court. 5. It appears, from the master's report, that the stores were rented from November to November; and he erred in assuming the 1st of April as the period of payment of annual rent. 6. A reasonable allowance should have been made to
*366] Story for the costs and risk of collecting rents. *7. The master erred in all his charges against the defendant; and failed to allow the defendant his proper credits.

All of these exceptions, except the third, are irregularly taken, and might be disposed of by us, without any examination of them, in connection with the master's report. They are too general; indicate nothing but dissatisfaction with the entire report; and furnish no specific grounds, as they should have done, wherein the defendant has suffered any wrong, or as to which of his rights have been disregarded. Strictly, in chancery practice, though it is different in some of our states, no exceptions to a master's report can be made, which were not taken before the master; the object being to save time, and to give him an opportunity to correct his errors or reconsider his opinion. Dick. 103. A party neglecting to bring in objec-

tions, cannot afterwards except to the report (Harr. Ch. 479); unless the court, on motion, see reason to be dissatisfied with the report, and refer it to the master to review his report, with liberty to the party to take objection to it. 1 Dick. 299; Madd. 340, 555. But without restricting exceptions to this course, we must observe, that exceptions to a report of a master must state, article by article, those parts of the report which are intended to be excepted to. Exceptions to reports of masters in chancery are in the nature of a special demurrer; and the party objecting must point out the error, otherwise, the part not excepted to will be taken as admitted. *Wilkes* v. *Rogers*, 6 Johns. 566.

The court directed the master to amend his report, so as to state that it contained all the evidence given under the reference, which the master did by his certificate; and this disposes of the defendant's third exception. To that certificate, the defendant's counsel did not object. In the subsequent proceedings in the court, upon the report, it was treated by both parties as conclusive of the fact; that all the evidence had been disclosed in the report, as it was originally made. The report was then before the court, upon exceptions by the defendant, which were argued by the counsel of the respective parties; and the court overruled the exceptions, on the 15th January, and decreed the defendant to pay to the complainant, within six months from that day, $32,958.18, the sum found by the master to be due by the defendant to the complainant; and further "decreed, that the master's report be in all other respects confirmed, and that the defendant conform to the decree of the supreme court in the case."

After this decree was made, the defendant filed a petition for a rehearing. The grounds taken in the petition are reasons against the confirmation of the report, on account of the court's proceedings upon it, by which the defendant alleges he had been deprived of an opportunity to except to the report as it had been amended. That the cause upon the report had not been docketed regularly for trial, on account of the master's having taken testimony *vivâ voce*, when it should have been by depositions upon interrogatories; that the court in its decree had not disposed of the question of costs; and *that the court, in its general direction to the defendant to do all things directed by the mandate of the supreme court, had [*367
left it uncertain to whom the defendant was to surrender and to convey the property. The court, after this petition had been answered by the complainant, heard an argument upon the motion. The judge finally overruled the application for a rehearing; and decreed, that the defendant should surrender and reconvey the property described in the bill of complaint, to Louise Livingston, widow and executrix, and devisee of Edward Livingston, deceased, and to Cora Barton, daughter and forced heir of said Edward Livingston, in conformity to the decree of the supreme court of the United States, and to the decree heretofore made, in pursuance thereof, by this court. This decree was made on the 6th February 1837.

The cause is now regularly before this court, on an appeal from the decree of the district court, overruling the defendant's exceptions to the master's report, and confirming the same. But before we consider the exceptions, we think it proper to notice the petition for a rehearing. Upon any matters in that petition, not directly touching the master's report, but assuming what this court did or did not decide or direct to be done by its mandate, it

is only necessary to repeat what this court said in *Ex parte Story*, 12 Pet. 343. "The merits of the controversy were finally decided by the court, and its mandate to the district court, require only the execution of its decree." As to the objection, that the defendant had not an opportunity to except to the master's report as it was amended, it is founded upon a misconception of the fact, for the defendant's third exception, that the report did not show that it reports the evidence, and the court simply allowed the master to certify that it did. If this certificate had not been allowed by the court, the exception could not have prevailed, unless the several allegations, that the evidence did not appear in the report, had been accompanied by a specification of the particulars in which it was deficient. On such an exception, supported by the oath of the party making it, or without oath, if the opposite party joins in the exception, without requiring the exception to be verified by affidavit, the court would call upon the master to report the evidence. We have noticed this exception, as a point of practice. The truth of the exceptions not appearing on the face of the proceedings, and not being supported by affidavit or otherwise, the court cannot notice the exceptions. *Thompson* v. *O'Daniel*, 2 Hawks 307.

The next objection in the petition for a rehearing, that the master, under the order of the court, did not possess the power to take testimony; and that if he did possess such power, then it was irregularly exercised, because it should have been by depositions upon interrogatories; we notice also, as points of practice, not now to be settled, but which have been long since determined. In a reference to a master for any purpose, the order need not particularly empower him to take testimony, if the subject-matter is only to be ascertained by evidence. And in taking evidence, though *the *368] better plan is to take the answers in writing, upon written interrogatories; he may examine witnesses *vivâ voce*, the parties to the suit being present, personally or by counsel, not objecting to such a course (as was the case in this instance), and joining in the examination. Such is the general rule in chancery. In many, if not in most, of the states in this Union, however, it is the practice for the master to examine witnesses *vivâ voce*, and to take down their answers in writing. But the objection in both its parts is answered and overruled by the 28th rule of practice for the courts of equity of the United States. That rule provides for bringing witnesses before the master; for their compensation; for an attachment for a contempt, when a witness refuses to appear upon *subpœna*; and the last clause of it, allowing the examination of witnesses *vivâ voce*, when produced in open court. We think the same reasons which allow it to be done in open court, permit it to be done by a master.

But it is said, the decree of the district court does not provide for the payment of costs. This too, is a point of practice,-which we remark, need not be a part of the decree or judgment, though it often is so; as the payment of them in most cases depends upon rules, and when rules do not apply, upon the court's order, in directing the taxation of costs.

We now proceed to examine the exceptions taken by the defendant to the master's report. The first, "that chancery practice has been abolished by a rule of the district court of Louisiana, and that such proceeding is unknown to the practice of the court," is not an exception to the report, but a denial of the propriety of the reference to the master; also, of the court's

authority to make such a reference under the mandate, and involves the assertion that the rule, if any such exist, may control the mandate and set it aside as a nullity. No such rule appears in the record. If any such exist, it certainly was disregarded in this instance (as it should be in every other by the court), or was not deemed applicable to a case like the one before it. We think the occasion, however, a proper one for this court to remark, if any such rule has been made by the district court in Louisiana, that it is in violation of those rules which the supreme court of the United States has passed to regulate the practice in the courts of equity of the United States. They are as obligatory upon the courts of the United States in Louisiana, as they are upon all other United States courts ; and the only modifications or additions which can be made in them by the circuit or district courts, are such as shall not be inconsistent with the rules prescribed. Where the rules prescribed by the supreme court to the circuit courts do not apply, the practice of the circuit and district courts shall be regulated by the practice of the high court of chancery in England. The parties to suits in Louisiana have a right to the benefit of them ; nor can they be denied, by any rule or order, without causing delay, producing unnecessary and oppressive expenses, and in the greater number of instances, an entire denial of equitable rights. This court has said, upon more than one occasion, *after mature deliberation, upon able arguments of distinguished counsel against it, that the courts of the United States in [*369 Louisiana possess equity powers, under the constitution and laws of the United States ; that if there are any laws in Louisiana directing the mode of procedure in equity causes, they are adopted by the act of the 26th May 1824, and will govern the practice in the courts of the United States. 9 Pet. 657. But if there are no laws regulating the practice in equity causes, we repeat what was said at the last term of this court, in *Ex parte Poultney* v. *City of La Fayette*, 12 Pet. 474, " That the rules of chancery practice in Louisiana, mean the rules prescribed by this court for the government of the courts of the United States, under the act of congress of May 8th, 1792, ch. 137, § 2. These rules recognise the appointment of a master ; the court below in making this reference, acted under them and the mandate, and it could not, therefore, sustain the exception to the master's report.

On the second exception, we need only remark, that the master apprehended rightly the decision and mandate of the court. The payment to Morse by the defendant was not considered an expenditure on account of the property, nor on account of Livingston. It was intended to be excluded from the credits to which the defendant was entitled. The third exception has been already disposed of. It was only a permission to the master to certify that his report contained all the evidence taken under the reference.

The fourth and seventh exceptions, on account of their generality and indefiniteness, may be considered in connection. The first of them is, that the master, in making his estimates and calculations, has not pursued the mandate of the court ; and the seventh is, that the master erred in all his charges against the defendant, and failed to allow the defendant his proper credits. In what particular the mandate has not been pursued, is not stated. It is a general objection to the whole report, imputing to the master a misconception of the principles upon which the account was to be taken ; and amounts to this, that if the court shall see upon the face of the report, and

the master's proceedings, error against the defendant, it will correct it, though no exception has been filed. In this view of it, the defendant will be protected, if the court shall detect error in the report. As to error in charges, and a denial of proper credits to the defendant, we remark, that without some specification of erroneous charge, and of disallowed credit, it is impossible to determine what the defendant objects to as a charge, or claims as a credit. Was any credit refused which was claimed, except that of the $1000 to Morse? That, we have said, was rightly refused. Was he not allowed all other credits on the general account of expenditures? Did the defendant, whilst the reference was in progress, or after the report upon it was made, claim any credit, by the exhibition of any account? Did he ask to introduce any evidence to the master, in support of any credit? Did he claim any other credit than such as are to be found in the account, giving, on his own oath, a statement *of his expenditures, and of the rents of the property, from 10th August 1822, to the 26th January 1829? Nothing of the kind appears. On the contrary, there is, in the report, a statement by the master, which is conclusive of the fact, as it has not been denied, that the defendant, though repeatedly called upon, and after having repeatedly promised to give an account, and having had five weeks to furnish it, refused to give any account.

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The parties were summoned to the reference, by the master, on the 6th of March. On the 8th, the defendant, Story, appeared in person, accompanied by counsel. Upon his suggestion, however, that one of his counsel was absent from the city, and that he had been so much occupied as not to have had leisure to complete his account, with his request that the hearing should be postponed, though it was opposed by the complainant's counsel, the master adjourned the reference, to give the defendant time to furnish his account, and to surcharge the account of the expenditures and rents up to the last of January 1829. The right to correct any errors in that account was conceded to him, the account was given in evidence, subject to such concession. Two witnesses were then sworn on the part of the complainant, without objection, and were examined by both parties. The meeting was then adjourned to the next day, the parties again attended, but the witnesses who had been summoned not being present, the defendant again suggested the propriety of adjourning for a few days, when he should be ready to present his account, which he had almost ready. It was assented to. The meeting was adjourned to the 24th of March. On that day, the parties appeared before the master, a witness was examined of the part of the complainant, and the defendant again declared he had been prevented by important business from completing his account; and he requested a little more time to make it complete. The complainant's counsel consented to an adjournment to the 5th of April. On that day, the defendant again requested further time; the case was continued to the 15th of April, and then the defendant said, he did not intend to furnish any account; but urged, that as the account of expenditures and rents up to the last of January 1829, had been received as evidence, that it must be considered as conclusive of the expenditures which had been made on account of the property. This was allowed to be correct. We have, then, the refusal of the defendant to furnish on account, and proof that he did not claim any other credit than those in that account. With what propriety, can a denial of

credits be urged as an exception to the report? The defendant was the only person who could furnish an account of the credits to which he supposed himself to be entitled; he refused to do so. To allow him to say, there is error in the report in this respect, would permit him to take advantage of his own wrong, and to defeat the complainant's rights by artifice. Nor is the account of expenditures and receipts up to the last of January 1829, now examinable (except as to mere errors in computation), either as regards the principal or interest; the defendant being concluded by his admission of it, *when he claimed the expenditures as a set-off against his own statement of the rents. [*371

What has been said of the fourth and seventh exceptions applies to the fifth, which is, that a reasonable allowance should have been made to the defendant for the costs and risk of collecting the rents. If, under the mandate, any such allowance could be made, the claim for it should have been presented to the master, supported by evidence of what was the customary compensation for such services, if the service is not compensated by a law of Louisiana. A mere claim for a reasonable allowance cannot give a right to any, and of course, is no valid exception to the report. It is the case of a party before a master, who merely claims for general expenses, without stating particulars. Under such a claim, he will be allowed nothing. *Methodist Episcopal Church* v. *Jaques*, 3 Johns. Ch. 81.

Six of the exceptions having been disposed of, the seventh only remains to be considered. It is, "that it appears from the master's report, that the stores were rented from November to November, and he erred in assuming the 1st April as the period of payment of annual rent." It was said in argument, that computing the payment of annual rent in extinguishment of the defendant's debt, on the 1st April, is in effect to deprive him of interest for a part of the year, as the aggregate of the rent was not in fact received; that it is to allow interest upon rents and profits, contrary to the mandate, and established decisions. This would certainly be so, if the rent had only been received at the end of the year. But if the rents were payable at intervals in the year, and were actually so received; and if the half, or any other portion, of the ascertained annual rent shall extinguish the interest upon the debt, when it was received, and reduce the principal; why should the whole debt continue to draw interest? Surely, to allow this would be to vary the obligations of these parties to each other, differently from what would be their respective rights, in any other case of a debt drawing interest upon which a payment had been made, which paid the interest and part of the principal. Is there any difference in the effect of a payment, whether made in person by the debtor, or if it arises from the income of his property? The correct rule, in general, is, that the creditor shall calculate interest, whenever a payment is made. To this interest, the payment is first to be applied; and if it exceed the interest due, the balance is to be applied to diminish the principal. If the payment fall short of the interest, the balance of interest is not to be added to the principal so as to produce interest. This rule is equally applicable, whether the debt be one which expressly draws interest, or on which interest is given in the name of damages. *Smith* v. *Shaw*, 2 W. C. C. 167; 3 Cow. 87, note *a*. This then being the rule, if the fact is probable in this case, that the income of the property received at any time in the course of the year did pay interest and a part of

principal, the defendant cannot complain; he being the receiver of the money, and refusing to give any account of the aggregate, or its parts,
*372] when received, *if the master has taken a date for the computation of the aggregate rent as payment, which places the parties upon an equality. Besides, the mandate does not restrict the right of the complainant to a credit for the aggregate of the rent at the end of the year. It does not allow interest upon the rent, but directs the rents to be applied to the payment of the sums incurred in building and repairing; secondly, to the interest on the sums which have been advanced on the loan, or in the improvement of the lot; and thirdly, to the discharge of the principal of the loan. The fair inference from the silence of the mandate as to the time when the rents are to be credited is, that they are to be so, when they are received, if the interest and part of the principal are paid. This is the general rule for the application of payments, and is the rule of equity, which does substantial justice.

What, then, is the case of the defendant in this particular? He has a debt drawing five per centum interest, yielding annually $1135.55, and is in possession of the property of the complainant, giving a rent annually, after deducting $700 for repairs and taxes, of $8000. But it may be asked, by what means or evidence did the master ascertain the amount of rents, and that they were paid at such times, and in such amounts, as to justify the computation of the annual aggregate as a payment, before the expiration of the year? First, he must have known that leases of houses are not made, either in Louisiana or elsewhere, for the payment of the entire rent at the end of the year; next, he had an account made by the defendant, verified by his oath, showing that, for seven years, the rents of this property were received by him, principally, in monthly payments; in the year 1828, altogether so; and then, at intervals of two, three or four months, in sums over $1700 up to $3000. The rents received in January and February 1828, exceeded the amount of interest upon the principal debt or loan by $600. The rent in that account, received on the 26th January 1829, was $950, and the account states $1000 as due on the 1st of February 1829. The amount of the annual rent the master ascertained from the tenants, who were witnesses before him, not to be less than $8000. Let it be remembered, that the question now is, not whether the defendant shall pay interest upon rents and profits, but the time when he shall credit a payment upon the debt, which discharges the interest and a part of the principal. His debt was bearing interest, and therefore, his receiving the rents of the property at any time, in a sum sufficient to pay the interest and part of the principal, should be applied at the date when it was received. The defendant could not claim an exemption from the operation of this general rule, in virtue of any relation between himself and the complainant, as trustee, bailiff, attorney or agent of the latter; who was always ready to pay, when called upon, who had not mingled the rents with his own money, and not used it as his own, or that it had been kept on hand to abide the decree of the court. If he had been in either of these attitudes, especially the latter, his
*373] own oath, if not *controlled by other testimony and the circumstances of the case, would have entitled him to a continued accumulation of interest upon the debt, without any credit of the rent, until the final decree had directed a sum to be paid to the complainant. Under the circumstances

of this case, the defendant refusing to give any account, yet admitting that he had received the rents, at intervals, in the year ; when we consider such to be the usual way of renting houses, he having agreed that the certificates of the tenants should be received as evidence of the amount of rents respectively paid by them ; the tenants having proved the amount of the annual rent of the premises ; we conclude, that the master did right in assuming an intermediate point in the year for the computation of the annual amount of rent, in the absence of all proof when its parts were paid ; and that it was the fairest way of carrying out the substantial intention of the mandate of this court.

But suppose, as was argued in argument, that the mandate had directed an annual application of the rent of the premises, to the payment of the debt of the defendant, without specifying that the interest was to be calculated to a date contemporaneous with the last payment of the rent, and the debt was one bearing interest *de die in diem*. The mandate could only be executed, according to the general rule, in the case of such a debt, by making every receipt for rent, in discharge first of the interest, then of the principal. *Raphael* v. *Boehm*, 11 Ves. 91. The mandate is to be interpreted according to the subject-matter to which it has been applied, and not in a manner to cause injustice. This is not like the case of a decree directing annual rests, with the view of compounding interest. The question now under consideration has been ruled, as it is now decided, in *Bennington* v. *Harwood*, 1 Turn. & Russ. 477, a case upon a master's report of an account, under a decree that the master should set an annual value, by way of rent, upon the premises, the mortgagee being in possession ; the master of the rolls decided, that a mortgagee can never receive more than his principal and interest ; and says, "now, if, in the early part of the year, a payment is made to him, exceeding the interest which is then due, and he is nevertheless allowed interest on the whole of his principal, down to the end of the year, what is the profit which he derives from his mortgage, in the interval between the date of that payment, and the date of the annual rent ? It is clear, that a part of his principal has been repaid to him, and yet he receives interest upon the whole of it ; in other words, he gets more than five per cent. on the sum for which he is actually a creditor. Suppose, that the sum paid to Eadon, on the 2d February, had been equal to the whole of the 500*l.*, which the arrears of interest, calculated to that day, would he have been entitled to interest up to the 5th of July ? Is it possible, that such would be the effect of a direction to make annual rests ? The sums which a mortgagee in possession receives, in respect of the mortgaged premises, at times intermediate between the dates of the annual rents, *must be applied, when they exceed interest, to the reduction of the principal ; and in the present case, that course is clearly prescribed, by the very words of the decree." Now, what was the decree in *Bennington* v. *Harwood* ? It was the usual decree against a mortgagee in possession, containing the common directions, that the master should tax him the costs of suit, and so set an annual value, by way of rent, upon the premises, with further directions that the sums received in February 1805, were to be applied forthwith, first, to the discharge of the then existing arrear of interest, and next, to the diminution of the principal. The master made the rest, on the 5th July, instead of doing so in February ; and the counsel con- [*374

tended in that case, as counsel have done in this, that a direction for annual rents, excludes all rents which are not annual. But that position was not sustained by the master of the rolls, on general principles, though he concludes by saying, in the present case, "that course is clearly prescribed by the words of the decree." The defendant here is substantially a mortgagee in possession, having a debt due to him, bearing interest *de die in diem;* and must abide the general rule for the application of payments to it.

This, then, is not a case in which the defendant has been deprived of a day's interest, by the master's report, nor one in which interest has been allowed upon rents and profits; but a case in which the application of a sum received by the creditor is made, to prevent his whole debt from drawing interest, after a part of it was probably paid. Of this, there is a violent presumption. The general principle is, as it was ruled in *Breckenridge* v. *Brooks*, 2 A. K. Marsh. 341, that a mortgagee in possession is not to pay interest upon rents; but as the chief justice said, in that case, "We will not say, there may not be special circumstances which would justify allowing interest upon rents received by a mortgagee. We say, in this, that whenever a mortgagee in possession, having a debt due to him, carrying interest *de die in diem*, shall collect an amount of rent, which will extinguish the interest and a part of the principal, that he is bound so to apply it." In *Fenwick* v. *Macey's Executors*, 1 Dana 286, rents received by a mortgagee were directed to be applied as they accrued, to keep down the interest. In *Reed* v. *Lansdale*, Hardr. 7, it was ruled, that the equitable rule in redeeming, when the mortgagee is in possession, is to charge the profits of the mortgaged property against the principal and interest.

Having thus disposed of the exceptions to the report, and considered the principal arguments of counsel against its confirmation, we remark, that there is nothing on the face of the report, adverse to the defendant's rights, which should cause it to be set aside. Even with the computation of the rents as a credit on the 1st April, he is still a gainer; for the difference between the calculation so made, and what would have been the amount he would have received, if the rents had been credited on the 1st November, is more than compensated by the use of large sums of money received by *him as rent, after the total extinguishment of his debt. The complainant, however, took no exception to the report; and it must stand good against her.

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We notice, in conclusion, an objection to the report, urged in the defendant's petition for a rehearing, and in the argument of the case. It is, that the decree of the court below is inconclusive as to whom the property is to be reconveyed. This is not an objection which the defendant can be permitted to urge. When he shall obey the decree, in reconveying and surrendering the property, his responsibility will be at an end. As to the defendant, the decree of the court is conclusive against all persons who may legally claim from him any interest in the property, as devisee or heir of Edward Livingston. As to those, the law of Louisiana fixes their respective rights, and upon those rights, this court has not, nor does it intend, to adjudicate in this cause. The general rule certainly is, that all persons materially interested in a suit, ought to be parties to it, either as plaintiffs or defendants, that a complete decree may be made between those parties. *Caldwell* v. *Taggart*, 4 Pet. 190. But there are exceptions to this rule, and

one of these is, where a decree in relation to the subject-matter of litigation can be made, without a person who has an interest, having that interest in any way concluded by the decree. *Bailey* v. *Inglee*, 3 Paige 122. See also *Joy* v. *Wurst*, 1 W. C. C. 517, where the rule is comprehensively expressed, in respect to active and passive parties; and where a party is not amenable to the process of the court, or where no beneficial purpose is to be effected, by making him a party, such interest must be a right in the subject of controversy, which may be affected by a decree in the suit. Such is the case as to Cora Barton, in this cause. The subject-matter is, to obtain from the defendant, money decreed to be due to Edward Livingston, and the surrender and reconveyance of property forming a part of the real estate of Edward Livingston. After his death, his widow, as executrix, was made a party to the bill; and the decree in that suit, cannot in any way determine the rights of Cora Barton in her father's estate. Besides, if there was any force in the objection, it comes too late; for where a complainant omits to bring before the court persons who are necessary parties, but the objection does not appear upon the face of the bill, the proper mode to take advantage of it, is by plea or answer. If the objection appears on the face of the bill, the defendant may demur. *Mitchell* v. *Lenox*, 2 Paige 280. The objection of a misjoinder of complainants should be taken either by demurrer or in the answer of the defendants; it is too late to urge a formal objection of this kind, for the first time, at the hearing. *Trustees of Watertown* v. *Cowen*, 4 Paige 510. So also, it was ruled in 3 Paige 222. We might crowd this opinion with decisions to the same point, from the English and American chancery reporters.

But further, the objection cannot prevail, for it does not show that the process of the court could reach Cora Barton. In *Mallow* v. *Hinde*, 12 Wheat. 193, it was *ruled, that wherever the case may be completely decided, as between the litigant parties, an interest existing [*376 in some other person whom the process of the court cannot reach, as if such person be a resident of another state, will not prevent a decree upon the merits. And in the same case, it was decided, where an equity cause may be finally decided as between the parties litigant, without bringing others before the court who would, generally speaking, be necessary parties, such parties may be dispensed with in the circuit court, if its process cannot reach them; as, if they are citizens of another state. But when the rights of those not before the court are inseparably connected with the claim of the parties in the suit, the peculiar constitution of the circuit court is no ground for dispensing with such parties. 12 Wheat. 194. In whatever point of view, therefore, the objection is considered, whether as to the interest of Cora Barton in the suit, the time when the objection has been made, or the manner in which it is made, in not showing that the process of the court could have reached her, is of no moment in this case. This court, in regard to her, only directs her name to be inserted in the reconveyance, it having been ascertained by the master that she is a forced heir of Edward Livingston, and that fact being admitted by the defendant, and the admission of its correctness being the foundation of his objection.

The decree of the court below, affirming the master's report, and directing a reconveyance of the property, is affirmed.

THIS cause came on to be heard, on the transcript of the record from the circuit court of the United States for the eastern district of Louisiana, and was argued by counsel: On consideration whereof, it is ordered, adjudged and decreed by this court, that the decree of the said circuit court, in this cause, affirming the master's report, be and the same is hereby affirmed. And this court doth order, adjudge and decree, that the defendant do, on or before the 10th day of the ensuing term of the said circuit court, pay to the complainant, Louisa Livingston, the sum of $32,958.18, with interest thereon, at the rate of five per cent. per annum, from the 15th day of July 1837 to the time of payment. And this court doth further order, adjudge and decree, that the said defendant, Story, do, on or before the 10th day of the next term of said circuit court, by deed, convey to the said Louise Livingston and Cora Barton, all the right, title and interest in and to the premises in controversy, derived to, and acquired by him, by the deed of conveyance made by the said Edward Livingston, with covenants of warranty against himself and his heirs, and all persons claiming by, through or under him, the said Benjamin Story, and that he deliver said deed into said court, and that he deliver the possession of the premises to said Louisa Livingston, her agent or attorney, on or before the 10th day of the next term of said circuit court. And this cause is remanded to the said circuit court with
*377] instructions to carry this decree *into effect. And it is further ordered, adjudged and decreed, that said circuit court retain this cause upon the docket, for the purpose of ascertaining and decreeing the amount of the rents of the premises from the first day of November 1837, to the time when possession thereof shall be surrendered, according to this decree, and with power to make such orders and decrees as may be necessary for that purpose, and for the payment of the said rents from the said first day of November 1837, to the time of the surrender of the possession, with five per cent. interest on the said rents, from the time said rents were received to the payment thereof. And this court doth further order, adjudge and decree, that the defendant do pay the costs in this court, upon this appeal, and the costs of the reversal of the decree of the said circuit court, by this court, at its January term 1837; and also such costs on the proceedings in the said circuit court in this cause, as the said circuit court shall tax and order to be paid; and that the said circuit court do issue execution therefor.

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*378] *JOHN WILCOX and others, *v.* CHESTER HUNT and others.

Louisiana practice.—Pleading.—Deed of trust.—Proof of contract under seal.

In the district court of Louisiana, the defendant put in a plea of reconvention, which is authorized by the code of practice of Louisiana; the district court on the motion of the plaintiffs, ordered the plea to be stricken off. The code of practice of Louisiana was adopted therein, by a statute of that state, passed after the act of congress of the 26th May 1824, regulating the practice of the district court of the United States for the eastern district of Louisiana; and the practice, according to that code, had not been adopted as part of the rules of practice of the district court, when the plea was stricken off: *Held*, that the plea was properly stricken out.

Where a deed of trust was made to secure the payment of certain promissory notes, in an action upon the deed, the notes may be read in evidence, to prove the amount of the debt intended

to be secured by the deed, without the notes having been assigned by the payees to the plaintiffs, the trustees in the deed.

The general rule is, that the allegations in the answer or plea, in an action, and the proof, must agree; where there are no averments in a plea, to authorize the proof offered by a defendant, it is properly rejected by the court.

In Louisiana, when a contract, having subscribing witnesses to it, is proved to have been made out of the state, the state courts presume the witnesses reside at the place where the contract was made, and are not subject to process issued out of those courts; they, therefore, allow secondary evidence to prove the contract. This being the settled doctrine of the supreme court of Louisiana, the district court of the eastern district of Louisiana properly admitted evidence of the handwriting of the witnesses to a deed of trust, which had been executed out of Louisiana, to go to the jury.

There is a material difference between the laws of New York and those of Louisiana, in relation to the dignity of instruments in writing; contracts made before a notary and two witnesses, called authentic acts, are, by the laws of Louisiana, elevated above all others; a contract under seal does not appear to be of greater dignity in Louisiana, than one without seal; and those who sue in the courts of that state must abide the consequences of those rules. The validity and interpretation of contracts are to be governed by the laws of the country where they are made; but the remedy must be according to the laws of the country where the suit is brought.

Error to the District Court for the Eastern District of Louisiana.

McKinley, Justice, delivered the opinion of the court.—This case comes before this court upon a writ of error to the district court of the United States for the eastern district of Louisiana. The defendants in error commenced their suit by petition in the court below, upon a deed of trust executed by Wilcox, one of the plaintiffs in error, in the state of New York; by which he covenanted, among other things, to pay to the defendants in error the sum of $25,206.08, being the amount of certain promissory notes, mentioned and enumerated in said deed of trust, payable to several persons in the city of New York. Others, to wit, James B. Hulin, Alfred Hennen and E. V. Jourdain, were made defendants to the suit, for the purpose of subjecting money in their hands, belonging to Wilcox, to the payment of the debt sued for, according to the mode of proceeding in Louisiana. Wilcox pleaded a general denial, and the plea of reconvention, claiming damages of the plaintiffs below, for breaches *on their part of the covenants [*379
in the deed of trust, to be set off against the amount sought to be recovered against him.

At the trial, the court ordered the plea of reconvention to be stricken out, to which Wilcox excepted. This plea is authorized by the Louisiana code of practice, which was adopted by statute, subsequent to the passage of the act of congress of the 26th of May 1824, regulating the practice in the district court of the United States for the eastern district of Louisiana, and which, at the time of the trial, had not been adopted as a rule of practice of that court. It being a plea not authorized by the rules governing the practice of the court, it was properly stricken out.

Three other bills of exception were taken at the trial, to the rulings of the court. By the first, it appears, the plaintiffs offered to prove the signatures of the defendant, Wilcox, and of the plaintiffs, to the deed sued on. The defendant, Wilcox, objected to this evidence; because it appeared by the deed, that there were two subscribing witnesses to it. But the court overruled the objection, and admitted the evidence, upon the ground, that as the deed was executed in the state of New York, it was fairly presumable,

that the subscribing witnesses resided there; and which was a sufficient reason for letting in secondary evidence to prove the execution of the deed. When a contract is proved to have been made out of the state of Louisiana, having subscribing witnesses to it, the state courts presume that the witnesses reside at the place where the contract was made, and are not subject to the process of the court. They, therefore, allow secondary evidence to prove the execution of the contract. 7 Mart. (N. S.) 542; 8 Ibid. 379; 12 Mart. 539. This being the settled doctrine of the supreme court of Louisiana, the court below very properly permitted the evidence to go to the jury.

But it is contended by the plaintiff's counsel here, that the contract having been made in the state of New York, it ought, in all respects, to be governed by the laws of that state. There is a material difference between the laws of New York and those of Louisiana, in relation to the dignity of the instrument sued on in the court below. Contracts made before a notary and two witnesses, called authentic acts, are, by the laws of the latter state, elevated above all others; a contract under seal does not appear to be of greater dignity there than one without seal. And those who sue in their courts must abide the consequences of these rules. The validity and interpretation of contracts are to be governed by the laws of the country where they are made; but the remedy must be according to the laws of the country where the suit is brought. 8 Pet. 361.

By the second of these bills of exception, it appears, the plaintiffs offered to read the notes included in the deed of trust, as evidence of the amount of debt due from the defendant Wilcox; to which he objected, because, they had not been assigned to the plaintiffs by the payees. The objection
*380] was overruled by the court, and the notes *read to the jury. If the action properly lay upon the deed of trust, to which there appears to have been no objection made, it was proper that the notes, which were included in the deed and made a part of it, should have been read to the jury.

The third and only remaining exception is, to the offer on the part of the defendant to prove, under the plea of general denial, a violation of the contract sued on, by the plaintiffs, before the commencement of the suit; and a failure, on their part, to comply with its stipulations. This evidence was objected to by the plaintiffs, and excluded from the jury by the court. The general rule is, that the allegations in the answer or plea and the proof must agree; and as there were no averments in the plea, to authorize the proof, it was properly rejected by the court. From the best consideration we have been able to give to this case, it seems to us, there is no error in the record and proceedings of the district court. The judgment is, therefore, affirmed, with costs.

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

*Ann Lupton, Appellant, *v.* Phineas Janney, Executor of David Lupton, Jun., deceased, Appellee.

Executors' accounts.

The executor of L. filed his accounts in the orphans' court of Alexandria, in 1816 and 1818, and settled his final account in 1821; no exceptions were taken to the accounts; in November 1831, a *subpœna* was issued against the executor, and in June 1833, a bill was filed by the devisee and legatee, against the executor, the object of which was to surcharge and falsify the accounts filed and settled in the orphans' court; the bill did not charge the executor with fraud, but imputed negligence, which was alleged to amount to a *devastavit;* no reason was given, or facts stated, to excuse the long delay and *laches* in bringing the bill: *Held*, that the lapse of time from the settlement of the accounts of the executor was a bar to this proceeding.[1]

Nothing is more clear than the general rule, that *ex parte* settlements of accounts by executors, in the orphans' court, being matters within the acknowledged jurisdiction of the court in the administration of estates, are *primâ facie* evidence of their correctness, and the *onus probandi* is upon those who seek to impeach them. If they seek to impeach them, it should be by a suit brought, *recenti facto*, within a reasonable time, and at farthest, within the period prescribed by the statute of limitations for actions at law on matters of account; or else assign some ground of exception or disability, within the analogy of the statute, to justify or excuse the delay; otherwise, it will be imputed to their voluntary *laches*, and relief will not be given by a court of equity.

Lupton *v.* Janney, 5 Cr. C. C. 474, affirmed.

Appeal from the Circuit Court of the district of Columbia, and county of Alexandria.

A bill was filed on a *subpœna* which had issued from the circuit court, on the fifth day of November 1831, by Ann Lupton, the sole devisee and legatee of David Lupton, Jr., for the purpose of surcharging and falsifying the accounts of the executor, Phineas Janney, which had been settled in three accounts rendered by him to, and allowed by, the orphans' court of Alexandria. The first account was rendered and was settled on the 26th of October 1816; the second account was settled on the 16th of April 1818; and on the 5th of January 1821, the executor rendered and settled his final account. The bill of the complainant was filed on the 4th day of June 1833.

The complainant alleged, that the executor was chargeable with certain debts due to the estate of the testator, which he had failed to collect, and for goods of the estate sold by him, the amount of which sales had not been paid to him; certain credits had been given in the accounts of the executor to parties not entitled to them; and in an amended bill, facts were charged which amounted to a *devastavit*, which it was alleged were not satisfactorily contradicted by an amended answer. There was no imputation or charge of fraud in the executor; but it was asserted, that gross negligence was to be imputed to the executor, for which he was answerable *de bonis propriis.*

The answers of the defendant denied all the allegations in the complainant's bill, material to charge him as executor of David Lupton, Jr. *The defendant also pleaded in his answer, an amended answer, as follows: [*382

"This respondent admits that the complainant was not present at, nor

[1] See Taylor *v.* Benham, 5 How. 233.

summoned to attend the said settlements. But he is advised and avers, that the said settlements were legally made before a court having full jurisdiction in the matter, in the due and regular exercise of its jurisdiction; and the respondent relies on the said settlements, in bar of the jurisdiction of this court, as a court of original jurisdiction, in the case stated by the complainant, in the same manner as if the same were specially pleaded." Also, "This respondent is advised, that an act of the general assembly of the state of Virginia, passed the 8th day of March 1826, entitled 'an act for the limitation of actions against persons acting in a fiduciary character, and their sureties, and other purposes,' is a complete bar to any proceedings against him, in that state, and was so when the said amended bill was filed."

In November 1838, the circuit court made a decree dismissing the complainant's bill; from which decree, this appeal was prosecuted.

The case was argued by *Semmes*, for the appellant; and by *Jones*, with whom was *Coxe*, for the appellee.

Semmes argued the cause on all the matters contained in the bill; but the court having decided the case on the limitation imposed by time on the complainant's right to recover, the argument on the point decided is alone given.

Semmes, for the appellant:—In reference to the ground of defence assumed in the amended answer, that the lapse of time intervening between the settlement of the respondent's accounts and the institution of this suit is a bar to any decree for opening those accounts, it may be observed, that the general rule under which equity denies a stale demand is not indiscriminate or universal in its application; time is not alone sufficient. Every case is to be decided on its own basis, and it is in the sound discretion of the court, on weighing the circumstances, to say, if they will grant or deny the relief. There is not, and there cannot be, in the mere lapse of time, a peremptory bar, where no express statute of limitations governs the case. In discouraging stale demands, for the peace of society, courts of equity have established a necessary rule, but that necessary rule is still a plastic one, suitable to cases as courts may judge it proper, the necessity of its application depending on many circumstances extrinsic and independent of the lapse of time. Thus, equity will not close its doors, in favor of a fraud, though time may have long passed since it was committed. Where an executor's or administrator's accounts have been settled in the proper court, *ex parte;* without notice to legatees or parties in distribution; the time
*383] within which a bill to *surcharge and falsify will be entertained, is extended. Whether the original parties to the transactions sought to be opened, be alive or dead, is another material consideration; in the former case, the remedial functions of the chancellor being more easy, and in the latter case, less easy of access.

Notwithstanding, however, the pliability of the rule, and its adaptation to cases according to their exigency and inherent equity, the courts have, in many cases where there were no rebutting circumstances of presumption, intimated, if not expressly fixed, a *terminus* to this lapse of time. Thus, they will, in general, presume the payment of a bond, the extinguishment of

a trust, and the surrender of a deed, after an acquiescence of twenty years by the parties in interest. A mortgage will be presumed discharged, after the same lapse of time ; and an adverse possession of twenty years will bar a bill in equity for the conveyance of the legal title. Yet even this rule, if rule it strictly be, is not inflexible. Courts frequently step beyond its limits, in cases where an obvious equity invokes its exception.

Should this rule apply to the case at bar? The appellant shows, that at the time these accounts were settled in the orphans' court, she resided out of the jurisdiction of the courts in the district of Columbia ; that she was the sole legatee of her husband, the testator ; that the executor whom she now seeks to charge was a brother-in-law of the testator, and that she had unbounded confidence in him ; that his executorial accounts were all settled *ex parte*, and without notice of any kind to her. She shows acts of gross omission to collect debts, and culpable negligence on the part of the executor, amounting to a *devastavit*. She shows that he has lost from $10,000 to $15,000 to her husband's estate, by his neglect. Moreover, the original parties are all alive—the appellant, the legatee and *cestui que trust ;* and the appellee, the executor and trustee. The lapse of time, from the settlement of the final account to the issue of the *subpœna*, is ten years and ten months ; to the filing of the bill about twelve years. The lapse of time, from the *devastavit* charged to the filing of the bill, is about sixteen years.

It is not necessary to cite authorities in regard to the defence against stale demands, nor to show the various modifications that doctrine has undergone in its application to different cases. One or two cases from Virginia may, however, be quoted, as ruling the present question. The courts of that state allow an executor's accounts to be opened, after a much greater lapse of time than twenty years, and even after the death of the original parties. In *Burwell's Executors* v. *Anderson's Administrator*, 3 Leigh 348, the court held lapse of time no bar, though thirty-one years had passed since the first testator's death. The executor of the distributee of the testator's widow was allowed to file his bill against the representatives of the executor of the first testator, surcharging and falsifying the accounts which had been settled, after a lapse of thirty-one years, and time was held no bar. The cases of *Hudson* *v. *Hudson's Executor*, 3 Rand. 117, and *Todd* v. *Moore's Administrator*, 1 Leigh 457, though the relief prayed was [*384 denied, under the peculiar circumstances, establish the general principle for which we contend.

Jones, for the appellee, contended, that even if the matter of the bill came at all within the cognisance of the circuit court, for original relief in equity, yet neither the bill itself, nor anything disclosed in the progress of the cause, lays any sufficient foundation for the interference of equity in the matter ; but on the contrary, all the pretences for charging the executor, by surcharging and falsifying the past settlement in the orphans' court, are *strictissimi juris*, at best ; and it is positively unconscientious and in equitable for the complainant to set up, after her long acquiescence, with actual notice and knowledge of the circumstances that give color to the principal objections now raised against the past settlement.

2. That far less than the actual length of time during which she implicitly acquiesced in the settlement before she filed her bill, would, under the cir-

cumstances of the case, have presented a positive bar in equity to charges against the executor, so strictly penal in their grounds and their consequences, calling for forfeiture rather than restitution ; and so entirely clear of all imputation of fraud, as those upon which alone she has founded her claims.

The settlements in the orphans' court, made by the executor, are *primâ facie* evidence of their correctness. This is on the supposition, that the parties interested in them had notice of the settlements. If they had not notice, or it was not supposed they had had notice, the accounts would not have been allowed to be filed. There was notice. The time of settlement of the accounts of an executor is fixed and limited. This is sufficient, to show that every one who had an interest in the accounts had a knowledge of them, or might have known of their having been filed. At all times, the accounts were open to the inspection of any one who might think proper to examine them.

Sixteen and a half years from the settlement of the first account, and twelve and a half from the filing of the final account, had elapsed, before the bill in this case was exhibited. While it is admitted, that as to persons acting in a fiduciary character, there is no limitation, in cases of fraud, this principle does not apply, when no fraud is charged ; and none is charged or imputed in this case. It is contended, that after a reasonable time, the settlement in the orphans' court, by the executor, is a bar. And the matters set up in the complainant's bill were proper for examination on exceptions to the accounts of the executor in the orphans' court ; and will the court, after twelve years of silence, allow a party, passing by the orphans' court, and neglecting to use the means of redress which that court would have afforded for any misfeasance or omissions of the executor, to come into the circuit court, by an original bill, and set up these matters ? When a technical **devastavit* is charged against an executor, without an allegation of fraud, it is a tort, and there is a limitation. This is not claimed to be the rule in cases of fraud.

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The court declined hearing *Coxe*, for the appellee.

Story, Justice, delivered the opinion of the court.—This is a case of an appeal from a decree of the circuit court of the county of Alexandria, dismissing a bill in equity, brought by the appellant, Ann Lupton, the widow and devisee of the testator, David Lupton. The bill was first filed in June 1833, although a *subpœna* was issued in November 1831, and it seeks to open the accounts of the administration, upon the allegation of certain errors and omissions therein, as they were settled in three successive accounts of the executor, rendered *ex parte*, and allowed in the orphans' court of Alexandria, in October 1816, in April 1818, and in January 1821. The bill charges, among other things, that the estate was charged by the executor with the payment of a supposed debt of $4459.43, to one Peter Saunders, without any sufficient or legal evidence that it was in fact due. It also charges, that the executor omitted to collect of John McPherson & Son, a debt due to the estate, of $4083.50, upon their note ; and also specifies certain credits which have been omitted to be given by the executor; and contains a general allegation, that other debts have been lost to the estate, by the negligence of the executor. The prayer of the bill is, in effect, to open the accounts, with

general liberty to surcharge and falsify. There is no charge in the bill, that the executor has been guilty of any fraud; nor any reason given, nor facts stated, to excuse the long delay and *laches* in bringing the bill. The answer denies all equity, and insists upon the correctness of the accounts as settled, and contains a full explanation, in reply to the specific charges of the bill. It also relies on the settlement of the accounts in the orphans' court, and the lapse of time, as a bar to the suit.

The opinion which we have formed upon this last point, renders it wholly unnecessary for us for consider several others which have been discussed at the bar; and especially, the objection, that the orphans' court has exclusive jurisdiction over the matters in controversy. We place this case wholly upon the ground of the lapse of time since the accounts were settled in the orphans' court, a period, from twelve or sixteen years before the filing of the bill; the total omission of the bill to state any facts or circumstances to account for or excuse this long delay; and the absence of any suggestion of fraud in the settlements. Nothing is more clear, than the general rule that *ex parte* settlements of accounts of this sort, in the orphans' court, being matters within the acknowledged jurisdiction of the court in the administration of estates, are *primâ facie* evidence of their own verity and correctness; and the *onus probandi* is upon those who seek to impeach them. If they seek to impeach them, it should be by a suit brought *recenti facto*, within a reasonable time; *and at farthest, within the period prescribed by the statute of limitations for actions at law upon matters [*386 of account; or else to assign some ground of exception or disability, within the analogy of the statute, to justify or excuse the delay. Otherwise, it will be imputed to their own voluntary *laches;* and courts of equity are never active in lending their aid to stale and neglected claims, for the known maxim of such courts is, *vigilantibus, non dormientibus, leges subveniunt.* We do not deem it necessary to refer to any authorities on this point, as it has been so long and so fully recognised in this court; and upon this short ground, we are all of opinion, that the decree of the circuit court dismissing the bill, ought to be affirmed, with costs.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the county of Alexandria, and was argued by counsel: On consideration whereof, it is ordered and decreed by this court, that the decree of the said circuit court in this cause be and the same is hereby affirmed, with costs.

*The Sarah Ann.

The New England Insurance Co. *v.* The Brig Sarah Ann: Woodbury and others, claimants.

Power of master to sell stranded vessel.

The right of the master to sell a vessel stranded, depends on the circumstances under which it is done, to justify it; the master must act in good faith, and exercise his best discretion for the benefit of all concerned; and a sale can only be made on the compulsion of a necessity, to be determined in each case by the actual peril to which the vessel is exposed, and from which it is probable, in the opinion of persons competent to judge, the vessel cannot be saved; this is an extreme necessity.

The true criterion for determining the authority of the master to sell a vessel stranded near a foreign port, or in a port of the United States, or of a different state than that to which the vessel belongs, or in which the owners may be or reside, when the necessity occurs, is the distance of the owners or insurers from the scene of stranding. If, by the ordinary means to convey intelligence of the situation of the vessel, the master can obtain directions as to what he should do, he should resort to those means; but if the peril be such, that there is a probability of loss, and it is made more hazardous by every day's delay, the master may act promptly, to save something for the benefit of all concerned, though but little can be saved. There is no way of doing so more effectual, than by exposing the vessel to sale; by which the enterprise of such men is brought into competition as are accustomed to encounter such risks, and who know from experience how to estimate the probable profits of such adventures.[1]

The power of the master to sell the hull of the stranded vessel, exists also as to her rigging and sails; which he may have stripped from her, after unsuccessful efforts to get her afloat, or when the vessel, in his own judgment and that of those competent to form an opinion and to advise, cannot be delivered from her peril.

If the master sells, without good faith, or without a sound discretion, the owner may, against the purchaser, assert his right of property in the sails and rigging; as he may in the case of a stranded vessel, which has been sold without good faith in the master. Scull *v.* Briddle, 2 W. C. C. 150, is not sound law; it is expressed in terms too broad.

The Sarah Ann, 2 Sumn. 206, affirmed.

Appeal from the Circuit Court of Massachusetts. In September 1834, in the district court of the United States for the district of Massachusetts, the New England Insurance Company filed a libel, stating that they were the true owners of the brig Sarah Ann, then in the district of Massachusetts, and in the possession of Obadiah Woodbury and others, claiming to be the owners of the said brig, and who are about to carry her to sea, without the consent of the libellants. A summons was issued to Obadiah Woodbury and others, commanding them to appear and show cause why process should not issue against the brig, as prayed for in the libel; and they appeared, and gave stipulations to abide by the final decree of the court, on an appeal, and put in an answer to the libel.

The case was proceeded in by the libellants and the respondents, in the district court, and after testimony had been taken to the matters in controversy, a *pro formâ* decree for the respondents, dismissing the libel, was given by the district judge, by the consent of the counsel of both parties; and the libellants appealed to the circuit court of the United States for the district of Massachusetts. Further evidence was taken in the circuit court,

[1] The Tilton, 5 Mason 465; The Lucinda Snow, 1 Abb. Adm. 305. And see The Julia Blake, 107 U. S. 427.

by the appellants and the defendants; and at May term 1835, the circuit court *made a decree in favor of the defendants; from which the New England Insurance Company prosecuted this appeal. [*388

The facts of the case were as follow: On the first day of March 1828, the appellants, at Boston, underwrote a policy of insurance on the brig Sarah Ann, valued at $4000, in port and at sea, during the term of one year from the 22d of February 1828. On the 25th of March 1828, the brig was stranded on the shore on the Island of Nantucket, and on the following day, an abandonment was made by the owners, for a total loss by the perils of the sea. The abandonment was expressly refused by the insurers, but it was not withdrawn by the owners of the vessel; and on the 3d of October 1828, a compromise was made between them and the insurers, and all the right and title of the assured in the brig was assigned to the appellants. The claimants of the brig, the appellees, asserted a title derived under a sale made by the master, after the stranding, on the ground of an absolute necessity for such a sale.

In May 1828, the brig was brought into Boston, after having been gotten off from the shore at Nantucket, and having been repaired. The repairs of the brig, and her cost at the sale made by the master, amounted to $2494.67; and she was sold in Boston, in July 1828, for $2736.41. On the 14th of May 1828, the president of the insurance company wrote to the agent of the former owners of the brig, the assured, stating that the brig was then in Boston, and saying, "As she is now within your own control, as agent for the owners, if you do not take possession of her in their behalf, the company must consider the sale of her at Nantucket, as affirmed by them; and that she is sold for their account. We, of course, shall contest the validity of the sale, as it regards ourselves, and we think the owners ought to contest it themselves." At this time, the title to the brig was in contest between the assured and the insurers. The abandonment was denied to be good; and neither party was in a situation to assert a title, without compromitting rights then actually in contestation. There were no allegations or proofs in the cause, that after the final acceptance of the abandonment, in October 1828, the brig had been within the ports of Massachusetts, and within the reach of the process of the court, for a reasonable time, within the knowledge of the appellants.

The facts of the case, as stated in the protest, and as detailed in the decree of Mr. Justice STORY, in the circuit court, 2 Sumn. 213, were: "The brig having on board a cargo of rice and cotton, sailed on a voyage from Savannah, for Boston, and on the 23d of March 1828, was stranded on the south-west side of the Island of Nantucket. On the next day, assistance was obtained from the shore, and the anchors were got out and hove tight, in order to start the vessel, but without success. In the course of the forenoon, the wreck-master came on board, with twenty men, and pursuant to his directions, the deck-load was thrown overboard. They then hove *the cables again, but with no beneficial effect. The then proceeded [*389 to open the hatches and discharge the cargo from the hold; and then hove out the cables again, but to no purpose, as the tide had fallen, and there was a considerable surf rolling in shore. The master and crew remained on board that night, and the day following, nothing could be done, as the wind blew strong at the south-east, and there was a heavy surf.

After the weather moderated, the cargo was, with great difficulty, got on shore. The protest stated, that the wind and the surf of the sea had driven the brig so far on shore, as to render it impossible to get her off. It further appeared from the evidence, that the place where the brig was stranded was on a sandy beach, about twelve miles distant by sea, and six miles by land, from the town of Nantucket ; and that the brig was at no time high and dry there. The depth of the water about her varied ; sometimes, it was six feet, and sometimes, it was ten feet ; and she was, at no time of tide, out of water. The cargo was discharged in about five days ; and the spars, sails and rigging were then stripped off, and carried on shore, and sold in small lots to the highest bidder. After the cargo was sold, the brig became loose in the sand, and slewed round, and lay with her broadside to the shore. She was sold on the 28th of March, by the master, at public auction, where she lay, for $127 ; at the same time, the spars, sails and rigging were sold for $422.40. No efforts appeared to have been made to get the brig off the shore, though she had not then sustained any serious injury. Three intelligent surveyors, at a subsequent period, estimated the repairs of her hull, as not exceeding $492.25. The brig was got off by the purchasers, soon after the sale ; and was carried to the port of Nantucket, and there repaired. The whole cost of the brig to the purchasers including the repairs and outfits to Boston, was represented to have been, $2494.67 ; and she was sold, under the order of the purchasers, as stated, at Boston, in July 1828, for $2736.41."

The case was submitted to the court, on printed arguments, by *Pickering*, for the appellants ; and by *Saltonstall*, for the appellees.

The argument for the *appellants* stated :—The appellants contend, that this case was not such as to require or justify a sale of the vessel by the master, upon the alleged ground of necessity, as the owners' agent, and the underwriters, were in Boston, and there was an easy and regular communication by mail between Boston and the island of Nantucket, where the vessel was ashore ; and they might and ought to have been consulted by the master before making such sale. In cases resting upon the same principles, for example, hypothecation by the master, in cases of necessity, the rule laid down by the English courts is, that the master can hypothecate, only when the vessel is in some other place than an English port. No *390] *case, it is believed, can be found, in which the master has been authorized to do it, while in England ; the English writers consider that every port in England is a home port, and the residence of the English owner.

The learned author, Abbott on Shipping 123, adds, that Ireland has been held to be a foreign country ; but that since the Union, it is doubtful, whether the rule is not altered. See also the case of *The Lavinia*, before Mr. Justice Washington, 1 W. C. C. 49. So, in cases of the lien of material-men, the courts of the United States have held, that when a vessel was repaired in a port of a state to which she did not belong, there was a lien by the general maritime law ; but if the repairs were made in her own state, there was no lien, unless established by the local laws of such state. *The General Smith*, 4 Wheat. 438.

As to the necessity of the sale, generally, it is a prominent fact, that

the vessel was gotten off, very soon after she was sold, on the sandy shore, which was a smooth beach, without any rocks, and she was immediately repaired and fitted for sea again. *The Brig Pearl*, 2 Sumn. 217, to which the circuit court alludes, in giving the opinion of the case at the bar, was stranded nearly in the same place with the Sarah Ann, and lay there through the winter, and was gotten off in the following spring. Several other vessels which went ashore on the same island, have been gotten off, as appears by the depositions in the case. In the case of *Gordon* v. *Massachusetts Fire and Marine Insurance Company*, 2 Pick. 249, the vessel belonged to Portland, Maine, and was stranded in St. Domingo, and the sale was held justifiable. In *Idle* v. *Royal Exchange Insurance Company*, 8 Taunt. 755 (cited in the Massachusetts case just referred to), a ship from London took the ground, in the river St. Lawrence, below Quebec; but in this case, it is to be noticed, that two of the owners resided in Quebec, and the sale was considered to be sanctioned by them; which distinguishes it from the ordinary case of sales by the master, upon his own authority alone. In *Hayman* v. *Molton*, 5 Esp. 65, the vessel went from London to Jamaica, where she got aground. In *Read* v. *Bonhom*, 3 Brod. & Bing. 147, a London ship was lost in the East Indies. The case of *Thorneley* v. *Hebson*, 2 Barn. & Ald. 513, was that of a New York vessel, insured in London, and, while on her voyage, so much injured by stress of weather, that the crew deserted her at sea; she was afterwards taken possession of by ships that fell in with her, and was brought into Rhode Island, about two hundred miles from New York, where the owners resided. She was sold under a decree of the admiralty court, for the salvors, at a great sacrifice; and the court of king's bench held, that the owners at New York "were near enough to have acted in the business, at the time," and might have prevented the sale, by raising money to release the ship, and therefore, were not entitled to abandon to the underwriters; and so the sale was not justifiable.

*In the case of *Cannan* v. *Meaburn*, 1 Bing. 243, the master sold the cargo, under a decree of a vice-admiralty court, in the Isle of France, in order to defray the expenses of repairing the vessel which was "in a sinking state." The court say, "nothing but an extreme necessity" will justify the sale, &c. This was also a foreign port. The court adopt the reasoning of Lord STOWELL, in the case of *The Fanny and Elmira*, Edw. Adm. 117, which again supposes a case where the ship is in a foreign port, where there is no correspondent of the owners, &c. The leading case of *The Gratitudine*, 3 Rob. 240, is also that of a vessel being in a foreign port, and requiring repairs. The master was allowed to hypothecate the cargo. The learned judge (Lord STOWELL), in his reasoning on the question of necessity, by way of illustration, puts the case of a ship driven into port, with a perishable cargo, where the master can hold no communication with the proprietor (see p. 259), in which case, the authority of agent is devolved upon him, &c. A similar illustration is again put at p. 261, still keeping in view, throughout, the idea of a foreign port as an ingredient in the necessity. [*391

In a Massachusetts case, *Bryant* v. *Commonwealth Insurance Company*, 13 Pick. 543, a vessel was owned and insured in Massachusetts, and stranded on the coast of Virginia; the cargo was landed, and was not of a perishable nature, and might have been kept in reasonable safety, until the owners and

insurers in Massachusetts could be heard from; and it was held, that the master had no authority to sell the cargo and break up the voyage, without waiting until the owners and insurers could be consulted. The court in this case lay down the rule, that the necessity must be so strong as to leave no alternative to the master. They say, "the courts have endeavored to limit and guard this branch of the mercantile law with the greatest care; the strongest language has been employed," &c. In *Hall* v. *Franklin Insurance Company*, 9 Pick. 487, the court say, "There must be something more than expediency in the case; the sale should be indispensably requisite. We mean, a necessity which leaves no alternative, which prescribes the law for itself, and puts the party in a positive compulsion to act." The case of *Scull* v. *Briddle*, 2 W. C. C. 550, was trover for certain sails, rigging, &c., which belonged to a vessel that was wrecked on the coast of Maryland. The vessel and tackle were sold at a public sale, by the master. Mr. Justice WASHINGTON laid down the rule of law to be, "that in cases of extreme necessity, the master may sell in a foreign country, rather than let the property perish, but not in the country where his owner lives; and no case of the sort, it is believed, can be shown. Mischievous would be the consequence if such doctrines were tolerated." See also the case of *The Schooner Tilton*, in the circuit court of Massachusetts, 5 Mason 46.

*392] *The result of these cases is, that the legal necessity to justify a sale by the master, must be something more than a mere moral necessity: it must be such a case of urgency as, in the language of the court in Massachusetts, "to leave no alternative;" and the degree of this necessity may be the better understood, by the important circumstance mentioned in the leading cases, viz., that the disasters in those cases happened to the vessels, while in foreign ports, and where the master had no opportunity of consulting the owners. Further, it is not enough, that the master makes a sale in good faith, although this must accompany the necessity; and this latter must be clearly and indisputably made out. It may be also added, that sound policy demands, that sales of this description should not be too much encouraged, by affording facilities to masters to effect them; especially, in cases like the present, where they have the means of consulting their owners in their own state or country.

But if the court should think that the facts prove a case of legal necessity, in respect to the sale of the hull of the vessel; the libellants still contend, that there was no such necessity as to the sails and rigging, &c. These had been taken out, as well as the cargo, and had carried on shore in safety. Instead of selling the sails and rigging on the spot, under every disadvantage, such as exacting cash in hand, and the purchaser to take the risk of title, &c., the master should have either sent them to Boston, where the parties interested could have sold them to the best advantage, or he should have immediately given information of their having been brought on shore, and then waited for orders. If sold at Boston, they would have brought $1000, or upwards; as, according to the usual estimate, the sails and rigging, &c., are considered about equal to the value of the hull, or half the value of the entire vessel. At all events, whatever might have been the value of the sails and rigging, there was no necessity for selling them, as they were already landed, with the cargo; and the master might easily have advised the owners and underwriters, and waited for their orders; which,

by the usual course of the mail from Boston to Nantucket, would have reached him in two days. In point of fact, the libellants did send an agent to Nantucket, as soon as the loss was known in Boston, who offered to pay all expenses incurred, &c., if the vessel could be delivered to him; but the sale had already taken place, and the purchasers refused to relinquish the vessel to the agent.

In conclusion, the libellants would respectfully urge upon the consideration of the court, the consequences of sanctioning sales of this kind, made under circumstances which do not clearly and unequivocally amount to the strict legal necessity which the courts have required. The greater the facilities that are afforded, the stronger will be the temptation to make such sales fraudulently; and the fraud will be the more difficult of detection, in proportion *as the necessity will be a question to be settled more by the opinions of the master and other witnesses, than by simple matters [*393 of fact. And even in cases where there may be no direct fraudulent intent, the facility of selling will proportionally lessen the efforts of the master and seamen to rescue their vessel from impending danger and loss; and the owners and underwriters will be made to suffer accordingly. The court must, in this and other cases, give weight to the important considerations of public policy or expediency, in laying down practical principles which are to govern the conduct of parties; and it is manifest, that far greater mischiefs will follow from allowing facilities in making such sales, especially in home ports, than by rigorously restricting them to cases of absolute necessity—such a necessity as, in the language of the courts, "leaves no alternative."

Saltonstall, for the appellees, submitted the following points:

1. The sale made by the master was, under the circumstances, justified by necessity. It was made by him in good faith. There was a moral necessity for it. The hazard to which the brig was exposed was so great, the expense that must be incurred in attempting to get her off would be great and certain, and the result of further attempts so uncertain, that the sale was justifiable, and passed the property to the purchasers.

2. The sale was assented to and adopted by Crosby and others, afterwards, who thus ratified the act of the master; and their assignees cannot stand in better right than they were.

3. Though the abandonment was not revoked, but was continued, yet the libellants cannot accept it, six months after it was made, having first refused to accept it; and thus avoid the effect of the acquiescence and adoption of the master's acts by the assured, by force of the technical rule, that an abandonment, when accepted, relates back to the time when it was offered.

4. The sale by Folger and others to the claimants was made in Boston, July 1828. The libellants knew the brig was in Boston, in May preceding, but gave no notice to the purchasers or their agent, and took no steps to prevent a sale. This, it is contended, is a fraud on the claimants; and a court of equity (which a court of admiralty is, with limited powers) will not aid a party who thus stands by, and by his silence and inaction, permits another, without notice, to purchase. It is fraud on the innocent *bonâ fide* purchaser.

5. The demand of the libellants is stale, and cannot now be set up and enforced. The vessel was abandoned March 29th, 1828 ; the libel was not filed until September 1834, more than six years afterwards.

6. If the sale be adjudged void, for want of authority in the master to make it, under the circumstances, and not ratified by the acquiescence of Crosby and others, with the knowledge of the libellants ; if the libellants are not estopped by their silence and inaction, *and the suit was com-
*394] menced in due season ; then the claimaints ask to be allowed the expenses and reasonable reward for their vendors' (the purchasers' and salvors') labor and hazard ; which amounts to nearly the sum for which she was sold.

I. The first point presents two questions : 1st, as to the authority of a master to sell his vessel, and under what circumstances ? 2d, whether the sale in this case was justifiable ?

As to the authority of a master to sell, on the ground of necessity, the law has been fully examined in England, and by this court, as well as in Massachusetts, New York and other commercial states, within a few years, and has been clearly settled. We believe it to be correctly stated in the opinion of the circuit court in this case. 2 Sumn. 206. "I agree, at once, to the doctrine," says the learned judge (p. 215), " that it is not sufficient to show that the master acted in good faith, and in the exercise of his best discretion. The claimants, upon whom the *onus probandi* is thrown, must go further, and prove that there was a moral necessity for the sale, so as to make it an urgent duty upon the master to sell, for the preservation of the interest of all concerned. And I do not well know how to put the case more clearly, than by stating, that if the circumstances were such, that an owner, of reasonable prudence and discretion, acting on the pressure of the occation, would have directed the sale, from a firm opinion that the brig could not be delivered from the peril at all, or not without the hazard of an expense utterly disproportionate to her real value, as she lay upon the beach, then, the sale by the master was justifiable, and must be deemed to be made by a moral necessity. And I consider this to be the true doctrine, deducible from the case of *Gordon* v. *Massachusetts Fire and Marine Insurance Company*, 2 Pick. 249 ; where the subject is examined very much at large, and with great ability." We believe the doctrine on this subject to be here truly stated, and are willing the conduct of Captain Philips should be tested by it.

The law on this subject was fully examined in the case cited, 2 Pick. 249, by the late distinguished Chief Justice Parker, of Massachusetts. It has come under the consideration of the same court, in several subsequent cases, and has been revised ; but on a careful consideration of the cases, it will be found that the doctrine of the first case has not been varied, but on the contrary, has been confirmed. *Hall* v. *Franklin Insurance Company*, 9 Pick. 466 ; *Winn* v. *Columbia Insurance Company*, 12 Ibid. 279 ; *Bryant* v. *Commonwealth Insurance Company*, 13 Ibid. 543. In the case in 9 Pick. 466, the sale was not justified ; but it was on account of the particular circumstances, as each case, indeed, must depend on its own circumstances. The ship was on a voyage from Boston to New Orleans ; struck on the coast of Florida ; was gotten off, and proceeded to Key West. She did not leak, and might have remained there in safety, until notice of the disaster should

have been sent to Boston ; and after the sale, the vessel, in fact, proceeded to *Boston, with the same master, and without any repairs. It was properly held, that the sale was not necessary, and that the insurers [*395 were not affected by it. *Bryant* v. *Commonwealth Insurance Company* was the case of a cargo, insured from Havanna to Castine, in Maine ; the vessel was wrecked, about forty miles from Norfolk, but the cargo was taken from the vessel, without damage, and might have been sent to its place of destination, for less than fifty per centum of its value ; but the master sold it on the beach ; and it was held, that there was not a legal necessity for the sale. It is very clear, that the sale was not justifiable, according to the doctrine in *Gordon's Case :* and as clear, that there is no similarity between the circumstances of that sale, and the sale of the brig Sarah Ann. This subject has come under the consideration of this court, and the law is settled, on the same principles as in the cases cited. *Patapsco Insurance Company* v. *Southgate*, 5 Pet. 604.

It can hardly be understood to have been settled in England, that a master has authority to sell a ship, on the ground of necessity, until the case of *Idle* v. *Royal Exchange Assurance Co.*, 8 Taunt. 770, and 3 Moore 115. In that, and in subsequent cases, it is placed on the same ground as in this country ; and that is, the ground of necessity—moral, legal necessity, arising from extrime peril and the danger of delay. It follows, necessarily, from the relation of the master to those interested, that there must be this authority. It supposes a case of extreme peril. What is to be done? It will not do to wait until the owner can be consulted. There is a necessity for immediate decision and action. In such cases, the master may do what he might well suppose the owner would do, if present ; and in the exercise of a sound direction, sell the vessel and appurtenances.

It follows, from the principles and the reasons on which this authority rests, that it cannot be affected by the circumstance, in what country the disaster happened ; whether in a foreign country or not. There is no case in which it is decided, that this authority is limited to cases happening in a foreign country. The question is, in every case, whether there was an urgent necessity for the sale? whether a delay would be extremely perilous? In such a case, it would be absurd to say, that the master shall not sell, because the vessel, though exposed to immediate destruction, is in the country of the owner's residence. And in a country of such vast extent as ours, the doctrine suggested would be extremely injurious in its consequences. In most of the decided cases, as might be supposed, the stranding happened abroad. In the case of hypothecation, the vessel is supposed to be in safety. The question is, as to funds for repairs and outfits ; and in such cases, it is reasonable, that in a country of such limited extent and facility of communication as England, the owner should be consulted. There can seldom be a necessity for instant action. Still, Ireland, and it is believed, Scotland, are considered to be foreign countries ; and it may be remarked, that Nantucket is farther from the main land, than Ireland is from *England, and that [*396 the owners were 500 miles from that island, and in another state.

The case of *Scull* v. *Briddle*, 2 W. C. C. 150, is very briefly reported ; and this point was not essential to the decision, which was mainly placed on another ground. In *Idle* v. *Royal Exchange Assurance Company*, the decision was not placed at all on the circumstance that one of the owners was

present; on the contrary, DALLAS, C. J., remarked, "I should further say, that on the broad ground of a power to act on a sudden emergency, in order to save as much as could be saved from impending ruin, whether the sale be by the owner or the captain, will make no difference; if the circumstances justified the selling, and the sale was honestly and fairly conducted." And with another remark of the same learned judge the consideration of this part of the case is closed: "Although general principles are highly valuable, when they can be of general and extensive application; yet, from the very nature of subjects of this description, the application of principles, as far as decided cases furnish any rule, must depend upon the circumstances of the particular case."

It is contended, that under the law, as settled, the sale of the Sarah Ann was proper and justifiable. This makes it necessary to look to the evidence. Was, then, the sale justifiable? Under all the circumstances, was it necessary for the master to sell the property? If it was a valid sale, then the title of the claimants is unquestionable. This depends on the state of things at the time. What was the situation of the vessel, when the master despaired of getting her off, and determined to unlade the cargo, to strip the vessel, and to sell the property there? It is necessary to look at the evidence. The depositions on the part of the claimants are very strong; and, we think, conclusive on this question. As to the main facts, they are uncontradicted; on the contrary, as to the exposure of the brig, &c., they are corroborated by Pease and Gardner, two of the libellants' witnesses. As remarked by the learned judge before whom the cause was tried (2 Sumn. 216), we must look to the state of things, as it was at the time of the sale and weigh all the circumstances; as, the position and exposure of the brig; the season of the year and chance of storms; the danger from storms; the expense of further attempts to get her off; the probable chances of success; and the necessity of immediate action on the part of the master. The object of the master, at first, and so long as there appeared to be any hope, was to get her off. He made use of judicious and strenuous exertions, availing himself of the skill and experience of George Myrick, the wreck-master, until the gale drove her so far on shore, that all further exertion seemed to be hopeless. As to the place where she lay, on the south-west shore of Nantucket, a reference to a map or chart will show at once that she was
*397] exposed to the whole reach of the ocean, from south-west to *south-east. No spot on the coast is more exposed to peril; and this is not contradicted by a single witness, except, perhaps, by Captain Atkins Adams, who went to Nantucket, where he never was before, as agent for the underwriters, and was within half a mile of the spot. At the time of the sale, the brig lay on an open shore of shifting sand, nearly high and dry; her cargo discharged, and the sails and rigging taken on shore to save them. Then, as to the probability of a gale. It will be seen by the testimony, that storms, and severe storms, are frequent at that season of the year. It was in the month of March; proverbially blustering and stormy.

But the great objection to the sale is, on the ground that it was in the country of the owners' residence; they residing in Hampden, Maine, and that they had an agent in Boston. There is nothing in the evidence, to show that Thomas Curtis was agent for the owners, and known to be such to Captain Phillips, except for the purpose of obtaining insurance. It is

conclusively proved, that there was a necessity for immediate action, and that a delay for the purpose of receiving instructions from the owners, or their agent, would have been attended with extreme hazard. Information of the state of the vessel was sent to Boston, March 23d. The abandonment was March 29th, probably, immediately upon the receipt of the letter. And it is believed, that at that time, in the month of March, the mail from that Island to Boston was seldom less than a week. There was then no steamboat communication.

We contend, that Captain Phillips could not have done otherwise than he did, after having, without success, attempted to get the vessel off, without the most gross carelessness. No course was left for him, but that which he pursued, to discharge the cargo, and get on shore the sails, &c., as soon as possible; and sell them there, to save what he could, for whom it might concern.

The vessel was, in fact, gotten off by the purchasers. We are not to judge by the event, but by the situation at the time of the sale. The master may act with perfect propriety in selling; a ship may be, to all appearance, in a desperate situation, and yet she may most unexpectedly be saved. That was the case of the ship Argonaut. *Peele* v. *Merchants' Insurance Company*, 3 Mass. 28. Her situation was much like that of this brig, it seemed to be desperate; but she was saved; and yet the learned judge, in a most able and elaborate opinion, decided, that "the owners had a good right to abandon, under the circumstances, even if the injury was less than half the value."

As to the chance of success in attempts to get this vessel off, there is one fact of the utmost importance; that is, the price she brought. Consider the circumstances—that this sale was only twelve miles from that wealthy and enterprising maritime place, Nantucket; that ample notice had been given of the sale; that there was a large company present; that there was no collusion or private agreement, but that the sale was fairly conducted; that several companies were *formed to purchase, if she did not go too high; and yet that the hull was sold for $125, and [*398 the whole amount of sales was only $549. Now, how can this be accounted for? Clearly, only because it was thought, by the best judges on the spot, that taking into consideration the chances of saving the vessel, and the expense that would attend the attempt, she was worth no more. This fact is considered to be of the utmost importance, when taken in connection with the opinions of the witnesses as to the value of the vessel as she lay, and as to her desperate situation, and the necessity of the sale. And the result shows, that the price given was as much as she was worth. The whole cost and expense of the purchase and repairing the brig was $2694; and she was sold, after being in Boston two months for sale, for $2736, little more than an indemnity to the purchasers. And the vessel was valued just before, in the policy, at only $4000. To the actual expense necessary, is to be added the risk that it would be lost by the total loss of the vessel. Great expenses were, therefore, necessary, and it was uncertain how much, and whether they would not be lost.

What, under these circumstances was the master to do? We think, he ought to have done just what he did; and, indeed, that his whole conduct was prudent and judicious. We think, he ought to have made use of proper

means and exertion to liberate his vessel. That he did. And afterwards, when she had been driven upon the beach, almost high and dry, and was then fastened in a place where six only of twenty-three vessels had been saved, with no means there of making further attempts to get her off (and this in a season of storms, and when a gale would, almost to a certainty, have been fatal to the vessel), we contend, that he did right to sell the vessel and appurtenances, and save what could be saved, for whom it might concern. He was justified by the necessity of the case. In the strong language of the Massachusetts court, which must be reasonably construed, or no sale would ever be necessary, "there was no alternative." But good faith must accompany the necessity, and must be clearly made out. Upon this point, there can be no question in this case. The whole conduct of the master shows, that he acted from good motives, and in perfect good faith. No other motive can be suggested for the sale, under the circumstances. The case, therefore, is brought clearly within the principles of law as settled on this subject.

But it has been suggested, on the part of the libellants, that there could have been no necessity for selling the sails, rigging, &c., as they might have been stored or sent to Boston. But there is no evidence to show that any part of the sails and rigging, or of the appurtenances sold, were connected with the vessel, at the date of the libel. By the account of the sales, it appears, that they were sold in small lots to many different persons. The sale was six years before the libel; the vessel had been constantly *employed; and the presumption, therefore, is, that no part of the original sails and rigging remained connected with the brig. It may be observed, that in the case of *Idle* v. *Royal Exchange Assurance Company*, and in most of the cases, the sails, rigging, &c., were separated from the vessel, and sold in different lots, but at the same time.

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II. We say, that the sale was adopted by the assured afterwards; that they thus ratified the act of the master; and that the libellants, claiming under them, as assignees, cannot stand in a better situation than they were. The sale was on the day when the offer of abandonment was made. That abandonment was expressly rejected. Whose vessel was she, then, at the time of the sale? We say, the original owners'; and that they, and all persons claiming under them, must be bound by their ratification of the sale, and by their conduct, as much so as if they had stood by and directed the sale. We contend, that the libellants cannot now be permitted to take different ground. Having taken the assignment, subsequently to the acquiescence of Crosby *et al.*, the libellants are bound by it. *Courcier* v. *Ritter*, 4 W. C. C. 549; *Pierce* v. *Clark*, 1 Barn. & Cres. 186; *Cairnes* v. *Bleeker*, 12 Johns. 300; *Codwise* v. *Hacker*, 1 Caines 526; *Marsh* v. *Gold*, 2 Pick. 289; *Clark's Executors* v. *Van Riemsdyk*, 9 Cranch 153.

III. As to the third point point: we think it is necessary to look to the situation of the parties, at the time of the acceptance of the abandonment, in October; and we contend, that the respondents had acquired rights under their purchase, by the conduct of the libellants. They refused the abandonment; they disclaimed any ownership in, or right to, the brig; the original owners stood by and saw the sale on the beach, and afterwards, in Boston, to the respondents, without objection or claim. By this acquiescence, the respondents acquired rights as against the original owners. Shall they now

be defeated, by the supposed relation back of the settlement in October, to the offer to abandon in March, which, at the time, was repudiated? On this point, we ask the consideration of the court.

IV. The conduct of the libellants was a fraud on the claimants. In May 1828, they knew the brig was in Boston, and for sale, but they took no steps to prevent it. They did not notify the master and part-owner, or Cartwright, the agent for selling, or the public, in any way, of any claim, or any objection to the sale. How were the purchasers to know of any objection? Suppose, they had inquired: to whom should they go? The selling agent had no knowledge of any objection on the part of Crosby *et al.* or the libellants. She was registered in the names of the purchasers. The respondents had a right to suppose, from the conduct of the libellants, that they made no claim; and indeed, they did not, at that time. But they were bound to give notice of their situation; and their standing by in silence and inaction, and permitting another to purchase, *is a fraud which can receive no favor in this court, upon a proceeding in admiralty. *Wendell* v. *Van Rensselaer*, 1 Johns. Ch. 344, and cases cited by KENT, Chancellor; *Storrs* v. *Barker*, 6 Ibid. 166. [*400

V. The demand is stale, and cannot now be enforced. The libel was not filed till six years and a half after the abandonment. If the libellants' title relates back to March 1828, for one purpose, it must for another; they ought then to have enforced their claim, without so great delay. The vessel was owned and employed in Gloucester, a short distance from Boston; she was often in Massachusetts; and might, with proper diligence, have been seized, at an earlier period, by the libellants; and if any doubt exists of this, the claimants ask leave to amend their answer and file proof of the fact. They ought not to have delayed enforcing their claim, almost six years. *Willard* v. *Dorr*, 3 Mass. 161; *The Schooner Adeline*, 9 Cranch 243; *The Marianna Flora*, 11 Wheat. 1.

VI. In support of the sixth point, in the brief statement, the claim of amelioration, we refer to this case. 2 Sumn. 220; *The Perseverance*, 2 Rob. 239; *The Nostra de Conceicas*, 5 Ibid. 294.

WAYNE, Justice, delivered the opinion of the court.—This is an appeal from the circuit court of the United States for the district of Massachusetts, and has been submitted to this court on the printed arguments of the counsel for the libellants and respondents. Those arguments so entirely occupy the grounds relied upon in support of the respective rights of the parties, and the case has been so fully considered in the court below, as it is reported in 2 Sumn. 206, that this court has little left for it to do, than to announce its opinion upon the points it deems material for its decision. This will be done briefly.

The particular case will be better understood and settled, by inquiring what is the right of the master to sell a ship, in the event of an admitted stranding? This involves the necessity for a sale, in the circumstances under which it is done, to make it justifiable in the master, or otherwise. All will agree, that the master must act in good faith, exercise his best discretion for the benefit of all concerned, and that it can only be done upon the compulsion of a necessity, to be determined in each case by the actual and impending peril to which the vessel is exposed; from which it is prob-

able, in the opinion of persons competent to judge, that the vessel cannot be saved; this is, as it is decided in some of the English courts, an extreme necessity. The master must have the best information which can be got, and must act with the most pure good faith. So says Lord ELLENBOROUGH in *Hayman* v. *Molton*, 5 Esp. 65. It is also properly termed a moral necessity, because when the peril and information concur, as we have just stated it, then becomes an "urgent duty upon the master to sell, for the preservation of the interest of all concerned." It should not be termed a legal necessity, as it is, in the argument of the counsel for the libellants: for
*401] though the necessity, information and good faith *of the master will make the sale legal, the term legal is not descriptive of the prerequisite upon which the master's right to sell depends. Nor can the necessity for a sale be denied, when the peril, in the opinions of those capable of forming a judgment, make a loss probable; though the vessel may, in a short time afterwards, be gotten off and put afloat. It is true, the opinion or judgment of competent persons may be falsified by the event, and that their judgment may be shown to have been erroneous, by the better knowledge of other persons, showing it was probable, the vessel could have been extricated from her peril, without great injury, or incurring great expense; and the master's incompetency to form a judgment, or to act with a proper discretion in the case, may be shown. But from the mere fact of the vessel having been extricated from her peril, no presumption can be raised, of the master's incompetency, or of that of his advisers. It is right also to test the peril in which the vessel may be, by information of the locality where she is stranded, by the season of the year, and by a comparison of the number of vessels lost or saved, which have been driven on the same beach or shoal. But in doing so, though it shall be found, that a larger number of vessels stranded have been gotten off than were lost on the same beach; it is very difficult, in a case of stranding upon a shifting beach of sand, with the wind blowing hard on shore, and in a month when the winds are usually strong and stormy, to disprove the necessity for the master to sell, by what may have happened in other cases.

The evidence taken in this case establishes, that five to one of the vessels stranded where the Sarah Ann was driven on the beach, have been altogether lost. The evidence in such a case, and under such proof of the loss of vessels there, must be very strong, before it can prevail to show that there was no necessity for the master to sell. It must also be proved, in a particular case given, that the means in the master's power, or which he may command from those to get his vessel off, had not been applied, and that there would have been what we shall call, and what ought to be so esteemed, a controlling difference between the value of the vessel, as her condition may be when she is sold, and the expense to be incurred in getting her off. Nor will any ascertainment of the cost of repairs, subsequent to the extrication of the vessel, raise a presumption against the necessity to sell, whatever may be her condition as to strength, and though she may not be injured in the hull, if the actual and immediate prospective danger menaces a probable total loss. We think such was the Sarah Ann's danger.

The court, then, having stated its opinion as to what makes an extreme necessity, it follows, that it cannot be laid down as a universal rule, that the master's power to sell is limited to cases of extreme necessity, in a

foreign port, or in a port of the United States, of a different state than that to which the vessel belongs, or in which her owners may be or reside, when the necessity occurs. The true criterion for determining the occurrence of the master's authority to sell is the inquiry, whether the owners or insurers, when they are not distant *from the scene of stranding, can, by the earliest use of the ordinary means to convey intelligence, be informed [*402 of the situation of the vessel, in time to direct the master, before she will probably be lost. If there is a probability of loss, and it is made more hazardous by every day's delay, the master may then act promptly, to save something for the benefit af all concerned; though but little may be saved. There is no way of doing so, more effectual, than by exposing the vessel to sale; by which the enterprise of such men is brought into competition, as are accustomed to encounter such risks, and who know from experience how to estimate the probable profits and losses of such adventures. And we here say, that the power of the master to sell the hull of his stranded vessel exists also as to her rigging and sails, which he may have stripped from her, after unsuccessful efforts to get her afloat; or when his vessel, in his own judgment, and that of others competent to form an opinion and to advise, cannot be delivered from her peril. The presumption is, that they are injured; they can never again be applied to the use of the vessel, and they must, ordinarily, become, from day to day, of less value. In fact, they are a part of the vessel, when stripped from her, and the mere act of separation by the vigilance and effort of the master, by which they are saved from the ocean, does not take them out of his implied power to sell, in a case of necessity. The necessity does not, as has been supposed, mean that no part of her tackle, apparel or furniture saved shall be sold, because they are no longer liable to loss; but when they are saved, whether a sound discretion does not require them to be sold for the benefit of all concerned. If, however, the master sells, without good faith, or without a sound discretion, the owners may, against the purchaser, assert their right of property in the sails and rigging; as they may in any case of a stranded vessel, which has been sold, without good faith in the master, with her sails and rigging standing.

We do not think the case of *Scull* v. *Briddle*, 2 W. C. C. 150, notwithstanding our respect for the memory of the eminent judge who made it, sound law. It is expressed in terms too broad. The mischievous consequences apprehended may be controlled in each case by such proof as we are obliged to depend upon, to maintain and secure from abuse other interests, equally important to society in general, as to individuals engaged in some particular pursuit. We think the interest of owners of vessels, in cases of a sale by the master, when pressed to make it by necessity arising from the perils of the sea, is amply protected; and that the power of the master to sell is secured from abuse, by the limitations placed upon the exercise of it, and by the obligation of the purchaser at the sale to main tain his ownership against the claim of the original owner, by showing that the necessity for a sale had arisen; that it was made in the good faith and sound discretion of the master. This, certainly, in the case of such sales, at home, gives to the owners of a stranded vessel a stronger guard against imposition and fraud, than they can have in sales made in a foreign port; and serves to support the correctness *of the opinion, that [*403

the master's power to sell is not confined to a foreign port, or to a stranding in another state. This doctrine holds out no encouragement to the master to sell; it gives him no facility to sell, when it is not authorized by necessity, clearly made out, and exercised with good faith and sound discretion.

We have decided the two points in the case necessary to a right decision of it. It is unnecessary for the court to examine other points argued by counsel, though they are in the record; and which it would have been necessary for the court to consider, if the respondent's rights under the sale had not been established by the points decided. We think the facts in the case, which will appear in the report of the case made by the reporter, show that the master of the Sarah Ann was in that necessity from her stranding and daily probable loss, to make it proper for him to sell her hull, sails and rigging, for the benefit of all concerned; that the sale was made upon the information and advice of competent judges, aiding his own judgment; and that it was made in good faith, and in the exercise of a sound discretion. The decree of the circuit court is, therefore, affirmed.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Massachusetts, and was argued by counsel: On consideration whereof, it is ordered, adjudged and decreed by this court, that the decree of the said circuit court in this cause be and the same is hereby affirmed, with costs.

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*404] **Ex parte* Myra Clarke Whitney.

Mandamus.

The district judge of the eastern district of Louisiana, while holding a circuit court, ordered proceedings on a bill in equity to be in conformity with the rules of the courts of Louisiana, thus disregarding the rules for proceedings in the circuit courts of the United States in cases in chancery, prescribed and ordered by the supreme court of the United States; it was also declared, that the practice and proceedings in all civil causes, those of admiralty alone excepted, should be conformable to the provisions of the code of practice of Louisiana, and of the acts of the legislature of the state; under this order, and by the course of the court, the proceedings on the bill in equity were suspended and prevented. A motion was made for a *mandamus* to the circuit court, in the nature of a writ of *procedendo*, to compel the court to proceed in the cause, according to the rules of practice prescribed to the courts of equity of the United States, &c., to award attachments, &c., and in all things to proceed in the cause in such manner as the constitution nd laws of the United States, and the principles and usages in equity will authorize: *Held*, that this was not a case in which a *mandamus* would lie; the appropriate redress, if any, is to be obtained after the final decision shall be had on the cause, by appeal.

A writ of *mandamus* is not the appropriate remedy for any errors which may be made in a cause, by a judge, in the exercise of his authority; although they may seem to bear harshly or oppressively on the party; the remedy in such cases must be sought in some other form.

Mr. Jones presented a petition, and moved the court for a *mandamus* in the nature of a writ of *procedendo*, to be directed to the circuit court of the United States for the eastern district of Louisiana.

Jones, for petitioner, stated, that William W. Whitney and Myra Clarke Whitney, had filed a bill in the district court of the United States for the eastern district of Louisiana, which was afterwards transferred to

the circuit court. The complainant, William W. Whitney having died, *pendente lite*, the suit was continued in the name of his widow, Myra Clarke Whitney. The *subpœna* issued on the bill was served on a number of defendants, and among them on Relf and Chew. The object of the bill was, to recover property devised to the complainant by a will of Daniel Clarke, in which the complainant, his only child and heir-at-law, was his general legatee; and Relf and Chew were charged in the bill with having fraudulently concealed and suppressed this will, and having set up a prior and revoked will, in which they were named executors, with plenary powers of disposal and sale over the real estate of the testator; and they had disposed of the immense estate, under color of their office and authority, as executors and testamentary legatees; whilst the complainant, for a time, an infant of tender years, was in ignorance of her parentage and true name, and of his rights. The other defendants were charged with combining with Chew and Relf, and with having purchased, and withholding parts of the estate of Daniel Clarke, under sales by Chew and Relf.

The bill, he stated, set out a case for the relief of a court of *equity, seeking special and general relief, according to the principles and course of procedure of a court of equity. A copy of the bill for each and every of the defendants, about fifty in number, was served with the *subpœnas*. [*405

On the 20th February 1837 (about two months after the *subpœnas* were returned served), the two executors, with twenty-five of their co-defendants, appeared by their respective solicitors, and filed a petition; wherein, styling themselves respondents, eleven of them say, French is their "mother tongue," not that they do not understand English as well, and pray, as a precedent condition to their being held to plead, answer or demur to the bill, that a copy in their "maternal language," be served on each and every of them, severally, over and above the English copies already served. Then, "all the aforesaid respondents (including of course the two executors) here appearing separatlely by their respective solicitors, crave *oyer*" of all the instruments and papers of every sort mentioned in the bill; but, "if it be not possible for said complainants to afford these respondents *oyer* of the originals of said supposed instruments, they then pray that copies of the same, duly certified according to the laws of the state of Louisiana, may, by order of this honorable court, to said complainants, be filed herein, and served on these respondents, that they may be enabled to take proper cognisance thereof." The respondents, more especially, crave *oyer* of twenty-three of these instruments enumerated and specified in a list, referring to the several clauses of the bill where they are respectively mentioned.

The late Judge Harper, formerly judge of the district court of the United States for the eastern district of Louisiana, "decreed, that the application of the defendants for *oyer* of the documents, and for copies of the bill in the manner prayed for, be granted; and he ordered, "that all the future proceedings in the case shall be in conformity with the existing practice of the district court.

The petitioner, by Mr. Jones, her counsel, stated, that the order so granting the prayers of the petition, *in extenso*, has ever since stood a bar against the entrance of the complainant by the threshold of justice; the

regular progress of the cause to issue has been arrested, and a hearing indefinitely delayed; unless the precedent condition, thus arbitrarily and illegally imposed, of a compliance with all and singular the requisitions of the respondents in their petition, be fulfilled to the last title. As if this were not a sufficiently distinct and emphatic renunciation of the jurisdiction, as well as of the forms and modes of proceeding appropriate to courts of equity, the further order, determining "all future proceedings in the case," is completely tantamount to an unqualified conversion of the case into a suit at law; since "the existing practice" referred to, is no other than a set of rules exclusively adopted to "suits at law, as contradistinguished from equity causes."

The death of Judge Harper occurred between the time of passing this order, and the then ensuing May term 1837, of his court; so that no opportunity was presented of bringing the practical effect *and operation of his order to the test of any motion before him to enforce the course of procedure prescribed by this court, upon the failure of the defendants to answer within three months after return of *subpœnas* served. But that test was presented to his successor, Judge Lawrence, at that term, when the time allowed for answers had expired more than two months, without any plea, answer or demurrer from any of the defendants; and when the option of one of the three modes, prescribed by this court as aforesaid, was complete in the complainants, and the right to exercise it absolute. The complainant then, by way of experiment, moved for an attachment for answer against the said Richard Relf, one of the defendants returned duly summoned, which motion the judge virtually overruled; that is, he refused to pass any order, or take the least notice of it during that term. Before the next ensuing session of the district court, its jurisdiction as a circuit court was taken away; and, together with all the causes then pending within the sphere of that jurisdiction, was transferred to the new created circuit court for the same district. At the first session of that court, held by Judge Lawrence alone, in the absence of the circuit judge, the motion for attachment was again pressed; and the judge not only refused to grant it, but resisted repeated applications from the complainant's solicitor to have the motion and his refusal of it recorded among the proceedings of the court; he refused to permit any notice whatever to be taken of the matter, in the minutes or proceedings of the court. The clerk thought it his official duty, *sua sponte*, to make the proper entries in his minutes of the proceedings; but on application to the judge, was refused permission. Judge Lawrence, at the same term of the circuit court, upon his sole authority, in the absence of the circuit judge, undertook to prescribe rules of practice for that court; and this he did very compendiously, by a general order "that the mode of proceeding in all civil causes (those of admiralty alone excepted) shall be conformable to the provisions of the code of practice of Louisiana, and of the acts of the legislature of that state, heretofore passed, amendatory thereto."

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The counsel for the petitioner further alleged, that the burdensome and oppressive exactions put forth by the respondents in their petition, could have had no other design or tendency but to evade the suit and its legitimate consequences; and to wear out and weigh down the complainant by mere vexation and chicanery, too thinly veiled behind frivolous pretexts, is

quite apparent. That both the district and circuit courts, enforcing those exactions, have flown in the face, and abnegated the authority, of the supreme tribunal expressly appointed by law to regulate their action and control their judgments, is plain and palpable. As little can the double result be questioned, of a manifest impediment to the course of public justice, coupled with wrong and oppression to the the individual who now claims, at the hands of this court, redress at once of the private and the public wrong, by the vindication *and maintenance of the cause of public justice violated, as it is, in her person. [*407

Mr. Jones further contended, in support of the motion, that if this court have an appellate jurisdiction over the proceedings of the circuit court of Louisiana, they may interpose by a *mandamus* to have done what the court has a right to correct by a writ of *mandamus*. This may be done in a case pending, although the court wil not originate a case by a *mandamus*. Cited, *Marbury* v. *Madison*, 1 Cranch 137. This court will proceed by a *mandamus*, when it is necessary to interpose for the exercise of the appellate power of the court, and when there are no other remedies. The issue of a writ of *habeas corpus* is on the ground, that in no other manner, in the case, could the appellate power of the court be exercised. The act of congress refers to the usages which are derived from the common law ; and at common law, a *mandamus* lies to enforce judicial acts, and to correct judicial errors in inferior courts. A *mandamus*, and a writ of *procedendo* differ very little, and are both to enforce the proceedings of courts. Cited, 3 Bl. Com. 109 ; 5 Com. Dig. 91. As to the difference between judicial and ministerial acts by a court, the counsel cited 5 Com. Dig. 34 ; 5 T. R. 549.

There is an obvious necessity for a remedy in this case. The proceedings of the circuit court of Louisiana are entirely suspended ; and by a palpable and flagrant violation of the rules of the court in chancery cases, as prescribed by this court, and to which the circuit court of Louisiana is bound to conform, the appellate power of the court is defeated. The case is kept from the final decision of this court by the entire disregard of his duties by the judge of the circuit court, and of rules which he is bound to enforce.

Story, Justice, delivered the opinion of the court.—This is the case of a motion made on behalf of Myra Clarke Whitney, for a *mandamus* to the circuit court of the eastern district of Louisiana. The petition on which the motion is founded states, that a bill in equity is now pending in the said circuit court, in which the petitioner is plaintiff, against Richard Relf and others, defendants ; that it is understood to be the settled determination of the district judge not to suffer chancery practice to prevail in the circuit court ; that her right to proceed in her suit has been denied, until she shall cause copies of her bill, in the French language, to be served upon the defendants, or some of them, and until she shall file documents, which are not made exhibits in the cause ; and then, that all further proceedings in the cause shall be in conformity with the existing practice of the court, which existing practice is understood to mean the practice prevailing in the court in civil cases generally, in disregard of the rules established by the supreme court to be observed in chancery cases. The prayer of the petition is for a *mandamus* in the nature of a writ of *procedendo*, to compel the *court to proceed according to chancery practice, to award an attachment, and [*408

compel Relf to answer her bill, and to suffer the petitioner in all things to proceed in the cause in such manner as the constitution and laws of the United States, and the principles and usages in equity, will authorize. A copy of the bill, and the orders and proceedings of the district judge thereon are presented with the petition.

That it is the duty of the circuit court to proceed in this suit according to the rules prescribed by the supreme court for proceedings in equity causes, at the February term thereof, A. D. 1822, can admit of no doubt. That the proceedings of the district judge, and the orders made by him in the cause, which are complained of, are not in conformity with those rules, and with chancery practice, can admit of as little doubt. But the question before us is not as to the regularity and propriety of those proceedings, but whether the case before us is one in which a *mandamus* ought to issue. And we are of opinion, that it is not such a case. The district judge is proceeding in the cause, however irregular that proceeding may be deemed; and the appropriate redress, if any, is to be obtained by an appeal, after the final decree shall be had in the cause. A writ of *mandamus* is not the appropriate remedy for any orders which may be made in a cause by a judge, in the exercise of his authority; although they may seem to bear harshly or oppressively upon the party. The remedy in such cases must be sought in some other form. The motion for the *mandamus* is, therefore, denied.

On petition for a *mandamus*, or for a rule to show cause why such writ should not issue, requiring the judges of the ninth judicial circuit to proceed in this cause, according to the rules of equity. On consideration of the motion made in this cause by Mr. Jones, on a prior day of the present term of this court, to wit, on Saturday, the 26th day of January last, and of the argument of counsel thereupon had, it is now here ordered, adjudged and decreed by this court, that the said motion be and the same is hereby overruled.

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*The Heirs of William Emerson, Plaintiffs in error, *v.* Charles H. Hall, Defendant in error.

Assets of decedent's estate.

The Josefa Segunda was condemned for a violation of the laws of the United States, prohibiting the slave-trade; and by a decree the district court of Louisiana allowed the claim of the collector, the surveyor and the naval officer, who had prosecuted for the forfeiture, to a portion of the proceeds of the sale of the property condemned; this decree was afterwards reversed, and the whole proceeds adjudged to the United States, on an appeal to the supreme court. William Emerson, the surveyor, afterwards died; and in 1831, congress passed an act for the relief of the collector, the heirs of William Emerson, and the heirs of the naval officer; under the authority of which, the sums which had been adjudged to those officers, and which had remained in the district court of Louisiana, were, by an order of the court, paid to them according to the provisions of the law. One of the creditors of William Emerson claimed the sum so paid to his legal representatives, as assets for the payment of his debt: *Held*, that the payment made by the order of the district court, to the minor children of William Emerson, as his legal heirs, was rightfully made; and that the same could not be considered in their hands as assets for the payment of the debts of their father.

The prosecution of the Josepha Segunda by the officers of the customs of Louisiana, was not done under the authority of any law, or by any authority; and these acts imposed no obligation, either in law or equity, on the government, to compensate them. The claim for those

services could not have been set up, either as an equitable or a legal off-set, to any demand of the government against them, or either of them; while, under the rules of law, any specific demand on the government which imposed on it even an equitable obligation, might be set up as an off-set.

Services rendered under the requirements of law, or of contract, for which a compensation is fixed, constitute a legal demand on the government; services rendered under an authority which is casual, or in some degree discretionary, may constitute an equitable claim. No individual can be made a debtor against his will; voluntary benefits may be conferred on him, which may excite his gratitude; or which, in the exercise of his generosity, he may suitably reward; but this depends on his own volition. It would constitute a singular item, under the law of assets, to raise a charge against an individual for a benefit conferred by some voluntary act of kindness; the rule is the same, whether the benefit be conferred on the government or an individual.

A claim against a foreign government for spoliations is not of this character; the demand in such a case is founded on the law of nations, and the obligation is perfect on the offending government.

ERROR to the Supreme Court of the Eastern District of Louisiana. In 1829, Charles H. Hall, residing in New York, presented a petition to the court of probates of the city and parish of New Orleans, stating, that the estate of William Emerson, deceased, was indebted to him, in the sum of $1700 and upwards, with interest; and he prayed the court, that Charles Byrne, the tutor and curator of the children of William Emerson, should be decreed to allow the debt, and to pay the same. Mr. Byrne, as tutor and curator of the minor heirs of William Emerson, by his answer, denied that the estate of Emerson was in any wise indebted to the petitioner: and on the 8th of February 1830 a decree was given in the court of probates against the estate of Emerson, for the amount of the debt claimed in the petition.

Afterwards, a case was submitted to the court of probates, by the *petitioner, Charles H. Hall, and Charles Byrne, tutor and curator, &c., by which it appeared, that William Emerson died in the year [*410 1828; previous to that time, he, as surveyor, B. Chew, as collector, and E. Lorrain, as naval officer of the port of New Orleans, had, at their sole expense, the brig Josefa Segunda condemned, in the name of the United States, in the district court of the United States for the Louisiana district, for an infraction of the slave laws; they claimed title to the proceeds of this seizure, as the true and actual captors and seizors, who made the last and only effectual seizure, and prosecuted the same to a final decree of condemnation. The decree of the district court allowed the claim; but the case having been brought up before the supreme court of the United States, that tribunal reversed the judgment, on the ground, that congress had made no provision for their compensation, and they were left, in common with those who made the military seizure, to the liberality of the government. Thereupon, the said collector, and surveyor and naval officer, applied for relief to congress, obtained from that branch of the government, an act entitled "an act for the relief of Beverly Chew, the heirs of William Emerson, deceased, and the heirs of Lorrain, deceased," the same being duly approved on the 3d March 1831; and in compliance with the provisions of said act, upon motion before the district court, the moneys remaining in court, after the payment of costs, were paid over to Beverly Chew, and to the legal representatives of both Emerson and Lorrain.

The question for the decision of the court was, whether the money

received by the minor children, as the legal representatives of William Emerson, by virtue of the act of congress of the 3d of March 1831, could be made liable for the payment of the debts of their father. The judge of the court of probates decreed, that the judgment rendered in favor of the petitioner, should be satisfied out of those moneys, or any other assets belonging to the estate, in the hands of the curator, or in those of the heirs of the deceased. Mr. Byrne, as curator and tutor, appealed from this decree, to the supreme court of Louisiana; by which court, the decree of the court of probates was affirmed.

This appeal, under the 25th section of the judiciary act of 1789, was prosecuted on behalf of the heirs of William Emerson.

Coxe, for the appellants, contended, that the moneys derived by the children of William Emerson, under the act of congress of 3d March 1831, were not assets for this payment of the debts of their father. They were a gratuity from the government of the United States; and made no part of the personal assets to which the curator of the estate was entitled. They were not a debt due by the United States to the naval officer. The whole proceeds of the Josefa Segunda, had, by the decree of the supreme court of the United States, been held to be the property of the United States. The act *of congress gave a portion of those proceeds to the officers of the customs; but this was a gift, and not the admission of a claim.

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McLean, Justice, delivered the opinion of the court.—This was a writ of error to the supreme court of the state of Louisiana, under the 25th section of the judiciary act. The defendant here, as plaintiff, in the court of probates at New Orleans, recovered a judgment, in 1830, against the estate of William Emerson, for $1788.62; and the question in this case is, whether the heirs of Emerson shall be held responsible for the payment of this judgment, under the following circumstances?

In April 1818, Emerson, being surveyor of the port of New Orleans, with B. Chew, the collector, and E. Lorrain, the naval officer, seized the brig Josefa Segunda, for a violation of the laws which prohibit the importation of slaves, and instituted proceedings against her, which resulted in the condemnation of the vessel and slaves. This judgment being pronounced by the district court of the United States for Louisiana, was affirmed on an appeal to the supreme court of the United States. On the cause being remanded to the district court, the negroes having been sold, as well as the vessel, a question was raised by several claimants, as to the distribution of the proceeds of the sale; and the district court, dismissing the claims of others, allowed those of the collector, the surveyor and the naval officer. From this decree, there was an appeal to this court. And as appears from 10 Wheat. 331, this court decided, that the proceeds, under the laws of the United States, should not be paid to the custom-house officers, who made the seizure, but that they vested in the United States. The decree of the district court, making the allowance, was therefore reversed; and that part of it which dismissed the petition of other claimants, was affirmed.

In 1828, Emerson died, leaving heirs. On the 3d March 1831, an act, entitled, "an act for the relief of Beverly Chew, the heirs of William Emerson, deceased, and the heirs of Edward Lorrain, deceased," was passed

by congress. The preamble of this act states, "Whereas, the brig Josefa Segunda was condemned, in the name of the United States, in the district court of the United States for the Louisiana district, in the year 1818, on the seizure and prosecution, and at the sole expense of Beverly Chew, collector of the district of Mississippi, William Emerson, deceased, surveyor, and Edwin Lorrain, deceased, naval officer of the port of New Orleans, for an infraction of the slave laws: and whereas, the one-half of the proceeds of the said brig and her cargo are now deposited, subject to the order of the said court, which half would have been payable to the said Beverly Chew, William Emerson and William Lorrain, but for an omission in the laws heretofore passed on that subject; therefore, be it enacted, &c., that the district court of the United States be authorized and directed *to order the proceeds of the said seizure, now deposited subject to [*412 the order of said court, be paid over to the said Beverly Chew, and the legal representatives of the said William Emerson and Edwin Lorrain, respectively." The question whether the sum of money, received by the heirs of Emerson, under this law, was assets in their hands, and liable to his debts, was first raised in the court of probates, which decided that it was so liable: and this judgment was, on an appeal to the supreme court of the state, affirmed.

In the seizure and prosecution of a vessel for a violation of law, Emerson, with those who co-operated with him, rendered a meritorious service to the public. But he acted under no law, nor by virtue of any authority. And his acts imposed no obligation, either in law or equity, on the government, to compensate him for his services. Had he been prosecuted on a debt due to the government, he could not have set up these services, either as an equitable or legal off-set. And this he might do, under the rules of law, of any specific demand he might have on the government, which imposed on it even an equitable obligation.

It is true, the payment of a debt cannot be enforced against the government by suit; but claims against it are not the less legal or equitable, on that account. Services rendered under the requirements of law or of contract, for which a compensation is fixed, constitute a legal demand. Services rendered under an authority which is casual, or in some degree discretionary, may constitute an equitable claim. An individual, by timely efforts, may save from destruction, by fire or otherwise, a large amount of public property. This would be a highly meritorious act; but would it constitute a claim on the government for compensation? From motives of public policy, the government might bestow a suitable reward on the individual, in such a case; but this would be a gratuity on its part. And if this reward were given to the heirs of such an individual, could it be reached by his creditors? Numerous pensions have been given by law to heirs, for the military services of their ancestors; and are these pensions liable to the debts of the ancestors? Under all the provisions of this kind, has it ever been supposed, that the pension, though given to the legal representatives of the deceased, and on the ground of military services, should be paid to his administrators? No individual can be made a debtor against his will. Voluntary benefits may be conferred on him, which may excite his gratitude, and which, in the exercise of his generosity, he may suitably reward. But this depends on his own volition.

It would constitute a singular item under the law of assets, to raise a charge against an individual, for a benefit conferred on him by some voluntary act of kindness. To find an obligation in such a case, we must look into those writers on ethics who speak of imperfect obligations, which cannot be enforced. The rule is the same, *whether the voluntary benefit *413] be conferred on an individual, or on the government. Had Emerson become insolvent and made an assignment, would this claim, if it may be called a claim, have passed to his assignees? We think, clearly, it would not. Under such an assignment, what could have passed? The claim is a nonentity. Neither in law nor in equity, has it any existence. A benefit was voluntarily conferred on the government; but this was not done at the request of any officer of the government, nor under the sanction of any law or authority, express or implied. And under such circumstances, can a claim be raised against the government, which shall pass by a legal assignment, or go into the hands of an administrator as assets?

If, in this form, debts could be originated against the government or an individual, there would be no security against such demands. One party, without the consent of the other, makes the contract, and assigns it to his creditors. For if there be even an equitable claim, it arises out of a contract express or implied. A claim against a foreign government for spoliations is not of this character. The demand is, in such case, founded upon the law of nations, and the obligation is perfect on the offending government. It is true, remuneration cannot be recovered against the government by action at law, but if justice be not done, the government of the injured citizen, in the exercise of its discretion, will protect and enforce his rights. In the case of *Comegys* v. *Vasse*, 1 Pet. 193, this court held, that the assignees of a bankrupt were entitled to a share of the indemnity for unjust spoliation, provided for under the treaty of 1819 with Spain. But that case is not analogous to the one under consideration. By the law of nations, Spain was bound to indemnify the owners of foreign vessels which had been illegally captured and condemned under her authority.

A claim having no foundation in law, but depending entirely on the generosity of the government, constitutes no basis for the action of any legal principle. It cannot be assigned. It does not go to the administrator as assets. It does not descend to the heir. And if the government, from motives of public policy, or any other considerations, shall think proper, under such circumstances, to make a grant of money to the heirs of the claimant, they receive it as a gift or pure donation. A donation made, it is true, in reference to some meritorious act of their ancestor, but which did not constitute a matter of right against the government.

In the present case, the government might have directed the money to be paid to the creditors of Emerson, or to any part of his heirs. Being the donor, it could, in the exercise of its discretion, make such distribution or application of its bounty as circumstances might require. And it has, under the title of an act, "for the relief of the heirs of Emerson," directed, in the body of the act, the money to be paid to his legal representatives. That the heirs were *intended by this designation is clear; and we think *414] the payment which has been made to them, under this act, has been rightfully made; and that the fund cannot be considered as assets in their hands for the payment of debts.

As the decision of the supreme court of Louisiana is not in accordance with this view, the judgment of that court is reversed, with courts.

This cause came on to be heard, on the transcript of the record from the supreme court of the state of Louisiana, and was argued by counsel: On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said supreme court in this cause be and the same is hereby reversed, with costs; and that this cause be and the same is hereby remanded to the said supreme court, that further proceedings may be had therein, in conformity to the opinion of this court.

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*Charles L. Williams *v.* The Suffolk Insurance Company.[1] [*415

Political questions.

The government of the United States having insisted, and continuing to insist, through its regular executive authority, that the Falkland islands do not constitute any part of the dominions within the sovereignty of Buenos Ayres, and that the seal fishery at those islands is a trade free and lawful to the citizens of the United States, and beyond the competency of the Buenos Ayrean government to regulate, prohibit or punish; it is not competent for a circuit court of the United States to inquire into, and ascertain by other evidence, the title of the government of Buenos Ayres to the sovereignty of the Falkland islands.

When the executive branch of the government, which is charged with the foreign relations of the United States, shall, in its correspondence with a foreign nation, assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department.[2]

Where a vessel, insured on a sealing voyage, was ordered by the government of Buenos Ayres not to catch seal off the Falkland islands, and having continued to take seal there, the vessel was seized and condemned, under the authority of the government of Buenos Ayres; the government of the United States not having acknowledged, but having denied, the right of Buenos Ayres to the Falkland islands; the insurers are liable to pay for the loss of the vessel and cargo; the master, in refusing to obey the orders to leave the island, having acted under a belief that he was bound so to do, as a matter of duty to the owners, and all interested in the voyage, and in vindication of the right claimed by the American government. The master was not bound to abandon the voyage, under a threat or warning of such illegal capture.

Certificate of Division from the Circuit Court of Massachusetts. This was an action brought by the plaintiff, a citizen of the state of Connecticut, against the Suffolk Insurance Company of Boston, Massachusetts, to recover a loss on part of the schooner Harriet, and part of her cargo, they having been insured by the defendants. There was a similar action against the defendants to recover losses substained on the schooner Breakwater and her cargo. Both the cases were brought from the circuit court of Massachusetts on certificates of division of opinion of the judges of the circuit court. The cases were stated in the record as follows:

"These were actions of *assumpsit* on policies of insurance, dated the 19th of August 1830, whereby the plaintiff caused to be insured by the defendants, for nine per cent. per annum premium, warranting twelve per cent., 'lost or not lost;' $4919 on fifteen-sixteenths of schooner Harriet, and $1875 on board said vessel, at and from Stonington, Connecticut, commencing the risk on the 12th day of August, instant, at noon, to the southern hemisphere, with liberty to stop for salt at the Cape de Verd islands, and

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[1] See s. c. 3 Sumn. 270, 510.

[2] See note to Marbury *v.* Madison, 1 Cranch 170, and Phillips *v.* Payne, 92 U. S. 130.

to go round Cape Horn, and to touch at all islands, ports and places, for the purpose of taking seals, and for information and refreshments, with liberty to put his skins on board of any other vessel or vessels, until she returns to her port of discharge in the United States; it being understood, that the value of the interest hereby insured, as it relates to this insurance, is not to be diminished thereby. It is understood and agreed, that if the
*416] Harriet should not proceed south-easterly of *Cape Horn, on a voyage towards the south Shetland islands, and there be no loss, then the premium is to be six per centum per annum, the assured warranting only nine per cent.: vessel valued at $5000; outfits valued at $2000. There was a similar policy underwritten by the defendants for the plaintiff, on the same day, for the like voyage in all respects, of $3500, on the schooner Breakwater, and $2000 on outfits on board, at the same premium; the vessel being valued at $3500, and the outfits at $2000, upon which also an action was brought.

"The declaration upon each policy averred a total loss, by the seizure and detention of one Lewis Vernet and other persons, pretending to act by the authority of the government of Buenos Ayres, with force and arms.

"The causes came on to be heard together, by the court, upon certain facts and statements agreed by the parties; the parties agreeing that the verdict should be rendered by the jury for the plaintiff, or for the defendants, according to the opinion of the court upon the matters of law arising upon those facts and statements; and the cause was argued by C. G. Loring, for the plaintiff, and by Theophilus Parsons, for the defendants. It appeared from these facts and statements, that both of the vessels insured were bound on a sealing voyage, and proceeded to the Falkland islands in pursuance thereof; and were there both seized by one Lewis Vernet, acting as governor of those islands, under the appointment and authority of the government of Buenos Ayres. The Harriet was seized on the 30th of July 1831, and was subsequently carried by the captors to Buenos Ayres; where certain proceedings were had against her in the tribunals, and under the sanction of the government of Buenos Ayres. She has never been restored to the defendants, but has been condemned for being engaged in the seal trade at the Falkland islands. The Breakwater was seized at the islands, on or about the 18th day of August 1831, and was afterwards re-captured by the mate and crew, who remained on board; and was by them brought home to the United States; and after her arrival was libelled for salvage in the district court of Connecticut district, and salvage was awarded of one-third part of the proceeds of vessel and property.

"Copies of the orders and decrees of the courts of Buenos Ayres respecting the seal fisheries, of the appointment of Vernet as governor of the Falkland islands, of the proceedings against the Harriet, of the correspondence of the American government with the Buenos Ayrean government, relative to the jurisdiction of the Falkland islands; were produced and read, *de bene esse*, in the case."

The following points and questions occurred in the case, on which the judges of the circuit court were divided in opinion; and they were stated and ordered to be certified to the supreme court to be finally
*417] decided:

*1. Whether, inasmuch as the American government has insisted,

and does still insist, through its regular executive authority, that the Falkland islands do not constitute any part of the dominions within the sovereignty of the government of Buenos Ayres, and that the seal fishery at those islands is a trade free and lawful to the citizens of the United States, and beyond the competency of the Buenos Ayrean government to regulate, prohibit or punish; it is competent for the circuit court, in this cause, to inquire into and ascertain by other evidence the title of said government of Buenos Ayres to the sovereignty of the said Falkland islands; and if such evidence satisfies the court, to decide against the doctrines and claims set up and supported by the American government on this subject; or whether the action of the American government on this subject is binding and conclusive on this court, as to whom the sovereignty of those islands belongs?

2. Whether, if the seizure of the Harriet, by the authority of the Buenos Ayrean government, for carrying on the seal fishery at the Falkland islands, was illegal and contrary to the law of nations, on account of the said islands not being within the territorial sovereignty of the said Buenos Ayrean government, and the master of the Harriet had warning from the government of the said islands, under the government of Buenos Ayres, that he should seize the said Harriet, if she should engage in the seal fishery, and after such warning, the master of the Harriet engaged in such seal fishery, and the Harriet was illegally seized and condemned therefor, the loss by such seizure and condemnation was a loss for which the plaintiff is entitled to recover in this case; if the master of the Harriet acted, in engaging in such seal fishery *bonâ fide*, and with a sound and reasonable discretion, and under a belief that he was bound so to do, as a matter of duty to his owners, and all others interested in the voyage, and in the vindication of the rights recognised and claimed by the American government; or whether he was bound by law to abandon the voyage, under such a threat and warning of such illegal seizure?

The case was submitted to the court, by *C. G. Loring* and *E. G. Loring*, for the plaintiff; and by *Parsons*, for the defendants. The printed argument for the plaintiff contained a full statement of the case.

Parsons, for the defendants, contended.—1. That the Malvinas are rightfully in possession of Buenos Ayres; and that historical evidence, and established principles of the law of nations show this to be so. 2. That however this may be, the courts of this country will not decide this question against Buenos Ayres, unless authorized to do so by a formal act of our government: Buenos Ayres being a nation friendly to us, claiming the Malvinas, certainly under color of right, and claiming and exercising that dominion for many years. *3. That there is no such act of our [*418
government. An American sloop of war (the Lexington, Captain Duncan), arriving at Buenos Ayres, soon after the seizure of the Harriet and Breakwater, proceeded to the Falklands, and broke up the establishment by violence. The government of Buenos Ayres complained urgently of this, and a correspondence ensued, wherein our consul, and our *chargè d'affairès* at Buenos Ayres, and our secretary of state, took a part; but the question remains unsettled between the countries. 4. By the constitution of this country, it is of vital importance, that our courts call nothing an act of the

government but one which passes through the forms of the constitution, and has the force and sanction of regular enactment. No analogies drawn from European nations (if any there be) can apply; because the judiciary holds no such place, and is intrusted with no such duties, in other nations.

It would seem difficult to doubt, from the historical evidence, and the plain principles of territorial and international law, that the ancient government of Spain, and the government of Buenos Ayres, as their successor, had a right, as owners of the islands and the coast, to regulate the fisheries thereon, and within a reasonable distance of their shores, and that the decrees actually passed are, therefore, justifiable by the laws of nations; and, consequently, fishing in violation of those decrees is an illicit and prohibited trading within the policy. It follows inevitably, that a seizure for that cause is not protected by the policy, though the condemnation may be informal.

If it be said, that the trespassers upon these islands and their fisheries appear to have been notified and threatened before, and then permitted to transgress with impunity, and that punishment for the offence was, therefore, unlawful; there is surely an obvious and sufficient answer to this. It is, that after mild means had been carried so far as to prove them ineffectual, more positive measures were resorted to. This is a plain and fair statement of the whole case upon this point; and if the whole testimony were exanined, and the indisputable facts of the case considered, they would fully confirm this view. Will the court then say, that forgiveness, with renewed prohibition and caution, implies perpetual forgiveness? That if the first offence, or any single offence, be pardoned by a nation, or one of its authorities, it shall never be lawful again to punish the offence, how often soever it be repeated, or howsoever aggravated the circumstances by which it is attended? It can hardly be expected, that such a principle as this can receive the sanction of this court; for it seems not more repugnant to law and justice, than to mere humanity.

McLean, Justice, delivered the opinion of the court.—Two actions were commenced by the plaintiffs against the defendant, in the circuit court of the United States for the state of Massachusetts, on policies of insurance, dated 19th August 1830, whereby the plaintiffs caused to be insured by the
*419] defendants, for *nine per centum per annum premium, warranting twelve per centum, lost or not lost, $4919 on fifteen-sixteenths of the schooner Harriet, and $1875 on board said vessel, at and from Stonington, Connecticut, commencing the risk on the 12th August, instant, at noon, to the southern hemisphere; with liberty to stop for salt at the Cape de Verd islands, and to go round Cape Horn, and to touch at all islands, ports and places, for the purpose of taking seals, and for information and refreshments; with liberty to put his skins on board of any other vessel or vessels, until she returns to her port of discharge in the United States: it being understood, that the value of the interest hereby insured, as it relates to this insurance, is not to be diminished thereby, &c. On the same day, there was a similar policy of $3500 on the schooner Breakwater; and $2000 on outfits on board, at the same premium, &c.

And on the trial, the following points were raised in the case, on which

the opinions of the judges were opposed, and on which the case is certified to this court.

1. Whether, inasmuch as the American government has insisted, and does still insist, through its regular executive authority, that the Falkland islands do not constitute any part of the dominions within the sovereignty of the government of Buenos Ayres; and that the seal fishery at those islands is a trade free and lawful to the citizens of the United States, and beyond the competency of the Buenos Ayrean government to regulate, prohibit or punish; it is competent for the circuit court, in this cause, to inquire into, and ascertain by other evidence, the title of said government of Buenos Ayres to the sovereignty of the said Falkland island; and if such evidence satisfies the court, to decide against the doctrines and claims set up and supported by the American government on this subject; or whether the action of the American government on this subject is binding and conclusive on this court, as to whom the sovereignty of those islands belongs?

2. Whether, if the seizure of the Harriet, by the authority of the Buenos Ayrean government, for carrying on the seal fishery at the Falkland islands, was illegal and contrary to the law of nations, on account of the said islands not being within the territorial sovereignty of the said Buenos Ayrean government; and the master of the Harriet had warning from the governor of the said islands, under the government of Buenos Ayres, that he should seize the said Harriet, if she should engage in the seal fishery; and after such warning, the master of the Harriet engaged in the seal fishery, and the Harriet was illegally seized and condemned therefor; the loss by such seizure and condemnation was a loss for which the plaintiff is entitled to recover in this case, if the master of the Harriet acted, in engaging in such seal fishery, *bonâ fide*, and with a sound and reasonable discretion, and under a belief that he was bound so to do, as a matter of duty to his owners and all others interested in *the voyage; and in the vindication of the rights recognised and claimed by the American government; or [*420
whether he was bound by law to abandon the voyage, under such a threat and warning of such illegal seizure?

As the fact is stated in the first point certified, that there is a controversy between this government and that of Buenos Ayres, whether the jurisdiction is rightful, which is assumed to be exercised over the Falkland islands by the latter; and that this right is asserted on the one side and denied by the other, it will not be necessary to look into the correspondence between the two governments on the subject. To what sovereignty any island or country belongs, is a question which often arises before courts in the exercise of a maritime jurisdiction; and also in actions on policies of insurance.

Prior to the revolution in South America, it is known, that the Malvinas, or Falkland islands, were attached to the vice-royalty of La Plata, which included Buenos Ayres. And if this were an open question, we might inquire, whether the jurisdiction over these islands did not belong to some other part, over which this ancient vice-royalty extended, and not to the government of Buenos Ayres; but we are saved from this inquiry by the attitude of our own government, as stated in the point certified.

And can there be any doubt, that when the executive branch of the

government, which is charged with our foreign relations, shall, in its correspondence with a foreign nation, assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department? And in this view, it is not material to inquire, nor is it the province of the court to determine, whether the executive be right or wrong. It is enough to know, that in the exercise of his constitutional functions, he had decided the question. Having done this, under the responsibilities which belong to him, it is obligatory on the people and government of the Union.

If this were not the rule, cases might often arise, in which, on the most important questions of foreign jurisdiction, there would be an irreconcilable difference between the executive and judicial departments. By one of these departments, a foreign island or country might be considered as at peace with the United States; whilst the other would consider it in a state of war. No well-regulated government has ever sanctioned a principle so unwise, and so destructive of national character. In the cases of *Foster* v. *Neilson*, 2 Pet. 253, 307, and *Garcia* v. *Lee*, 12 Ibid. 511, this court have laid down the rule, that the action of the political branches of the government in a matter that belongs to them, is conclusive. And we think, in the present case, as the executive, in his message, and in his correspondence with the government of Buenos Ayres, has denied the jurisdiction which it has assumed to exercise over the Falkland islands; the fact must be taken and acted on by this court as thus asserted and maintained.

*421] *The decision of the first point materially affects the second, which turns upon the conduct of the master. If these islands are not within the jurisdiction of the Buenos Ayrean government, the power assumed and exercised by Governor Vernet was unauthorized, and the master was not bound to regard it. He was not necessarily to be diverted from the objects of his voyage, and the exercise of rights which belonged in common to the citizens of the United States, by an unauthorized threat of the seizure of his vessel. He might well consider the prohibition of Vernot as influenced by personal and sinister motives, and would not be enforced. If the principle were admitted, that the assured were bound to regard every idle threat of any individual who might assume to exercise power, as in this case, it would be most injurious, and in many cases, destructive, to commercial rights.

The inquiry is, whether the master, under all the circumstances of the case, acted in good faith, and with ordinary prudence. If he acted fraudulently, he was guilty of barratry; and the underwriters are discharged. In 4 Taunt. 858, Mr. Justice Gibbs, in giving the opinion of the court, lays down the true rule. "The master," says he, "being asked why he had not British colors and British papers, said, I cannot have them, because I have not a British register. He stands on his strict rights. He says, I will do nothing to endanger my owners; I am a neutral, and I have a right to enter your port. The master really communicated the true facts of the case, when she was searched; and says, I cannot go off, because of my charter-party. The other says: then I will seize you. We think, then, each party stands on his strict rights; and we are now to consider the strict point of law, not the question whether it would have been more prudent for him to go to Tercera, but whether he acted *bonâ fide*." And so, in the present case, the question is not whether the master of the Harriet would not have

acted with more prudence, had he yielded to the inihibition of Vernet ; but whether, in placing himself upon his strict rights, he did not exercise a proper discretion. He violated no regulation which he was bound to respect. In touching at the Falkland islands, for the purpose of taking seal, he acted strictly within the limits of his commercial enterprise ; and did not voluntarily incur a risk which should exonerate the insurers. It was the duty of the master to prosecute his voyage, and attain the objects of it, for the benefit of his owners : and in doing this, he was not bound to abandon the voyage, by any threat of illegal seizure. We think, therefore, that the underwriters are not discharged from liability, by the conduct of the master, as stated in the second point.

The other case depending upon the same principles, the same certificate will be affixed to that case.

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 Massachusetts, *and on the points and questions on which the judges of the said circuit court were opposed in opinion, and which were certified to [*422 this court for its opinion, agreeable to the act of congress in such case made and provided, and was argued by counsel : On consideration whereof, it is the opinion of this court, 1st, That, inasmuch as the American government has insisted, and still does insist, through its regular executive authority, that the Falkland islands do not constitute any part of the dominions within the sovereignty of the government of Buenos Ayres, the action of the American government on this subject is binding on the said circuit court, as to whom the sovereignty of those lands belongs. And secondly, that the seizure and condemnation of the Harriet was a loss for which the plaintiff is entitled to recover in this case, under the circumstances as stated in the second point certified. Whereupon, it is ordered and adjudged by this court, that it be so certified to the said circuit court, accordingly.

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*Barrington Anthony, Marshal of the United States, Plaintiff in error, *v.* Cyrus Butler, Defendant in error. [*423

Chattel-mortgages.—Recording.

A mortgage was executed by D. G., as agent of the Union Steam Mill Company, conveying to the mortgagee certain lands in Rhode Island, with a woollen mill and other buildings, and the machinery in the mill ; D. G. was, and had been, the general agent of the company, and as such, had made all purchases and sales for the company, and the mortgage was executed by him, with the consent and authority of the persons who, at the time of its execution, were members of the company. The machinery, and other movables, were taken in execution by the marshal of Rhode Island, under an execution issued on a judgment, obtained after the mortgage, against the company. The court *held*, that although the mortgage was not valid, as the deed of the corporation, it was sufficient to convey a title to the mortgagee in the machinery, and that he could maintain an action of replevin for the same against the marshal.

The mortgage was recorded by the town-clerk of the place where the property was, he being the proper officer to record such instruments, under the statute of Rhode Island ; he kept two books, in one of which he recorded mortgages, which included real estate ; and in the other, mortgages upon personal property only. The mortgage in this case was first recorded in the book kept for recording mortgages on real estate ; and he gave a certificate, " lodged in the town-clerk's office to record, November 20th, 1837, at 5 P. M., and recorded same day, in

the record of mortgages, in East Greenwich, book No. 4," &c. The court held, that this certificate was properly received in evidence, in the circuit court.

It is a well-settled rule, though a very technical one, that one partner cannot bind his copartners by deed; and it is equally well settled, that one partner may dispose of the personal property of the firm. One partner may bind his copartner by deed, if he is present, and assent to it; the seal of one partner, with the assent of the copartner, will bind the firm.

Where a statute requires that mortgages on personal property shall be recorded in a book to be specially kept for the purpose, and says nothing as to the book in which mortgages on real and personal property shall be recorded, and in the conveyance, the personal and real property is so blended as to be inseparable; to require a double record would seem to be an unreasonable construction of the statute. The record of the mortgage in the book kept for recording mortgages on real estate, is within a fair construction of the Rhode Island statute.

ERROR to the circuit conrt of Rhode Island. The defendant in error, Cyrus Butler, in 1838, instituted an action of replevin, against Barrington Anthony, the marshal of the United States for the district of Rhode Island, to recover from him certain machinery, and articles used in the manufacture of goods which had been the property of the Union Steam Mill Company, and which were claimed by the plaintiff, under a mortgage alleged to have been executed to him by the Union Steam Mill Company, on the 20th of November 1837, to secure to him the payment of $16,459, loaned to the company, by Cyrus Butler.

The defendant in the circuit court, the marshal of the district of Rhode Island, ordered the taking of the goods under an execution issued out of the circuit court of the United States for that district, on a judgment against Daniel Greene, William P. Salisbury and Rufus W. Dickinson; *424] which execution had been so levied upon *the goods as of said Greene, Salisbury and Dickinson, for the purpose of satisfying the debt and costs.

The cause was tried before a jury, in November 1838, and a verdict and judgment were rendered for the plaintiff. The defendant prosecuted this writ of error.

The matters of law arising in the case were presented on a bill of exceptions, taken by the counsel for the defendant on the trial. The bill of exceptions stated, that the plaintiff in support of his title to the articles named in the replevin, produced a certain deed, dated 20th November 1837, executed by one Daniel Greene, as agent for the Union Steam Mill Company (the said company being a corporation), conveying the property of the company, the articles mentioned in the replevin included, to the plaintiff on mortgage; and proved the execution of the deed, and produced the act of the legislature of Rhode Island, incorporating the company, and produced the record of the corporate proceedings of the company, having duly proved the said proceedings. The execution of the deed of 20th November 1837 was in the following form: "Union Steam Mill Company, Daniel Greene, [L. S.]." The plaintiff also produced and read in evidence, a deed, dated 13th May 1837, from William P. Salisbury to Daniel Greene, by which all the property of said Salisbury in the Union Steam Mill Company, was conveyed to Daniel Greene. The plaintiff also proved that Daniel Greene was, and had been, agent, from the time of the formation of the company; and that the deed to the plaintiff was executed by him, by and with the consent and authority of the company.

The plaintiff insisted, that the deed of Daniel Greene was the corporate

deed of the Union Steam Mill Company, and conveyed to him the articles mentioned in the replevin ; and he further insisted, that if it was not their corporate deed, it was sufficient to convey a valid title to the property to him, inasmuch as the said deed was made and executed by and with the consent of those who, at the time, were members of the company ; and that Daniel Greene, as the general agent of the company, was authorized to convey the articles named in the plaintiff's writ.

The defendant objected to the deed as inoperative, the Union Steam Mill Company having had no corporate existence at the time it was executed ; and the court decided, that the corporate existence was not so proved as to allow the deed to be given in evidence, as the deed of the corporation ; but if inoperative, as the corporate deed, it was sufficient and competent to convey the articles in the replevin to the plaintiff. To this opinion, the defendant excepted.

The defendant also objected to the deed, as it did not appear to have been recorded according to the law of Rhode Island regulating the recording of mortgages on personal property, prior to the defendant's levy on the goods. On the back of the deed was the indorsement of the town-clerk of the place where the property was situated, stating that the deed had been "lodged in the town-clerk's office, to record, November *20th 1837, at 5 o'clock, P. M., and recorded, same day, in the record of [*425 mortgages in East Greenwich, book No. 4, pages 49, 50 and 51." The town-clerk was the proper recording officer, by the laws of Rhode Island. The defendant's counsel objected to the sufficiency of the certificate, as evidence that the deed was duly recorded, and produced evidence that there was a book kept by the town-clerk, in which mortgages of personal property only were recorded ; and other mortgages which included real estate, were recorded in other books kept in the office ; and after recording the deed in the book of mortgages of real estate on the 20th November 1837, the deed was taken by him to the office of the town-clerk, on the 14th November 1838, and was recorded in the book kept for mortgages on personal property. The court decided, that the certificate was sufficient evidence that the said deed was duly recorded. The defendant excepted.

The case was submitted to the court, on printed arguments, by *Pearce* and *Turner* and *Atwell*, for the plaintiff in error ; and by *Ames*, *Tillinghast* and *Green*, for the defendant.

For the *plaintiff* in error, it was argued.—The counsel for the plaintiff in error say, the deed in question is either the deed of the party executing it, or it is no deed. Two of the necessary incidents to a deed, says Lord Coke (2 Thomas' Co. Litt. 272) are a person able to contract, and by a sufficient name. In the deed offered in evidence by the defendant in error, in the circuit court, the grantor is a corporator, described as such, and using the name and style of the corporation. Individuality is an attribute of corporations as well as of natural persons. *Dartmouth College* v. *Woodward*, 4 Wheat. 636 ; 1 Kyd on Corp. 15 ; 4 Serg. & Rawle 356. The distinction between those bodies and natural persons, is distinctly marked. 1. Corporations are limited in their powers by the terms of their creation. *Beaty* v. *Lessee of Knowler*, 4 Pet. 152. 2. By the personal irresponsibility of their members. *United States Bank* v. *Planters' Bank*, 9 Wheat. 907;

2 Serg. & Rawle 311 ; 9 Mass. 355 ; 15 Ibid. 505 ; 16 Ibid. 9. The interest of corporators in the capital stock of a corporation is different from that of ordinary copartners. *Wood* v. *Dummer*, 3 Mason 308.

The deed was made as the conveyance of the corporation, and was so received by the grantee. If there was no such corporation in existence, the persons voting and acting as corporators had no legal powers, and there was no one competent to act as a grantor in the deed. The deed is made, and intended as made, not by persons acting in their natural capacities, and as distinct individuals, under the general *laws of the land ; but by per-
*426] sons acting under the artificial character of corporators, with the limited and restricted rights and powers conferred upon them by their charter of incorporation. If, then, the party by whom the deed is supposed, from its language and evident intent, to have been made and executed, had no legal existence—was not *in esse ;* by what rule of law is it that the deed can be held to inure to the grantee, as a deed of another person, possessing a distinct individuality, and different legal attributes? The maxim "*quando quod ago, non valet ut ago, valeat quantum valere potest,*" under which courts give to deeds a legal effect, different from the technical effect of the words of the instrument itself, does not apply to this case ; because that rule is only applied to the character of the estate intended to be granted, in order to effectuate the intention of the parties, and not to the character of the parties themselves. 4 Cruise Dig. 298–303, and cases there cited. The deed cannot be the deed of the copartnership, and thus inure to the benefit of the grantee ; because it is under seal, and is executed by one partner only in the name of the whole, and without a special authority for the purpose, under the seal of the corporation. *Harrison* v. *Jackson*, 7 T. R. 207 ; 4 Ibid. 313. Their subsequent assent to it was as corporators, and not as copartners.

At the trial, it did not appear, that the deed had been recorded prior to the levy on the property, according to the act of the general assembly of Rhode Island, passed February 1st, 1834. This statute is remedial in its character, and was intended by the legislature to remedy the mischief occasioned by the rule of law, as expounded by the courts, that possession by the vendor of personal property (if such possession was consistent with the deed) was not evidence of fraud. The construction of such a statute should be liberal, to prevent the mischief ; or, as said by Lord Coke, the judges shall put such a construction on a statute as may redress the mischief, guard against subtle inventions and evasions for the continuance of the mischief, *pro privato commodo*, and give life and strength to the remedy, *pro bono publico*, according to the true intent and meaning of the law. *Heyden's Case*, 3 Co. 7 ; *Pierce* v. *Hopper*, 1 Str. 253. The full result contemplated by this statute cannot be reached, without the record is made in the manner pointed out in the act. The manner of record is, therefore, an essential part of the law. See State Laws 835.

The certificate of the town-clerk was not in itself sufficient evidence that the mortgage in question had been recorded in conformity with the provisions of law ; because the expression "book of mortgages," used in said certificate, was ambiguous in its character, and might refer to mortgages of real estate, as well as to personal property. This ambiguity being explained by evidence, it is apparent, that the actual record was not made in conformity with the form prescribed by the statute, to wit, in a book to be kept

by the town-clerk, for the especial purpose of recording therein mortgages of personal *property. This form is imperative. 2 Inst. 388 ; 1 East 64. It is of the essence of the statute, and therefore imperative. [*427 1 Burr. 447. And it is not directory only, for it makes void the mortgage when not recorded. *Rex* v. *Bunningham*, 8 Barn. & Cres. 29. Although it is the duty of the clerk to record the mortgage, yet the party claiming under it is affected by the misfeasance or nonfeasance of that officer, in the performance of his duty. *Johnson* v. *Stagg*, 2 Johns. 510 ; *Beekman* v. *Frost*, 18 Ibid. 544 ; *Frost* v. *Beekman* (same case), 1 Johns. Ch. 288. The New York statute is in its terms like the Rhode Island statute. 18 Johns. 553.

The subsequent record of the morgage in the proper book, under date of the 14th November 1838, was made after the levy by the marshal, and was, consequently, void as to that levy. That record cannot relate back to the time when the deed was lodged to be recorded (November 20th, A. D. 1837) for the statutes of Rhode Island make a manifest distinction between mortgages of real and personal property ; making the first valid as to subsequent purchasers, when recorded or lodged to be recorded, and the second valid, when recorded only. Laws of Rhode Island, 202, 835. And it is the further policy of the state of Rhode Island, that no deed, when once left to be recorded, shall be taken from the office of the clerk, until the same shall have been by him duly recorded. Laws of R. I. 878.

For the defendant in error, it was contended, by *Ames*, *Tillinghast* and *Green*, that the deed of Daniel Greene, of 20th November 1837, executed by Greene, as the agent, and in behalf, of the company, was fully competent to convey the articles in contest between the parties to this suit. The circuit court decided, that as the legal existence of the corporation was not shown, it was not proved to be the deed of the corporation ; but as the property conveyed was that of the individuals represented by Mr. Greene, and the deed was made with the individual approbation of the owners, it was sufficient. This decision was correct. The individuals composing the corporation were in partnership, transacting business as partners, when the charter was granted. By the charter, the property vested in the corporation ; and each of the corporators are made individually liable for the corporate debts. Mr. Greene was the agent, before and after the charter was granted.

If the Union Steam Mill Company were not a corporation, they were a copartnership. If the property in question did not belong to them as a corporation, it belonged to them as a copartnership. This copartnership acted by an agent, and always had so acted. The deed in question was executed by this agent, with the assent of all the copartners. The deed in form purports to be executed by the corporation ; but if, in law, there was no corporation, and the property in question was held by the corporators as copartners, still the deed is competent, as their individual act, to convey the property.

*It is not material, whether the company held the property as a [*428 copartnership, or as a corporation. If the deed was executed by the agent of the company, with the assent of all the stockholders or copartners, they are bound by it. If they, or an attaching-creditor, could be allowed to set up their title as copartners, against the present deed, the charter would become an instrument of the grossest fraud. They hold themselves out to

the defendant in error as a corporation, and as such, owning the property in question, and having legal authority to convey the same to him by deed of mortgage. Upon the faith of these representations, the defendant in error parts with his money, and takes his mortgage. He is then told, that the parties who made the mortgage in the character of corporators, were copartners; and that, as they owned the property as partners, and not as a corporation, he takes nothing by his deed.

It is not necessary, to pass personal property, that the conveyance shall be by deed. It may pass by an ordinary bill of sale, or bill of parcels. In this case, the transfer of the goods by sale was made by Daniel Greene, and this mortgage was assented to expressly by every member of the company. Cited, *Stow* v. *Wyse*, 7 Conn. 214; *Coe* v. *Talcott*, 5 Day 88. There is a large class of cases, in which deeds not being competent to effectuate the intent of the parties, in the form in which they have been drawn, have been construed to operate in another way, in order to effectuate that intent. Thus, it has been decided, that a deed which was intended to operate as a lease and release, or bargain and sale, but could not take effect in that manner, should operate as a covenant to stand seised. 4 Cruise Dig. p. 299, § 31. A deed intended to operate as a bargain and sale, but which was void for want of a pecuniary consideration, has been held to operate as a confirmation. Ibid. § 32. See also, *Roe* v. *Tranmer*, 2 Wils. 75; *Wallis* v. *Wallis*, 4 Mass. 135; *Marshall* v. *Fisk*, 6 Ibid. 24; *Cox* v. *Edwards*, 14 Ibid. 491; 1 H. Bl. 313; *Vere* v. *Lewis*, 3 T. R. 182; *Gibson* v. *Hunter*, 2 H. Bl. 187.

It is said by the plaintiff in error, that if the Union Steam Mill Company had no corporate existence, there was no grantor to the deed. This would be allowing a party to take advantage of his own fraud. A corporate deed is the form in which the owners of the property chose to convey it, and they are bound by such a deed, in the same manner that they would have been, had they chosen to convey it under assumed names. If a man executes a bond or any other instrument, under an assumed name, he is bound by it, in the same manner as if he had executed it in his true name.

The next question is, was the deed sufficiently recorded? The plaintiff in error objects, that this mortgage deed should have been recorded in a book for the record of mortgages of personal property only. This question depends on the true construction of the act of the assembly of Rhode Island, passed January 1834. The defendant in error contends, that this statute
*429] does not apply *to a mortgage, comprehending real and personal estate; the personal being incident to and connected with the real, both the real and personal forming an entire estate. By such a deed, the personal would pass as incident to the real, without being mentioned. If A. conveys his cotton mill to B., the machinery in the mill will pass as much as the mill itself, or the land on which it stands, or the dams and flumes which belong to the mill, if it be a water-mill. See *Whitney* v. *Olney*, 3 Mason 280; *Gennings* v. *Lake*, Cro. Car. 168; *Boocher* v. *Samford*, Cro. Eliz. 113; *Yates* v. *Clincard*, Ibid. 704; *Doe* v. *Collins*, 2 T. R. 498. The mortgage to the defendant in error was "of all the machinery in the said factory." The construction of the law relative to recording mortgages, which is claimed by the plaintiff in error, would make this deed esentially different from what was intended by the parties to it. It was a mortgage of real estate, carrying with it, as appurtenant to the real estate, the

machinery in the mill. The mortgagor has, by the law of Rhode Island, three years after the mortgage is foreclosed, to redeem. The defendant in error could not have taken the personal property out of the mill and sold it.

Under the mortgage, the defendant could take no possession of the property, but as an incident to the mill. This possession of the property was only as such an incident; and if an ejectment were brought, the machinery would be recovered as an incident to the mill. If, then, the estate conveyed by the mortgage, personal as well as real, is redeemable as real estate; if the general rights and obligations of the parties to this mortgage, be the rights and obligations of the parties to a mortgage ofreal estate, the defendant in error contends, that it is not to be recorded as a mortgage of personal property, under the act of January 1834.

The object of the act was to give notice of the existence of the incumbrance. That object is answered by a record in one book, as well as by a record in two. To require a double record to be made in the same office, would be requiring the performance of an idle ceremony; which would be no benefit to those who are entitled to notice, and failure to perform which would subject an innocent mortgagee to the loss of his property. The defendants in error contend, that the provisions of the recording act are only directory to the town-clerks; and the law is complied with, by the recording of the deed in the town-clerk's office. If recorded in the office of the town-clerk, it is all sufficient. The town-clerk is the keeper of the records, and he, of course, knows where to find the record of any instrument. He alone has a right to search them, at the expense of a party inquiring. It is for him to make such arrangements for the recording of papers, as will give him the best means of making an accurate search. Cited, as to the construction of statutes, in the manner contended for by the counsel for the defendant in error, *Rex* v. *Loxdale*, 1 Burr. 457; *Rex* v. *Sparrow*, 2 Str. 1123; *Rex* v. *Inhabitants *of Bunningham*, 8 Barn. & Cres. 29; *Beverley* v. *Ellis*, 1 Rand. 102; *Breckenridge* v. *Todd*, 3 T. B. Monr. 54. The defendant in error also contended, that according to the true construction of the act, the mortgage was properly recorded in the record of mortgages of personal property. The book of mortgages of real estate is wholly unknown to the registry laws of Rhode Island. The law does not contemplate mortgages of real estate to be recorded in one book, ond absolute deeds in another. It makes no distinction between them; nor between mortgages, and any other conveyance of real estate. [*430

The defendant in error further contends, that the certificate of the town clerk is conclusive evidence of the facts therein stated. He alone is the recording officer. He alone is entitled to the custody of the records; and he alone is the certifying officer. See Laws of Rhode Island 878. He certifies the day and the hour when the mortgage was left for record. His certificate of this fact, and of the fact that the record has been made, cannot be contradicted. Cited, *Tracy* v. *Jenks*, 15 Pick. 465; *Frost* v. *Beekman*, 1 Johns. Ch. 288.

The counsel for the *plaintiff* in error, in reply, denied, that a deed or any other conveyance, purporting to be executed by a corporation, and using such terms as are proper to convey property, could be taken as the joint deed

of these individual corporators. Nor could such a deed be made to operate as a joint deed of the individuals, on the ground, that the corporators had committed a fraud by holding themselves out as capable of making such a deed.

Nor could the deed operate as an estoppel. An estoppel does not bind a stranger. Co. Litt. 352 *a*. An estoppel does not bind mere strangers, or those who claim by title paramount the deed. I does not bind persons claiming by an adverse title, &c. *Carver* v. *Astor*, 4 Pet. 83.

Simply recording a mortgage in the town-clerk's office, in any book, would not, in the judgment of the general assembly, have accomplished this object; because, in practice, the records in the town-clerk's office are open, at all convenient hours, to public inspection; are searched, as matter of right, by every freeman and freeholder; and the town-clerk himself is not exclusively entitled to their perusal, although when called upon to search the same, he is by law entitled to certain fees. We believe this practice to be common to every state in the Union. The legislature were well aware of its existence in Rhode Island; and in passing the act in question, they manifestly intended, that the record of mortgages of personal property should be so made, that every person interested might know with certainty where to look for it. If it were not so, where was the necessity of prescribing the mode and place of record? If the town-clerk had the exclusive right to search the records, and the community were dependent on him solely for information as to their contents, why the necessity of directing him as to the place where to make the record?

*431] *In conclusion, the statute of February 1834 is a remedial statute; the whole must be construed together, in order to effectuate the remedy provided, and prevent the mischief contemplated by the statute; and the deed in question was not recorded prior to the levy by the plaintiff in error, on the articles named in the writ of replevin of the defendant in error, in conformity with the provisions of said statute.

McLean, Justice, delivered the opinion of the court.—This case is brought before this court by a writ of error to the circuit court of Rhode Island. The defendant, Cyrus Butler, commenced an action of replevin against the plaintiff in error, for various articles of personal property specified in the writ of replevin, and claimed by him under a mortgage, dated the 20th day of November 1837. The defendant had taken possession of the property, by virtue of an execution directed to him as marshal, on a judgment against the mortgagors.

On the trial, certain exceptions were taken to the rulings of the court, which bring the questions decided before this court. The mortgage was executed by one Daniel Greene, as the agent of the Union Steam Mill Company, said company being a manufacturing corporation, conveying to the plaintiff below certain lands, with a woollen mill and other buildings, with the machinery in said mill, &c. And the incorporating act and several acts amendatory thereto were read in evidence. And also a deed from William P. Salisbury to the said Greene, dated the 18th May 1837, conveying all his interest in the real and personal property of the Union Steam Mill Company. And it was proved, that Daniel Greene, who executed the deed first aforesaid, was, and had been from the time of the formation of said com-

pany, the general agent, and as such, had made all purchases and sales for the company; and that the deed was executed by him with the consent and authority of said company; and also by and with the consent and authority of the persons who, at the time of the execution thereof, were members of said company. The court decided, that the said corporation was not so proved as to entitle the deed to be read to the jury as the deed of the said corporation; but that the deed was good to convey a valid title to the articles named in the writ of replevin. To this decision, the counsel for the defendant excepted.

And it was further objected to said deed, that it did not appear, that the same had been recorded prior to the defendant's levy on the articles by the writ of replevin, in conformity to the statute on the subject. The counsel for the plaintiff produced and read to the court, an indorsement on the back of said deed, signed by the clerk of the town of East Greenwich, in the words and figures following, to wit: "Lodged in the town-clerk's office, to record, Nov. 20th, 1837, at 5 o'clock P. M., and recorded, same day, in the records of mortgages, in East Greenwich, book No. 4, &c." *It was proved, that the said clerk kept a book in which all mortgages of personal property only were recorded; and all other mortgages, which included real estate, were recorded in other books kept in the office. After the deed was recorded, it was taken away by the plaintiff below; and afterwards, on the 14th November 1838, was returned by him to said office, when it was recorded in the book kept for mortgages of personal property. And the court decided, that said certificate was sufficient evidence that the deed was duly recorded. To which decision, the defendant excepted. [*432

The above exceptions present two points for examination. 1. Whether the mortgage deed was valid? 2. Whether it was duly recorded?

To the decision of the court, that the evidence did not show that the stockholders had organized themselves under the act of incorporation, so as to enable them to execute a corporate deed, there was no exception; this ruling of the circuit court is not, therefore, brought before this court. The deed of mortgage purports to be executed by the corporation. The Union Steam Mill Company is the name of the corporation; and on the face of the deed, the company is stated to have been legally incorporated. Daniel Greene, as the agent of the company, and in its name, signed the deed, and affixed to it the seal of the corporation. And the counsel for the plaintiff in error insist, that this mortgage can only be operative as the deed of the corporation; that if it be not the deed of the corporation, it is no deed; and that in no sense can it be considered the deed of the stockholders of the Union Steam Mill Company, as partners; independent of the act of incorporation. This, it is said, would be giving a different effect to the deed from that which was intended by the parties who executed it; they bind themselves as corporators, and convey, as such, the property of the corporation; and to hold that the deed binds them in any other capacity, or conveys the property in any other, would not only essentially vary the terms of the deed, as clearly expressed upon its face, but it would be a fraud against the creditors of the company. And it is also insisted, that the deed, being under seal, and executed by only one of the partners, cannot bind the company.

From the record, it appears, that this company did business before the

act of incorporation was passed, and that Daniel Greene acted as its agent. And that after the deed of William P. Salisbury, conveying to the company all his interest in the property, in May 1837, Daniel Greene and R. W. Dickinson composed the stockholders of the company. And it appears, after they assumed their corporate functions, much formality was observed in the record of their proceedings. Greene acted as chairman, and Dickinson as secretary; motions were made, and, as it would seem, were unanimously decided. A special meeting of the stockholders was called, on the
*433] subject of executing *the mortgage, by a formal note, addressed by R. W. Dickinson, as clerk, to Daniel Greene, and another to himself. In their business proceedings, generally, as well as in the execution of the mortgage, these individuals assumed to act as a corporation. But they were not authorized to act in this capacity. This fact must be taken as granted, at least so far as the decision of the present case. And here a question arises, whether the acts of these individuals, in their assumed character as corporators, are void. May they hold themselves out to the world as entitled to certain corporate privileges, when they were not so entitled; and afterwards avoid their contract on this ground? This would be a somewhat new, and certainly, a most successful mode of practising fraud. It would be enabling a party to take advantage of his own wrong.

As the present controversy involves only the right to the personal property named in the deed of mortgage, it is not necessary to consider the validity of that instrument, beyond the effect it has on this property. It is a well-settled rule, though a very technical one, that one partner cannot bind his copartner by deed. And it is equally well settled, that one partner may dispose of the personal property of the firm. In this case, had an absolute sale and delivery of this property been made by Greene, no one, in the absence of fraud, could have questioned the title of the purchaser. But the mortgage was executed under seal, and Greene, it is alleged, could not bind his partner by deed. That these individuals, not being responsible on their contracts as a corporation, are liable as copartners, is too clear to admit of doubt. The property of the company, both real and personal, was vested in them; and they controlled its entire operations. The mortgage deed was executed on the 20th of November 1837. And it appears from the record, that Greene and Dickinson unanimously resolved, that the mortgage should be executed by Greene, as agent of the corporation. And it was accordingly executed on that day.

Now, that one partner may bind his copartner by deed, if he be present and assent to it, is a well-established principle. The signature and seal of Greene are affixed to the mortgage; and that this was done with the assent of his copartner, Dickinson, is unquestionable. But was Dickinson present at the execution of the mortgage, and did he then assent to it? We think the facts in the record will warrant such a conclusion. The resolve of the partners to give the mortgage, and the execution of it, bear the same date; and may well be considered the same transaction. This seems to be the fair result of the facts stated, and must be received as *primâ facie* evidence of the due execution of the deed. These facts are liable to be rebutted by
*434] any one who questions the validity of the deed. *All those parts of the deed, which refer to the corporation, including the corporate seal, may be rejected as surplusage, which do not vitiate it. They are considered

as merely descriptive, and being false in fact, can have no effect on the deed. The seal of one partner to a deed, with the assent of the copartner, will bind the firm. From these considerations, we think the circuit court did not err, in receiving the mortgage deed in evidence; treating it as a valid instrument, as it respects the rights involved in this suit.

2. Was this mortgage duly recorded? By an act of the legislature of Rhode Island, passed at the January session 1834, entitled "an act to prevent fraud in the transfer of personal property," it is provided, that no mortgage of personal property, except as between the parties, shall be valid, unless possession accompany the deed, or it be recorded in the office of the town-clerk. In the second section, it is made the duty of the clerk to record such mortgages in a book kept for that purpose. It appears from the evidence, that the town-clerk kept a book in his office in which he recorded all mortgages of personal property; and all other mortgages which included real estate, or real estate and personal, were recorded in other books kept in said office, in one of which this mortgage was recorded. And the question is, whether such a registration is sufficient, under the statute. The object of the recording act is to give notice to subsequent purchasers. The statute undoubtedly requires the clerk to record mortgages for personal property only, in a book kept for that purpose. This being the requirement of the law, to which the clerk strictly conformed, there could be no uncertainty in searching the record for a personal mortgage.

But it seems, that the statute did not expressly provide, in what book a mortgage like the one under consideration, for both real and personal property, should be recorded. And it appears, that it was the usage of the office, to record such mortgages in the book which contains mortgages for real estate. Now if this be insufficient, nothing short of recording such a deed in both books, could be held a compliance with the statute. And can this be necessary? The conveyance of the personal and real property is so blended in the mortgage, as to be inseparable. To require a double record, would seem to be an unreasonable construction of the statute, as it cannot be necessary to effectuate its object. Both records are kept in the same office, and by the same person; who performs the duties of the office, and must always be well acquainted with its usage. Any inquiry of the clerk for the record of a mortgage like the one under consideration, would as certainly lead to it, under the usage, as if it were recorded in both books. If this mortgage had been recorded in the book for personal mortgages, the same strictness as now contended for might be urged *against such [*435
record book, as it would not then be kept exclusively for personal mortgages. We think, that this mortgage has been recorded in a book kept, though not exclusively, for the purpose of recording mortgages which convey real and personal property; and that it is within a fair construction of the statute.

We think also, that the circuit court did not err, in deciding that the certificate of the clerk was sufficient evidence that the mortgage deed was duly recorded. The judgment of the circuit court, not being erroneous, is affirmed, with costs.

Judgment affirmed.

*Carey Bagnell and the Executors of Morgan Byrne, Plaintiffs in error, *v.* George W. Broderick, Defendant in error.

Patents for lands.—New Madrid certificates.

The plaintiff in error had exhibited, in an action instituted against him in the circuit court of Missouri, evidence, conducing to prove that a patent from the United States, under which the plaintiff in the ejectment, the defendant in error, claimed the land, had been improperly granted by the government of the United States, and that the title to the land was in him: *Held*, that in an action at law, a patent from the United States for part of the public lands is conclusive; if those who claim to hold the land against the patent can show that it issued by mistake, then the equity side of the circuit court is the proper *forum*, and a bill in chancery is the proper remedy, to investigate the equities of the parties.

Congress has the sole power to declare the dignity and effect of titles emanating from the United States; and the whole legislation of the government in reference to the public lands, declares the patent to be the superior and conclusive evidence of legal title; until it issues, the fee is in the government; which, by the patent, passes to the grantee, and he is entitled to recover the possession in ejectment.

The practice of giving in evidence a special entry, in aid of a patent, and dating the legal title from the date of the entry, is familiar in some of the states, and especially in Tennessee; yet, the entry can only come in aid of the legal title, and is no evidence of such title, standing alone, when opposed to a patent for the same land.[1]

The presumption is, that the judgment of a circuit court is proper, and it lies on the plaintiff in error to show the contrary.

When the title to the public land has passed out of the United States, by conflicting patents, there can be no objection to the practice adopted by the courts of a state, to give effect to the better right, in any form of remedy the legislature or courts of the state may prescribe.[2]

No doubt is entertained of the power of the states to pass laws, authorizing purchasers of lands from the United States to prosecute actions of ejectment upon certificates of purchase, against trespassers on the lands purchased; but it is denied, that the states have any power to declare certificates of purchase of equal dignity with a patent; congress alone can give them such effect.[3]

Error to the Circuit Court of Missouri. This was an action of ejectment, for a tract of land, in the state of Missouri, instituted by George W. Broderick against Bagnell, the defendant, the tenant in possession; and in the progress of the cause, Morgan Byrne, the landlord, was made co-defendant, and he dying, his executors were substituted.

Other actions of ejectment were, at the same time, instituted by George W. Broderick, for parts of the said tract, in the possession of McCunic and of Sampson; and the executors of Morgan Byrne became, in the same manner, co-defendants in the cases. A verdict, in conformity to the opinion of the circuit court, having been given for the plaintiff, in each of the cases, on the 10th of April 1838, the defendants prosecuted writs of error to the supreme court; bills of exception having been sealed by the court.

The bills of exception showed, that on the trial of these cases, the plaintiff below read in evidence a copy of the patent from the United States to

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[1] The inception of title, under a New Madrid certificate, is the recording of the plat and survey in the recorder's office. Lessieur *v.* Price, 12 How. 59; Rector *v.* Ashley, 6 Wall. 143; Rector *v.* United States, 92 U. S. 698.

[2] See Doe *v.* Eslava, 9 How. 421.

[3] A state law cannot confer on the equitable owner the right to maintain ejectment against the patentee, in a federal court. Fenn *v.* Holme, 21 How. 481; Hooper *v.* Scheimer, 23 Id. 236. A patent raises the presumption that all previous steps had been regularly taken to justify the issuing of it. Murter v. Crommelin, 18 How. 87. See Quinn *v.* Chapman, 111 U. S. 445.

John Robertson, Jr., dated 17th June 1820, for the tract of land mentioned in the above statements, which, reciting that *John Robertson, Jr., had deposited in the general land-office, a certificate, No. 192, of the [*437 recorder of land-titles at St. Louis, Missouri; whereby it appeared that in pursuance of an act of congress passed 17th February 1815, entitled, "an act for the relief of the inhabitants of the late county of New Madrid, in the Missouri territory, who suffered by earthquakes," the said John Robertson, Jr., was confirmed in his claim for 640 acres of land, being survey No. 2810, and section 32, township 50 north, and range 15 west of 5th principal meridian; and the United States granted to John Robertson, Jr., in fee, the tract of land described above. Also, a deed from John Robertson, Jr., to Augustus H. Evans, dated 16th November 1830, conveying the same tract of land to the said Evans in fee, expressly stipulating, however, against any warranty. Also, a deed from Augustus H. Evans to George W. Broderick, the plaintiff below, now defendant in error, dated 7th June 1830, conveying the same tract of land to the said Broderick in fee; and proved possession of the premises by the defendants below, at the commencement of the suits respectively; and here closed his testimony.

That the defendants below, now plaintiffs in error, read in evidence a transcript of a notice to the recorder of land-titles for the United States, at St. Louis, taken from the records of the office of the recorder, given by John Robertson, Jr., which stated that he claimed 750 arpens of land, in the Big Prairie, on the ground of inhabitation and cultivation, prior to and on 20th December 1803, by and with the consent of the proper Spanish officer. Also, a copy of proceedings had before the board of commissioners on land-claims, on the 11th July 1811, taken from the minutes of the proceedings of the board for ascertaining and adjusting the titles and claims to lands, which showed, that on the claim of John Robertson, Jr., for 750 arpens of land, in the Big Prairie, the board granted to John Robertson, Jr., 200 arpens of land. Also, a transcript of opinion, and report of the recorder of land-titles of the United States, at St. Louis, made 1st November 1815, which, in connection with act of congress of 29th April 1816, entitled, "an act for the confirmation of certain claims of land in the western district of the state of Louisiana, and in the territory of Missouri" (see § 2 of this act), showed, that the confirmation of 200 arpens, parcel of the claim of John Robertson, Jr., for 750 arpens of land, in the Big Prairie, made by the board of commissioners aforesaid, was extended to 640 acres, and this quantity, 640 acres, was accordingly confirmed to him. Also, a deed from John Robertson, Jr., to Edward Robertson, Sr., dated 29th May 1809, conveying the said 750 arpens of land to the said Edward Robertson, Sr., in in fee; reciting in same conveyance, that 330 arpens of the said 750 arpens had been surveyed, and how; and specifying the manner of laying off the residue, and authorizing the said Edward Robertson to apply for and receive from government, or the proper authoriites, a patent, in his own name, for the same; and covenanting, on behalf of himself and his heirs, to warrant the title *against all persons claiming under, through or by the vendor. [*438 Also, a deed from Edward Robertson, Sr., to Morgan Byrne, dated 30th October 1813, conveying to the said Byrne, in fee, 300 arpens of land, out of a tract of land, the head-right of John Robertson, Jr., situated and being in the Big Prairie, bounding the part conveyed, parcel of the 750 arpens

above described; and covenanting, for himself and his heirs, to warrant and defend the title against all claims whatever. Also, a deed from Edward Robertson, Sr., to Morgan Byrne, dated 11th September 1816, conveying to the said Byrne in fee, 250 arpens of land, part of the head-right of John Robertson, Jr., of 750 arpens, situated in the Big Prairie, and containing a covenant, for himself and heirs, to warrant the title against all claims whatever. Also, a copy of deed from Edward Robertson, Sr., to William Shelby, dated 29th October 1816, conveying to the said Shelby in fee, 200 arpens of land, bounding the same, parcel of the head-right of John Robertson, Jr. (and parcel of the 750 arpens above described), and containing a covenant of general warranty. Also, a copy of deed from William Shelby to Levi Grimes, dated 2d December 1816, conveying to the said Grimes in fee, the 200 arpens of land next above described, and containing a covenant of warranty. Also, a deed from Levi Grimes to Morgan Byrne, dated 26th February 1817, conveying to the said Byrne in fee, the 200 arpens of land next above described, and containing a special warranty.

The defendants also produced in evidence an extract from the registry of relinquishments, in the office of recorder of land-titles for the United States, at St. Louis, of lands materially injured by earthquakes, under the act of congress of 17th February 1815; which showed that the confirmation aforesaid to John Robertson, Jr., for 640 acres, situated in the Big Prairie, was relinquished by Morgan Byrne, as the legal representative of John Robertson, Jr., and on such relinquishment the location certificate No. 448 issued. Also, a copy of certificate of location, dated September 1818, and No. 448, issued by the recorder of land-titles of the United States, at St. Louis, which certified that a tract of 640 acres of land, situated in the Big Prairie, was materially injured by earthquakes, and that in conformity with the provisions of the act of congress of 17th February 1815, the said John Robertson, Jr. (reciting that he appears from the books of his office, recorder of land titles of the United States, to be the owner), or his legal representatives, was entitled to locate 640 acres of land on any of the public lands, &c. Also, a copy of the location, under the foregoing certificate of location, made 8th October 1818, which showed that Morgan Byrne, as the legal sepresentative of John Robertson, Jr., entered and located 640 acres of land, by virtue of the certificate of location, commonly called a New Madrid certificate, issued by the recorder of land titles of the United States, at St. Louis, dated September 1818, No. 448, so as to include section 32, township 50 north, range
*439] 15 west of *5th principal meridian (the same premises in dispute); and here the defendants below closed their testimony.

The plaintiff below then read in evidence, a copy of notice by John Robertson, Jr., of claim for 330 arpens, and proceedings on same had before the board of commissioners of land-claims, on 24th March 1806, and 15th August 1811, which showed, that John Robertson, Jr., filed a notice of claim for 330 arpens, situate in the district of New Madrid, under the 2d section of the act of congress of March 1805, accompanied by a plat of survey of 330 arpens, made by one Joseph Story, at request of John Robertson, Jr. (as the same purported), who, as the survey recited, claimed the same as part of his settlement right, by virtue of the 2d section of the act of congress of March 1805; that the board of commissioners, on the 24th March 1806, granted to the claimant 750 arpens, and on the 15th August 1811,

rejected the claim entirely, saying the claim ought not to be granted. Also, a transcript of opinion, and report of the recorder of land-titles of the United States, at St. Louis, made 1st November 1815, which, in connection with the act of congress of 29th April 1816, before referred to, showed that the claim of John Robertson, for 330 arpens was confirmed to him, and 330 arpens accordingly granted. Also, a copy of certificate of location, in favor of John Robertson, Jr., or his legal representatives, dated 18th September 1818, No. 447, issued by the recorder of land-titles of the United States, at St. Louis, which certified that a tract of 330 arpens of land, situate on lake St. Marie, had been materially injured by earthquakes, and that in conformity with the provisions of the act of congress of 17th February 1815, the said John Robertson, Jr., reciting that he appeared from the books of his office (recorder of land-titles of the United States), to be the owner, or his legal representatives, was entitled to locate 330 arpens of land, &c.

The defendants below then read in evidence, an extract from registry of relinquishments, in the office of the recorder of land-titles of the United States, at St. Louis, of lands materially injured by earthquakes, under the act of congress of 17th February 1815, which showed, that the confirmation aforesaid of 330 arpens to John Robertson, Jr., was relinquished by James Tanner, as his legal representative, and that on such relinquishment, the location certificate, No. 447, issued. Also, a certificate of the recorder of land-titles aforesaid, that from entries made in the books of his office, of New Madrid location certificates issued, the certificate of location No. 447, was delivered to one Jacoby, for James Tanner, and certificate of location No. 448, was delivered to Morgan Byrne ; and proved that the premises in dispute in each case, was of the value of $3000 : which closed and was all the evidence given in the causes.

Upon the case made, the defendants below moved the court to instruct the jury as follows : 1. That the entry, or New Madrid location, made by Morgan *Byrne, in his own name, as given in evidence in these cases, is proof of legal title to the land ; and is a sufficient defence against [*440 all persons who do not show a better legal title to the same land. 2. That the patent, a copy of which has been given in evidence by the plaintiff, did not vest in the patentee any better legal right to the land in question, than he had before the date thereof, as against the defendants claiming the same land adversely by other title. 3. That after the entry, and before the patent, Morgan Byrne had a legal title to the land in question, sufficient to enable him to prosecute or defend an action of ejectment therefor ; and that the issuing of the patent could not divest that title. 4. That if the jury believe, the patent, a copy of which has been offered in evidence by the plaintiff, issued on the location made by Morgan Byrne, and shown in evidence on the part of the defendants in these cases ; the patent is not such title as will avail against the location. All which instructions the court refused : to which refusal, exceptions were taken.

Beverly Allen submitted a printed argument, for the plaintiffs in error. The errors assigned are, besides the general assignment, four ; answering respectively to the refusal of the court to give the four instructions prayed ; and a fifth, that the judgment against the executors of Byrne was *de bonis propriis*, whereas, it should have been *de bonis testatoris*.

It appears from the testimony in the three cases, that Morgan Byrne, the landlord and testator, was the owner of the land in New Madrid, which was injured by earthquakes; that he applied for and obtained the certificate of location, No. 448, relinquishing his land in New Madrid, in lieu of which this certificate issued by the United States, and was located, in his own name, on the tract of land in dispute, in virtue of certificate No. 448; that upon his location, a patent certificate issued, and on this certificate, a patent issued to John Robertson, Jr., the same person who once owned the land in New Madrid, relinquished by Byrne, and under whom Byrne claimed that land. That the plaintiff derives title to the land in dispute, from John Robertson, Jr., by deeds executed since the issue of the patent; and being such owner, instituted these actions of ejectment, to recover the possession of the land located as aforesaid by Byrne.

The question is, whether, in such a case, and on such a statement of facts, John Robertson, Jr., the patentee, or George W. Broderick, his assignee, can recover against Morgan Byrne, the locator of the land, or his representatives. The plaintiffs in error, contend, that the patentee and his assignee cannot; and rely on the following grounds: 1. The title of Morgan Byrne
*441] was sufficient to maintain an action *of ejectment. See Revised Code of Missouri of 1825, page 343, § 2, in force at commencement of these suits;(*a*) and Revised Code of Missouri of 1835, p. 234–5, § 1, 2, 9, in force at trial of same.(*b*) 2. That whatever was sufficient to maintain, must

(*a*) § 2. Be it further enacted, that any person claiming lands or tenements, by virtue of any pre-emption right, New Madrid location, entry with the register and receiver, confirmation by the board of commissioners of land-claims for the territory of Missouri, or by the recorder of land-titles, or by concession, not exceeding one league square, or by settlement-right, or other right, where such right or concession has been confirmed by the commissioners aforesaid, or recorder aforesaid, or by any act of congress, or where the same is held by deed, patent, entry, warrant or survey, being confirmed as aforesaid; or by any French or Spanish grant, warrant or order of survey, which, prior to the 10th day of March 1804, had been surveyed by proper authority, under the French or Spanish governments, and recorded according to the custom and usages of the country, although such person may not be in the actual possession; or if the same shall have been actually surveyed, by authority of the United States, since the 10th day of March 1804, or by any proper officer, under the French or Spanish governments, prior to the said 10th day of March 1804; such person shall and may maintain actions of ejectment or trespass, in any court having jurisdiction thereof, against any person not having a better title; and in all actions of ejectment, where a verdict shall be found for the plaintiff, the jury shall also find damages for the mesne profits, up to the time of rendering the verdict: provided, however, that mesne profits shall not be recovered for any time prior to the commencement of the suit, unless the plaintiff shall prove that the defendant had knowledge of his claim; and then only from the time of such knowledge coming from the defendant.

(*b*) § 1. The action of ejectment may be maintained, in all cases when the plaintiff is legally entitled to the possession of the premises.

§ 2. The action of ejectment may also be maintained, in all cases where the plaintiff claims possession of the premises, against any person not having a better title thereto, under or by virtue of: 1st, An entry with the register and receiver of any land office of the United States, or with the commissioner of the general land-office thereof; or, 2d, A pre-emption right under the laws of the United States; or, 3d, A New-Madrid location; or, 4th, A confirmation made under the laws of the United States; or, 5th, A French or Spanish grant, warrant or order of survey, surveyed by proper author-

be sufficient to defend an action of ejectment. This is a corollary from the first ground. If these two points are well taken, the first special error is well assigned. 3. That the patent is not, in this case, and on this statement of facts, the "better title" contemplated by the acts of assembly referred to.

I. As to the first point, argument cannot elucidate the words of the law. Its meaning is evident, and the first rule of construction is, not to construe that which needs no construction.

II. As to the second point. The correctness of this is necessarily implied in the language and spirit of the law. It is a sequence from the first. If the title of Byrne was such as would enable him to maintain an action of ejectment and recover possession, it would be *absurd, not to hold it to be sufficient to maintain that possession, when recovered. [*442

III. As to the third point. Here the inquiry arises, what is the meaning of the phrase "better title," in the acts of assembly referred to. A title is thus defined by Lord Coke (1 Inst. 345), "*Titulus est justa causa possidendi id quod nostrum est.*" Or, by Blackstone (2 Bl. Com. 195), "It is the means whereby the owner of lands hath the just possession of his property." What this "*justa causa*" or "means" is, must, in all countries, depend on the law of the country where the subject of the title is situated. *United States* v. *Crosby*, 7 Cranch 115; *Clark* v. *Graham*, 6 Wheat. 577; *Kerr* v. *Devisees of Moon*, 9 Ibid. 565; *McCormick* v. *Sullivant*, 10 Ibid. 192. The "*justa causa*" or "means" is nothing more than those *indicia* of ownership which are recognised by the laws of the country, as evidence of right. Title is by descent or purchase. The *indicia* of the former is heirship, of the latter, any of those modes of acquiring property which are recognised by law. The laws of Missouri, where lies the property in dispute, recognise the entry or location of land, as in this case, to be a mode of acquiring property, and an evidence of right in the locator. They also recognise a patent to be a mode of acquiring property, and an evidence of right. We have then an *indicium* of ownership in Morgan Byrne, and an *indicium* of ownership in John Robertson, Jr.; and these *indicia* of ownership are considered by the laws of Missouri such evidence of right as will enable either to maintain or defend an action of ejectment. Morgan Byrne had, in this case, the possession, the right of possession, and the right of property, which together constitute a completely good title, denominated a double right "*jus duplicatum*" or "*droit droit.*" 2 Bl. Com. 199. In him was the "*juris et seisina conjunctio*," which constitute the title completely legal, or a perfect title. Kent's Com. Lect. 65.

It may be admitted, that a patent is considered in law a higher species of evidence of right, but that can avail nothing in this case, where the evidence of right in the other party is sufficient to maintain or defend the action of ejectment. The words of the law are not, "against any person not hav-

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ity under the French or Spanish governments, and recorded according to the usages of the country, prior to the 10th day of March 1804.

§ 9. To entitle the plaintiff to recover, it shall be sufficient for him to show, that, at the time of the commencement of the action, the defendant was in possession of the premises claimed, and that the plaintiff had such right to the possession thereof, as is declared by this act to be sufficient to maintain the action.

ing a title thereto, proved by a higher species of evidence," but "against any person not having a better title thereto;" that is, an *indicium* of ownership recognised by the law as evidence of a better right. It then necessarily follows, that in the construction of the words "better title," we must look not at the species of evidence of the title, but to the justness of the title. On looking into the titles of these two contending claimants, the patentee and the locator, we find, they both have the same origin; they both originate in the relinquishment made by Morgan Byrne, and the certificate of location No. 448; and now, which of the two has the better title, or more just title to the land located under the certificate, Morgan Byrne, whose land was relinquished, or John Robertson, Jr., who had no interest in the land re-
*443] linquished; Byrne, *who was interested in and made the location, or Robertson, Jr., who had no interest therein, was no party to it, and who had previously sold and conveyed to him, under whom Byrne claimed the land thus relinquished, and in virtue of which relinquishment, Byrne made that location? Seeing, then, both to have those evidences of right, recognised by the law, to be sufficient to maintain or defend an ejectment, the justness of the title of Robertson, Jr., must be examined. On this examination, it will be found, that Robertson, Jr., shows no title better than Byrne's; and failing in this, Broderick, the assignee of Robertson, Jr., cannot recover against the tenant and representative of Byrne.

There has been no adjudication by the supreme court of Missouri, what is meant by the words "better title." In the case of the *Administrators of Janis* v. *Guarno*, 4 Mo. 458, the court says, "what shall be considered a better title, the act does not define. It surely does not mean, that the bare possession of the defendant shall be so considered. We understand, then, that the meaning of the act is, that when the plaintiff produces a confirmation of the land to himself, he has made out his case, and will be entitled to recover, unless the defendant can show a better title. What, in all cases, or indeed, what would be a better title, in any case, need not be now decided."

Titles are legal or equitable, predicated on that distinction, known in many of the states of the Union, between law and equity. The former are subjects of examination in courts of law, and the latter, in courts of equity. In those states of which Missouri is one, legal titles are the subject of examination in courts of law, equitable, in courts of equity; whether a title be legal or equitable, that is, whether it be the subject of examination in a court of law or equity, the foundation of a proceeding in one court or the other, depends on the statute of the state where the tribunal is situated in which the examination or proceeding is had. *Robinson* v. *Campbell*, 3 Wheat. 212; *Society for the Propagation of the Gospel* v. *Wheeler*, 2 Gallis. 105. In Missouri, the title of Morgan Byrne is the subject of examination, and the foundation of a proceeding in a court of law. It is a title, on which an ejectment, which, by the law of Missouri, is a legal proceeding, may be maintained or defended, and is, therefore, a legal title, and will be so considered in the courts of the United States, conformable to the decision in *Robinson* v. *Campbell*, 3 Wheat. 212. There is, then, before the court, in these cases, a legal title, in both plaintiffs and defendant in error; and the inquiry again recurs, which has the better title; not which has the higher species of evidence of title, but which, in point of justness or superior right, should prevail. What has already been said, shows that Byrne, who owned

the land in New Madrid, relinquished the same to the United States, and made the location, has a more just and superior right, in other words, a better title, to the land located, than John Robertson, Jr., original owner of the land in New Madrid, who sold the same to Edward Robertson, Sr., under whom Byrne claimed *the same; who had no agency in the relinquishment, no interest in the land relinquished, and no right to [*444 the land located by Byrne, anterior to the issuing of the patent. In other words, by Byrne's act, the land in dispute was severed from the domain of the United States, and by him appropriated, with the consent of the United States, by him purchased for a good and valuable consideration from the United States, by him acquired in an exchange with the United States. He gave other lands for it to the United States. From the moment of the location, it became his—the United States had no title to it at the date of the patent. See act of congress, 17th February 1815, § 2, proviso 2, The title was in Byrne, and that title was such as enabled Byrne to institute, in the courts of law of Missouri, an action of ejectment; and it is submitted, whether, under these circumstances, it can be said, that the title of John Robertson, Jr., is better than the title of Morgan Byrne; whether a patent issuing from the United States to John Robertson, Jr., for land they had previously disposed of, can prevail against Byrne, to whom it was so disposed, and this disposition being recognised by the laws of Missouri, as a title on which to maintain an ejectment. Our statute requires, that in actions of ejectment, an examination be made into the successive gradations of title, or the various evidences of title to land, in a contest between two persons claiming the same land, whenever those gradations or evidences are recognised by the law as legal titles, or titles on which an ejectment may be maintained or defended. This is all that is insisted on in these cases. It is not asked, to maintain or defend an ejectment, on an equitable title, nor to look behind the patent, as to the regularity of the steps from the first to the last, ending with the issue of the patent; but to ascertain who had the prior legal right, that right on which an ejectment might be maintained or defended. The plaintiffs in error feel confident, that on such examination, their right will be found to be a legal and prior right; being legal, it is examinable in a court of law; is the foundation of a legal proceeding; is sufficient to maintain or defend an action of ejectment; and being prior in time, is more powerful in law and right, and must prevail against the right of the defendant in error, which, though legal, is posterior in time. But if is should be said, that the patent is the legal title, and the location an equitable title, yet the statute of Missouri, making this equitable title examinable in a court of law, and giving it that dignity which authorizes an action of ejectment to be maintained or defended on it, the courts of the United States are bound to give it the same dignity; and when they find it possessing the effect ascribed to it by the laws of Missouri, to give to it the like preference over the patent in this case, that the courts of Tennessee and the supreme court of the United States, following those courts, give to the junior patent, founded on an elder entry, over an elder patent, founded on a junior entry. *Polk's Lessee* v. *Wendall*, 9 Cranch 87.

The decision of the supreme court of the United States that a patent is a title from its date, and conclusive against all those whose *rights [*445 do not commence previous to its emanation (7 Wheat. 212), implies

that there may be rights commencing anterior to the patent. Is there a right, in these cases, commencing anterior to the date of the patent? The location was anterior, and gives a right. Is this anterior right examinable in a court of law? The statute of Missouri makes it so examinable; and being so, whenever a contest arises between a patent and an anterior location, this location, whether a legal or an equitable right, must, in the construction of the statute of Missouri, have its effects; and, if of a merit superior to the patent, have the same effect it would have in a court of equity, and prevail over the patent. *Finley* v. *Williams*, 9 Cranch 164; *McArthur* v. *Browder*, 4 Wheat. 488. If the preceding views be correct, the general and first four special errors are well assigned.

As to the fifth special error. There is no such thing known to the law, nor in the practice of the law in the courts of Missouri, as those pleas peculiar to an executor or administrator, growing out of the matter of assets. In Missouri, no execution issues against an executor or adminisirator, sued as such, unless specially sued for a *devastavit*, or on his bond as such. All demands, no matter of what dignity, are presented to the court having cognisance over the administration of estates, by whom they are classed; and at the annual settlements of the administrators or executors, that portion of the assets which consists of money, is apportioned among the creditors: and thus, and not otherwise, are demands, whether by simple contract, by specialty or by judgment, against an estate, collected. For all defaults on the part of an executor or administrator, a suggestion of a *devastavit* is made and tried in the court having cognisance of the administration of estates, or the bond of the executor or administrator is put in suit. Judgments predicated on the false pleading of the executor or administrator, as technically understood in the laws of England, are unknown to the law or in its practice in Missouri. See Revised Code of Missouri of 1835, title Administration.

Coxe, for the defendant in error.—The decision of the circuit court is to be considered correct, until its incorrectness is made to appear. This was so held by this court, in the case of *Carroll* v. *Peake*, 1 Pet. 23. Have the plaintiffs in error shown that there was error in the decision of the circuit court? It was a question on the legal title of the parties in the cause, and this question alone was decided by the court. The equitable claims of those who alleged they were justly entitled to the land under Robertson, could not be taken into consideration in the action on the law side of the circuit court. The chancery powers of the court could have been invoked by the defendants, in another form than in a defence to an action of ejectment.

The grant and patent are evidence in a court of law of the matters re-
*446] cited in them. The grant, legally and fully executed, was *competent evidence of the matters set forth in it; and as none other was necessary, it was in effect conclusive. *United States* v. *Arredondo*, 6 Pet. 724. No facts behind the grant can be investigated. 11 Wheat. 580. A patent is evidence in a court of law, of the regularity of all the previous steps to it. 5 Wheat. 293; 7 Ibid. 151. The court are bound to presume the acts of commissioners, intrusted by laws of congress to inquire into claims to lands, regular; and the decisions of these commissioners are, in

courts of law, binding and effectual. This principle was decided in the case of *Ross* v. *Barland*, 1 Pet. 668.

The defendant in error supported his claim to the land, by a patent issued by the proper authority. The patent was granted on the facts stated in the records of the land-office, and those records are evidence of the proceedings stated in them. They are conclusive evidence ; this was fully decided by this court, in the case of *Galt* v. *Galloway*, 4 Pet. 342. This court then said, "as the records of the land-office are of great importance to the country, and are kept under the official sanction of the government, their contents must always be considered, and they are always received in courts of justice, as evidence of the facts stated."

The commissioner of the land-office was empowered, by the act of congress, to investigate the facts connected with every application for land, in consequence of the injuries sustained by the earthquake ; and he was to adjudge to the person entitled, after such investigation, the land to be granted by the United States. In this case, Robertson was in full life, when the land was granted and patented to him ; and he conveyed it to those under whom, by regular conveyances, the defendant in error holds. In a court of law, nothing more was necessary than the exhibition of such a legal title.

Nor could the plaintiffs in error derive any right to maintain their title under the provisions of the law of Missouri, of 1835. That law can have no operation on the system established by the United States for the sale of their public lands, and the granting of titles thereto. Against trespassers, the law of Missouri may have full effect ; and a holder of land in Missouri under a pre-emption right, New Madrid location, or entry with the register, might maintain an ejectment. But this law could give no right to an ejectment, under an inchoate right, in the courts of the United States, against a patent issued by the proper officer authorized by the act of congress to grant a patent. The states of the United States cannot make, by their statutes, any titles or claims to lands, by certificates of entry, which are inferior to a patent, of equal dignity with a patent.

Catron, Justice, delivered the opinion of the court.—This was an action of ejectment, by Broderick against Bagnell, for a section of land, lying in Howard county, Missouri ; and Peter and Luke Byrne were admitted to come in and defend, under the following circumstances : Morgan Byrne claimed to be the owner of the land, and he was first admitted a co-defendant with Bagnell ; *Byrne died, and Margaret Byrne, his executrix, was admitted as a co-defendant ; then she died, and Peter Byrne [*447
and Luke Byrne, executors of the last will of Morgan Byrne, were admitted. The judgment below is, that the plaintiff recover the land and costs, against Carey Bagnell and Peter and Luke Byrne, executors of Morgan Byrne. It is assigned for error, that the judgment for costs against Peter and Luke Byrne, should have been *de bonis testatoris*, and not *de bonis propriio*.

The presumption is, that the judgment of the circuit court is proper, and it lies on the plaintiffs in error to show the contrary. 1 Pet. 23. The executors of Morgan Byrne had no interest in the land, by virtue of their letters-testamentary, but could well have an interest by the will of their testator. On no other ground could they properly have been permitted to

come in and defend, in the character of executors. On this ground, therefore, we presume, they were admitted: and like other defendants in ejectment, having failed to show the better title, the recovery was proper; and costs necessarily followed the judgment, *de bonis propriis.*

The plaintiff Broderick claimed by virtue of a patent from the United States, to John Robertson, Jr., dated June 17th, 1820; and deeds in due form from Robertson and others to himself, proved Carey in possession at the commencement of the suit; and here rested his case. To show that the better title had been in Morgan Byrne, the defendants produced a deed, dated 20th May 1809, from John Robertson, Jr., to Edward Robertson, Sr., for 750 arpens of land, lying in Big Prairie township, in the district of New Madrid, adjoining the lands of Sheckler and Cox; and which deed authorized Edward Robertson to procure a patent from the government. By different conveyances, Morgan Byrne claimed title to the 750 arpens, through and under Edward Robertson.

The land lies in the county of New Madrid, in the state of Missouri, and was injured by the earthquakes of December 1811. To relieve the inhabitants who had suffered by this calamity, congress passed the act of 17th February 1815; providing that those whose lands had been materially injured, should be authorized to locate the same quantity on any of the public lands in the Missouri territory, but not exceeding in any case 640 acres; on which being done, the title to the land injured should revert to the United States. The recorder of the land-titles for the territory of Missouri was made the judge, "to ascertain who was entitled to the benefit of the act, and to what extent," on the examination of the evidences of claim; as compensation for which, if well founded, he was directed to issue a certificate to the claimant. This certificate having issued, and a notice of location having been filed in the surveyor-general's office, on application of the claimant, the surveyor was directed to survey the land selected, and to return a plat to the office of the recorder of land-titles, together with a notice in writing, designating the tract *located, and the name of the claimant on whose behalf the location and survey had been made; which plat and notice, it was the duty of the recorder to record in his office; and he was required to transmit a report of the claim as allowed, together with the location by survey, to the commissioner of the general land-office; and deliver to the claimant a certificate, stating the circumstances of the case, and that he was entitled to a patent for the tract designated. The notice of location made by the claimant with the surveyor-general, is no part of the evidence on which the general land-office acted; but the patent issued on the plat and certificate of the surveyor, returned to the recorder's office, and which was by him reported to the general land-office.

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The United States never deemed the land appropriated, until the survey was returned; for the reason, that there were many titles and claims, perfect and incipient, emanating from the provincial governments of France and Spain, and others from the United States, in the land-district where the New Madrid claims were subject to be located; so, there were lead-mines and salt-springs excluded from entry; then, again, the notice of entry might be in a form inconsistent with the laws of the United States: in all which cases, no survey could be made in comformity to it. If no such objection existed, it was the duty of the surveyor to conform to the election made by

the claimant, having the location certificate from the recorder. Still, the only evidence of the location recognised by the government as an appropriation, was the plat and certificate of the surveyor. Such is the information obtained from the general land-office. As evidence of the form of location, and practice of the office, we have been furnished with a copy of the plat and certificate of survey on which the patent in this record is founded, and which is annexed. As before stated, the patent to John Robertson, Jr., is deemed to have been issued regularly ; and we must presume, that all the usual incipient steps had been taken before the title was perfected. 5 Wheat. 293 ; 7 Ibid. 157 ; 6 Pet. 724, 727–8 ; Ibid. 742. And of course, that the certificate of survey, returned by the recorder, was in the name of John Robertson, Jr. The patent merged the location certificate on which the survey was founded ; so that no second survey could be made, by virtue of the certificate. Thus fortified, stands the title of the plaintiff below.

The defendant then relied upon a notice of entry filed with the surveyor-general in these words :

"Morgan Byrne, as the legal representative of John Robertson, Jr., enters 640 acres of land, by virtue of a New Madrid certificate, issued by the recorder of land-titles for the territory of Missouri, and dated St. Louis, September 1818, and numbered 448, in the following madner, to wit, to include section No. 32, in township No. 50, north of the base line, range No. 15, west of the fifth principal meridian.

"St. Louis, Oct. 8th, 1818. MORGAN BYRNE."

*Which is founded on the following certificate of location : [*449

"No. 448. St. Louis, Office of the Recorder of Land-titles, September 1818.

"I certify, that a tract of 640 acres of land, situate, Big Prairie, in the county of New Madrid, which appears, from the books of this office, to be owned by John Robertson, Jr., has been materially injured by earthquakes ; and that in conformity with the provisions of the act of congress of the 17th February 1815, the said John Robertson, Jr., or his legal representatives, is entitled to locate 640 acres of land, on any of the public lands of the territory of Missouri, the sale of which is authorized by law. *Vide* Com'rs Cer'e, No. 1126, ext'd. FREDERICK BATES."

This is obviously the foundation of the survey and patent to John Robertson, Jr.; a fact admitted ; but it is insisted, that Byrne had the better title to the recorder's certificate ; that it issued to him in fact, as the "legal representative of John Robertson, Jr.;" and that the notice of entry, filed with the surveyor-general, vested in Byrne a title of a character on which he could have maintained an ejectment against Broderick ; and that, consequently, his devisees could successfully defend themselves. That they could, if the entry be the better title, must be admitted.

There is evidence in this record, tending to show that Morgan Byrne made the relinquishment of the New Madrid claim ; but the same evidence (being extracts from the records of the recorder's office) shows, that the location certificate was granted to John Robertson, Jr. They are as follows :

Warr. or ord. of survey.	Survey.	Notice to the recorder.	Quantity claimed.	Where situated.	Poss'n, Inh'n, Cult. &c.	Opinions of the recorder.
By U. S. Com's for 200 arpens, cer. 1126.		John Robertson, Jr.	750 arpens.	Big Prairie.		Granted 640 acres E.

A list of relinquishments of lands materially injured by earthquakes, in the late county of New Madrid (present) state of Missouri, under the act of congress of 17th February 1815.

Loc'n cert.	Claimants of record.	Quantity.	Situation.	Relinquishment by whom, and general remarks.
448	John Robertson, Jr.	640 acres.	Big Prairie.	Morgan Byrne, representative.

This evidence, taken in connection with the deeds to Edward Robertson, and those from him and others to Byrne, it is insisted, establishes *the
*450] better equity to have been in the latter ; and that this equity can be made available for the defendants in the circuit court, by force of the act of the legislature of Missouri, which provides, that an action of ejectment may be maintained on "a New Madrid location."

Our opinion is, first, that the location referred to in the act, is the plat and certificate of survey, returned to the recorder of land-titles ; because, by the laws of the United States, this is deemed the first appropriation of the land, and the legislature of Missouri had no power, had it made the attempt, to declare the notice of location, filed with the surveyor-general, an appropriation, contrary to the laws of the United States. The survey having been made and certified to the recorder, in the name of John Robertson, Jr., Byrne had no title that would sustain an ejectment, in any case ; and of course, those claiming under him cannot successfully defend themselves on the evidence they adduced.

But secondly, suppose, the plat and certificate of location had been made and returned to the recorder, in the name of Morgan Byrne ; and that it had been set up as the better title, in opposition to the patent adduced on behalf of the plaintiff in ejectment ; still, we are of opinion, the patent would have been the better legal title. We are bound to presume, for the purposes of this action, that all previous steps had been taken by John Robertson, Jr., to entitle himself to the patent, and that he had the superior right to obtain it, notwithstanding the claim set up by Byrne ; and having obtained the patent, Robertson had the best title (to wit, the fee) known to a court of law. Congress has the sole power to declare the dignity and effect of titles emanating from the United States ; and the whole legislation of the federal government, in reference to the public lands, declares the patent the superior and conclusive evidence of legal title ; until its issuance, the fee is in the government, which, by the patent, passes to the grantee ; and he is entitled to recover the possession in ejectment.

If Byrne's devisees can show him to have been the true owner of the 750 arpens of land relinquished, because injured by earthquakes, and that the patent issued to John Robertson, Jr., by mistake ; then the equity side of the circuit court is the proper *forum*, and a bill the proper remedy, to in-

vestigate the equities of the parties. But whether any equity existed in virtue of the act of 1815 ; and if so, whether it was adjudged between the parties, by the recorder of land-titles ; are questions on which we have formed no opinion, and wish to be understood as not intimating any.

We have been referred to the case of *Ross* v. *Barland*, 1 Pet. 662, as an adjudication involving the principles in this case ; we do not think so. In that, there were conflicting patents ; the younger being founded on an appropriation of the specific land, by an entry in the land-office, of earlier date than the senior patent. The court held, that the entry and junior patent could be given in evidence in *connection, as one title, so as to overreach the elder patent. The practice of giving in evidence a special [*451 entry, in aid of a patent, and dating the legal title from the date of the entry, is familiar in some of the states, and especially in Tennessee ; yet the entry can only come in aid of a legal title, and is no evidence of such title, standing alone, when opposed to a patent for the same land. Where the title has passed out of the United States, by conflicting patents, as it had in the case in 6 Peters, there can be no objection to the practice adopted by the courts of Mississippi to give effect to the better right, in any form of remedy the legislature or courts of the state may prescribe. Nor do we doubt the power of the states, to pass laws authorizing purchasers of lands from the United States, to prosecute actions of ejectment, upon certificates of purchase, against trespassers on the lands purchased ; but we deny that the states have any power to declare certificates of purchase of equal dignity with a patent ; congress alone can give them such effect.

For the several reasons stated, we have no doubt, the judgment of the circuit court was correct ; and order it to be afirmed.

In the cases of *Sampson* v. *Broderick*, and *McCunie* v. *The Same*, the judgments are also affirmed.

McLean, Justice. (*Dissenting.*)—Being opposed to the decision of the court in this case, I will state, as shortly as I can, the grounds of my dissent. I am induced to do this, from the peculiar circumstances of the case.

To sustain his action of ejectment, the plaintiff in the circuit court, gave in evidence a patent to John Robertson, Jr., which states, " that he had deposited in the general land-office a certificate, No. 192, of the recorder of land-titles at St. Louis, Missouri ; whereby it appears, that, that in pursuance of an act of congress, passed 17th February 1815, entitled, an act for the relief of the inhabitants of the late county of New Madrid, in the Missouri territory, who suffered by earthquakes, the said John Robertson, Jr., is confirmed in his claim for 640 acres of land, being survey No. 2810, and section 32, of township 50 north, in range 15 west of the fifth principal meridian line," &c. The patent bears date 17th June 1820. On the 16th November 1830, the patentee conveyed the land to Augustus H. Evans. And on the 7th June 1831, Evans conveyed to Broderick, the lessor of the plaintiff.

The defendants first gave in evidence a confirmation of a Spanish claim for settlement and cultivation to John Robertson, Jr., for 640 acres of land, in the Big Prairie, near New Madrid. The entire interest in this right was conveyed by John Robertson, Jr., to Edward Robertson, Sr., the 29th May 1829. On the 30th October 1813, Edward Robertson, Sr., conveyed 300 arpens of this tract of land to Morgan Byrne. And *the 11th of [*452

September 1816, he conveyed to Byrne 250 arpens more of the same tract. One the 29th October 1816, Robertson conveyed to William Shelby 250 arpens of the same tract. And on the 2d December 1816, Shelby conveyed to Levi Grimes; and on the 26th February 1817, Grimes conveyed to Morgan Byrne. By these conveyances, Byrne became vested with the entire original right of John Robertson, Jr., to the tract of land as above stated.

Under the act of congress of the 17th February 1815, any person owning land within the county of New Madrid, in the Missouri territory, which had been injured by earthquakes, had the right to relinquish the same to the United States, and receive a certificate therefor, specifying the quantity of acres, not to exceed 640, which he was authorized to locate on any land of the United States; and on such location being made, the land relinquished became absolutely vested in the United States. Under this law, Byrne relinquished to the United States the 640 acres in the Big Prairie, as the legal representative of John Robertson, Jr., who was the claimant of record originally. The following is a copy of the certificate of location issued on this relinquishment:—

"No. 448. St. Louis, Office of the Recorder of land-titles. September 1818.

I certify, that a tract of 640 acres of land, situate, Big Prairie, in the county of New Madrid, which appears from the books of this office, to be owned by John Robertson, Jr., has been materially injured by earthquakes; and that in conformity with the provisions of the act of congress of the 17th February 1815, the said John Robertson, Jr., or his legal representatives, is entitled to locate 640 acres of land on any of the public lands of the territory of Missouri, the sale of which is authorized by law.

[Signed] FREDERICK BATES."

And on the 8th of October, 1818, Byrne made the following location:— "Morgan Byrne, as the legal representative of John Robertson, Jr., enters 640 acres of land, by virtue of a New Madrid certificate, issued by the recorder of land-titles for the territory of Missouri, and dated St. Louis, September 1818, and numbered 448, in the following manner, to wit: to include section No. 32, in township No. 50 north of the base line, range No. 15 west of the fifth principal meridian." And here the evidence of the defendants closed.

On this state of facts, the defendant's counsel moved the court to instruct the jury, that the entry or New Madrid location, made by Morgan Byrne, *453] in his own name, is proof of a legal title to the land; *and is a sufficient defence against all persons who do not show a better legal title to the same land. That if the jury believe, the patent, a copy of which has been given in evidence by plaintiff, issued on the location made by Morgan Byrne, the patent is not such title as will avail against the location.

The revised code of Missouri of 1825, which was in force when this action was commenced, provides, that a New Madrid location shall be a title on which to sustain an action of ejectment against any person not having a better title. The defendants show, by deeds of conveyance from John Robertson, Jr., that Morgan Byrne had a full and clear title to the 640 acres of land near New Madrid; that he relinquished said land, under the act of congress of 1815, to the United States, and located the section of

land now in controversy. He being the owner of the land, as the legal representative of John Robertson, Jr., was the only person who could relinquish it to the United States. By virtue of this relinquishment, and in consideration of its having been made, he received the certificate which authorized him to locate the same number of acres of any part of the public land which had been offered for sale. It appears, that under the laws of 1815, the New Madrid claimant had to show a confirmation of the land claimed by him, on the public records, in the name of the first claimant, and to show a derivative title to himself, before he was permitted to relinquish it to the government. And in the present instance, John Robertson, Jr., being the original confirmee of the title, the record was produced, establishing the fact; and Byrne then proved, by an exhibition of his deeds, that Robertson had parted with all his right in the premises, and that he was his legal representative. It was in this capacity, that the relinquishment was made, and the certificate of location was issued. And he made the location of the land in controversy, in the same character.

In this view of the case, there can be no doubt, that Byrne, or his assignee, has the title to the land. And that there is possession under this title, is shown by the fact, that the action of ejectment was commenced by the lessor of the plaintiff, to obtain the possession. It appears, that the patent was issued to John Robertson, Jr., improperly; as, in 1809, he conveyed all his interest in the land relinquished. Before the emanation of the patent, he had not a shadow of title, either equitable or legal, to the land in dispute. And the patent must have been fraudulently obtained by him, on the presentation of the certificate of location made by Byrne. The evidence on this point is too clear to be controverted. It is established, by deeds executed in the most solemn form, and by records which contain the highest verity. The inference of the fraud is as irresistible as are the facts from which it is inferred. The proof of Byrne's title is irrefragable; and it is equally clear, *that Robertson had no title to the land, until he fraudulently obtained the patent. Having no shadow of right, he [*454 could obtain the patent in his own name, by no other than fraudulent means. And no court which could feel itself authorized to look behind the patent, could hesitate to pronounce the title of Byrne valid against the patentee, who has sought to cover his fraud by this legal instrument.

And the question here arises, whether, under the Missouri statute, the circuit court ought not to have instructed the jury, that under the deeds and records given in evidence, Byrne's was the better title. I cannot doubt, that this instruction should have been given. The statute makes the location a legal title, for the purposes of the action of ejectment. And if it be a good title, on which to bring an ejectment, it must be equally effectual in the defence of such an action. This title, the statute declares, shall prevail against any person who has not the better title.

And what kind of a title, is this better title. Surely, it is a title that, under the facts and circumstances of the case, ought to prevail against that to which it is opposed. It is urged, that this better title must mean a better title than others of the same class; but that it can never be considered a better title against a patent. And why may it not be considered a better title against the patent? The title set up in the defence derives its validity from laws of the United States, as entirely as the patent. The

question then is, which is the better title of the two, both originating from the same sovereignty? The statute of Missouri does nothing more than declare that a court of law may do in an action of ejectment, what no one doubts would be competent for a court of chancery to do. And may not the legislature do this? It does not originate a title, under any pretence of state sovereignty, which is to operate against a patent from the United States; but it gives to a court of law powers, in the action of ejectment, which in some other states are exercised only by a court of chancery. This has always been the rule in Pennsylvania, and in other states which have no court of chancery.

Technically, a location is an inchoate legal title. But out of this class of titles, a new rule of equity grew up, by the practice of the courts of Kentucky. And this rule is in conformity with the long-established principles of a court of equity. As between conflicting entries, the doctrine of notice is utterly discarded. The entry must be a legal one, by embracing all the substantial requisites of the law, or a subsequent entry may be made on the same land, though the locator have full knowledge of the first entry.

This forms an anomaly in the history of equity jurisdiction. It authorizes a court of equity to give effect to that which is, in itself, strictly a legal right. Principles growing out of this peculiar system have been acted *455] *on, from necessity, by the courts of the United States; but they have not been regarded as appropriate to an equitable jurisdiction in other cases. Had the courts of Kentucky acted upon entries, as legal titles, whether under their own rules, or by virtue of statutory provisions, the courts of the United States would have adopted the same mode of proceeding. In the state of Tennessee, a junior patent, under the first entry, will overreach an elder patent, under a junior conflicting entry. This, in Kentucky, would be the exercise of an equitable jurisdiction. In Missouri, under the statute, it would be examinable at law.

It is said, the patent merges the location. This, under the Kentucky system is true; but where the patent has been issued, through a mistake or fraud, to an individual who was not entitled to it, a court of equity will control the right of the patentee, by compelling him to convey to the person who has the better right. And why may not a court of law protect this better right? The right may be investigated, as fully, and considering the nature of the rights under the Missouri statute, as safely, in a court of law, as in a court of chancery. But this, with the court, is not a question of policy. It is a rule of evidence and of property, adopted by the state of Missouri, and our whole course of adjudications requires us to regard it. There is, therefore, no more violation of principle, in examining the title of Byrne at law, then in equity. The result is substantially the same in both modes; as the title of Byrne must be protected from the fraud by which it has been attempted to be overreached and subverted.

Judging from the evidence of this case, I have never seen a grosser act of fraud, than the obtainment of this patent by Robertson, eleven years after he had conveyed every vestige of right in the land which was relinquished, as to the consideration of the United States for the location in controversy. It was stated in the argument, that Byrne made the location, but took no step subsequently to perfect the title. That Robertson had the survey executed and returned. This is an argument against the record. By

the certificate which authorized the location, it was required to be located on land, "the sale of which is authorized by law." And no land is authorized by law to be sold, except such as has been surveyed by the officers of the United States. The location in question was made on a section designated by its number, township and range, and which, of course, had been surveyed. As Robertson's name was inserted in the location, agreeable to the forms used, he being the original claimant on record, of the New Madrid tract relinquished, he was enabled to practise an imposition and fraud on the commissioner of the general land-office, and obtain the patent.

It is a well-settled principle, that fraud may be investigated as well at law as in chancery; and I am strongly inclined to think, if *this fraud had been brought before the court and jury, independent of the [*456 statute of Missouri, they must have determined that it vitiated the patent. Can any one look at these two titles, that of Byrne having been obtained by a fair purchase, relinquishment and location; and that of Robertson, by fraudulently obtaining the patent; and hesitate in deciding which is the better title? And it appears to me, that the statute of Missouri, in providing that such a location shall be a title, on which an action of ejectment may be sustained, covers the whole case, and enables the court and jury to determine which is the better title.

In the case of *Sims's Lessee* v. *Irvine*, 3 Dall. 457, this court say, "in Pennsylvania, where the consideration has been paid, a survey, though unaccompanied by a patent, gives a legal right of entry, which is sufficient in ejectment." Why they have been adjudged to give such right, whether from a defect of chancery powers, or for other reasons of policy or justice, is not now material. The right once having become an established legal right, and having incorporated itself, as such, with property and tenures, it remains a legal right, notwithstanding any new distribution of judicial powers, and must be regarded by the common-law courts of the United States, in Pennsylvania, as a rule of decision.

And in the case of *Ross* v. *Barland*, 1 Pet. 664, this court say, "for the plaintiff, it is argued, that the state court erred in deciding that the elder grant should not prevail in the action of ejectment." The question in this case was between a claimant under a patent of the United States, and one who claimed the same land under a donation certificate, given by commissioners. The question was identically the same, in principle, as in the case under consideration. And this court decided, "where by the established practice of courts in particular states, the courts, in actions of ejectment, look beyond the grant, and examine the progressive stages of the title, from its incipient state until its consummation; such a practice will form the law of cases decided nnder the same, in these states; and the supreme court of the United States regard those rules of decision, in cases brought up from such states, provided that in so doing, they do not suffer the provisions of any statute of the United States to be violated. Under the act of congress of March 3d, 1803, such lands only were authorized to be offered for sale as had not been appropriated by the previous sections of the law, and certificates granted by the commissioners in pursuance thereof. A right, therefore, to a particular tract of land, derived from a donation certificate, given under that law, is superior to the title of any one who purchased the

same land at the public sales." This was the rule in ejectment cases, in the state of Mississippi, from whence this case was brought. This decision was given in 1828; the one cited from Dallas was *made in 1799; and
*457] the rule laid down in these cases has not been questioned by any other adjudication of this court. Other decisions might be referred to, of the same import, but it is deemed to be unnecessary.

I will, however, notice a case, decided at the present term, which, in my judgment, in principle, has a strong application to the question under consideration. By a statute of Kentucky, it is provided, that "any person having both the legal title and possession of land, may institute a suit against any other person setting up a claim thereto; and if the complainant shall be able to establish his title to such land, the defendant shall be decreed to release his claim thereto, and to pay the complainant his costs," &c. Now, here is a statute, which creates an equity, or rule of proceeding in a court of chancery; which, in the case of *Clark* v. *Smith*, has been very properly recognised as a rule of proceeding in this court. Now, the statute of Missouri created a legal right, or rule of proceeding, in the action of ejectment. And if the Kentucky statute can give the rule of proceeding to this court, in chancery, why may not the Missouri statute do the same thing at law.

In the state of Illinois, by statute, a certificate of the register of the land-office of the United States, of an entry of land, is made a good title on which to sustain an action of ejectment; and the supreme court of that state has long since settled the rule, that such a title may be held good against a patent wrongfully or fraudulently obtained. In the state of Alabama, there is a similar law, and it has received, by the supreme court of that state, the same construction. The idea, that if a state can pass a law authorizing an action of ejectment, on a certificate of the register, and that if this certificate, under any circumstances should be held the better title, against a patent wrongfully issued, would endanger the public lands, is so novel and so unfounded, that I must notice it. Had not such an argument been advanced, I should have supposed, that two things so wholly disconnected as this premise and conclusion could never be associated in the mind of any one.

How are the public lands endangered by the establishment of this rule? The certificate, as well as the patent, emanate from the federal government. Now, if the patent, through mistake or fraud, has been issued wrongfully, no one doubts, that a court of chancery may protect the right, in such a case, of the certificate-holder. The state of Illinois says, this may be done at law, and this is the whole matter. If there be danger to the public lands in this, it is not only a modern discovery; but to guard effectually against the danger, the states must abolish their courts of chancery, or restrict them under all circumstances, from questioning the right of the patentee. If the state courts cannot try these cases between their own citizens, and under their own laws, where are they to be tried? All who claim under a patent are entitled to the same rights as the patentee.

*458] *McKinley, Justice, concurred in opinion with Mr. Justice McLean.

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 Missouri, and was

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

NOTE.

No. 192. Office of the recorder of land-titles. St. Louis, March 9, 1820.

I certify, that in pursuance of the act of congress, passed the 17th day of February 1815, a location certificate, No. 448, issued from this office, in favor of John Robertson, Jr., or his legal representatives, for 600 acres of land; that a location has been made, as appears by the plat of survey herewith, and that the said John Robertson, Jr., or his legal representatives, is entitled to a patent for the said tract, containing, according to said location, 640 acres of land, being section No. 32, in township No. 50 north of base line, range No. 15 west of 5th principal meridian. No. of survey, 2810.

FREDERICK BATES.

Township No. 50, north of the base line, range No. 15, west fifth principal meridian.

79 50

No. 448. John Robertson, Jr. Section 32. 640.

Surveyors' Office, St. Louis. January 15, 1820.

I certify, that section No. 32, in township No. 50 north of the base line, range No. 15 west of the 5th principal meridian, was located, on the 8th day of October 1818, for John Robertson, Jr., or his legal representatives, by virtue of No. 448, dated September 1818, issued by the recorder of land-titles for the Missouri territory, to said John Robertson, Jr., or his legal representatives, for 640 acres of land, in conformity with the provisions of the act of congress of the 17th February 1815, for the relief of sufferers by earthquakes in the late county of New Madrid.

WM. RECTOR.

To Frederick Bates, Esq., Recorder of land titles for the Missouri Territory.

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*RICHARD RAYNALL KEENE *v.* WARREN WHITTAKER and others. [*459

Error upon case stated.

A case cannot be brought by writ of error from a circuit court of the United States, upon an agreed statement of facts.

The rules of the supreme court require, that the clerk of the circuit court to which any writ of error shall be directed, may make return of the same, by annexing a true copy of the record and of all the proceedings in the cause, under his hand and the seal of the court; the court will not, according to the 31st rule, hear any cause, without a complete copy of the record having been brought up.

THIS case came up from the Circuit Court of the United States for the eastern district of Louisiana. In that court, a statement of the case had been made by the plaintiff, and the counsel for the defendants, upon which the court gave a judgment for the defendants. The plaintiff petitioned the circuit court for a writ of error to the supreme court, and the same was allowed. The record, as sent up from the circuit court, contained nothing but the agreed statement of facts, the judgment of the circuit court on

these facts, and the petition of the defendant for a writ of error, together with an allowance of it by the circuit court, in December 1838. The case was submitted to the court, without argument.

WAYNE, Justice, delivered the opinion of the court.—This case has been brought to this court on an agreed statement of facts, without any of the proceedings of the court below being in the record. It cannot appear, therefore, that this court has jurisdiction of the case; which is essential, before it can give its judgment in any cause.

We refer also to the 11th and 31st rules of this court. The 11th is as follows: "It is ordered by this court, that the clerk of the court to which any writ of error shall be directed, may make return of the same, by transmitting a true copy of the record, and of all proceedings in the cause, under his hand and the seal of the court." The 31st rule is: "No cause will hereafter be heard, until a complete record, containing in itself, without references *aliunde*, all the papers, exhibits, depositions and other proceedings, which are necessary to the hearing, shall be filed. The court orders this case to be dismissed.

THIS cause came on to be heard, on the transcript of the record from the circuit court of the United States for the eastern district of Louisiana; and it appearing upon an inspection of the papers filed in the case, that it has been brought here upon an agreed statement of facts, without any of the proceedings in the court below being in the record. Whereupon, it is adjudged and ordered by this court, that this cause be and the same is hereby dismissed, with costs.

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*460] *NATHAN CARR and others, Appellants, *v.* JOSEPH HOXIE, Appellee.

Second appeal.—Supersedeas.

An original decree was made in the circuit court of Rhode Island, at June term 1834, and an appeal was taken to January term 1835, of the supreme court; this appeal was dismissed at January term 1837, on the motion of the counsel for the appellees, without an examination or decision on the merits of the cause; at the November term of the circuit court, the defendants prayed and were allowed a second appeal to the supreme court; which appeal had not been yet entered on the docket of the supreme court; the circuit court afterwards proceeded to order execution of the decree of 1834, and the defendant appealed to the supreme court from this decree: *Held*, that this appeal from the decree of the circuit court, ordering the execution of the original decree, was not a *supersedeas* to further proceedings in the circuit court to execute the original decree; and that the circuit court was at liberty to use its discretion to proceed to execute the original decree: *Held*, also, that the decree of execution was not a final decree, in the contemplation of the act of congress, from which an appeal lies.

APPEAL from the Circuit Court of Rhode Island. In the circuit court for the district of Rhode Island, at June term 1834, in the case of Joseph Hoxie against Nathan Carr and others, a decree was rendered for the complainant on a bill of equity filed in that court. From this decree, the defendants appealed to the supreme court of the United States, to January term 1835. At January term 1837, on motion of Mr. Green, of counsel for the appellees, the appeal was dismissed; and a certificate thereof having been sent to the circuit court that court, proceeded, at November term 1837, to order and decree the execution and decree made at the June term 1836. The court de-

creed a sale of the property, according to its decree of 1836; and that the proceeds thereof should be brought into the registry, to be paid and applied as ordered in and by the original decree. From this decree, the defendants prayed for an appeal to the supreme court, which was allowed. The record brought up on this appeal contained no part of the proceedings on the original bill in which there was a decree in 1834. It presented nothing but the proceedings of the circuit court of Rhode Island, in November 1837, and the decree of the supreme court of the United States dismissing the appeal, and the decree of the circuit court in the original suit, at June term 1834, with the decree of the court on the 5th day of November 1837, ordering the execution of the same. The proceedings in the original bill were not again brought up to the supreme court, by a second appeal in that case.

The case was argued by *Tillinghast*, for the appellants; and by *Coxe*, for the appellee.

Tillinghast stated, that the only question now before the court was whether this appeal could be sustained. The appeal in the original case was dismissed, on *the motion of the counsel for the appellee, at the January term 1837. This was done, in the absence of the counsel for the appellants, and there was no decision of this court on the merits of the cause. It was a dismissal for want of the prosecution of the appeal. Five years have not yet elapsed since the decision of the circuit court in the original bill; and the act of congress (1 U. S. Stat. 85) gives five years for an appeal. *[461

It is claimed, that if an appeal is dismissed for any other cause than a decision on the merits, it is not a final dismissal, another appeal may be prosecuted. The case stands as if no appeal had been taken. The right to appeal is not lost by the action of the circuit court in allowing the first appeal. Has it been lost by the action of this court, in dismissing the first appeal. Unquestionably, according to the rules of this court; but with no decision on the merits of the controversy in the cause. The parties have a right to the judgment of this court on the merits; and the act of congress gives them five years, in which they may claim that judgment on an appeal. If, on the first appeal, from accident, or from any other cause, no such decision was obtained, they have sustained the penalty which is imposed for the failure to prosecute their appeal, by the payment of the costs. This is the whole penalty; and to go beyond it, is to defeat the purpose and object of the provision of the law relative to appeals.

Coxe, for the appellees, contended:—1. That it is not a case in which the party can appeal. 2. That in this last decree there is no error. 3. That the former proceedings are not, and cannot be now reviewed.

There are no authorities on the question whether a second appeal can be taken, after a dismissal in the first appeal, unless it be the case of the *Lessee of Wright* v. *De Klyne*, Pet. C. C. 199. In that case, it was decided, that the dismissal of a bill in chancery is not conclusive against the complainant in a court of law. In *Duval* v. *Stump's Executors*, in this court, the appeal was dismissed, the appeal not having been taken by all the parties. The proceedings were afterwards amended, and the case was brought up and decided.

In the case before the court, the appeal from the circuit court was regularly taken, and a judgment of dismissal was entered. This was a final determination of the case. To allow a second appeal, would be to allow a party to profit by his own negligence. To the appellees, this is doing great injustice; and keeps undecided questions which ought to have been settled on the first appeal. A fair construction of the act of congress is to allow a party five years in which he may prosecute an appeal; and having used that privilege, the permission given by the law has been fully used, and is at an end. There is no provision for a second appeal.

*462] *In the case before the court, the appeal has been entered on the order of the circuit court for proceedings on the original decree. It is alleged, that a second appeal has been taken in the original case, but this has not been prosecuted; the proceedings in that case have not been brought up. There are then two appeals in this same controversy; this cannot be allowed.

Story, Justice, delivered the opinion of the court.—This is an appeal from a decree in equity of the circuit court for the district of Rhode Island, made in a case where the appellant was the original defendant. The facts, so far as they are now before us upon the present record and appeal, are briefly these: The original decree was made at the June term of the circuit court 1834; and at the same term, an appeal was taken therefrom to the supreme court. The appeal was entered at January term 1835, of the supreme court, and was dismissed for want of due prosecution, at January term 1837. At the November term of the circuit court 1837, a petition was filed by the original appellant, praying for a new and second appeal from the original decree; which was granted by the court, upon bonds being given according to law. At the same term, the original plaintiff prayed for further proceedings to enforce the original decree, whereupon, a supplemental decree was passed by the court for a sale of the premises in controversy, pursuant to the original decree: and from this last decree, the original appellant also claimed an appeal, which was granted by the court, upon his giving bonds; and the case now comes before us solely upon this last appeal, the record and proceedings in the original suit not having as yet been brought up and filed in the court, in pursuance of the second appeal from the original decree already referred to. The question, therefore, whether this second appeal lies to this court, after the dismissal of the former appeal, is not now before us; and can only arise, when the original proceedings shall come before us, upon a due prosecution and entry of the second appeal. The only question now before us is, whether this second appeal is, under the circumstances, a *supersedeas* to all further proceedings in the circuit court to execute the original decree. If it is, then the appeal from the supplemental decree of sale is maintainable; otherwise, it ought to be dismissed. Upon full consideration, we are of opinion, that it is no *supersedeas;* that the circuit court is at full liberty, in its discretion, to proceed to execute the original decree, if it shall deem it advisable: and that the supplemental decree of sale is but a decree in execution of the original decree; and not a final decree, in the contemplation of the acts of congress, from which an appeal like that now before us lies. It must, therefore, be dismissed with costs. But, in order to guard against any mis-

apprehension, it is proper to add, that this dismissal is in no sense to be construed to prevent the original proceedings and decree from being brought before this court upon the second appeal taken thereto in the circuit court, for full consideration, whether it lies or not.

*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 Rhode Island, and was argued by counsel: On consideration whereof, it is the opinion of this court, that the supplemental decree of sale, in execution of the original decree in this case is, but an execution of the original decree, and not a final decree from which an appeal lies to this court. Whereupon, it is ordered, adjudged and decreed by this court, that this appeal be and the same is hereby dismissed, with costs; and that this cause be and the same is hereby remanded to the said circuit court, with directions that the said court may, in its discretion, proceed to execute the original decree, if it shall deem it advisable. [*463

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*Thomas O. Burton, Appellant, *v.* William L. Smith and others, Appellees. [*464

Lien of judgment in Virginia.

Under the laws of Virginia, in relation to lands of which the debtor has an actual seisin, although there is no statute of that state which expressly makes a judgment a lien on the lands of the debtor, yet during the existence of the right of the plaintiff to take out an *elegit*, the lien of the judgment is universally acknowledged.

All the authorities, ancient and modern, agree in this proposition, that a reversion after an estate for life is assets, or, as some of the books express it, *quasi* assets, in the hands of the heir, in regard to the bond of the ancestor, binding heirs; and that in such case, the plaintiff may take judgment of it, *quando acciderit*. Upon principle, it would seem to be clear, that whatever estate descended to the heir, which was liable as assets to the bond debt of the ancestor, must be bound by a judgment obtained against the ancestor in his lifetime.

There is a current of authorities going to prove, that a reversion after an estate for life is bound by a judgment obtained against the ancestor, from whom it immediately descended.

So far from its being proper for a court to hesitate about decreeing a sale of an interest, because it is reversionary, the character of the interest affords a stronger reason for such a decree; for although, in regard to property in present actual possession, the *elegit*, although tardy in its operation, yet is in some degree an effective remedy, inasmuch as the creditor will by that means annually receive something towards his debt; whereas, in case of a dry reversion, if the outstanding life-estate should continue during half a century, the creditor might look on in hopeless despondency, without the possibility of receiving a cent from that source, except through the interposition of the court of equity in decreeing a sale.

It is the very nature and essence of a lien, that no matter into whose hands the property goes, it passes *cum onere;* if this were not the case, it would cease to be a lien.

Appeal from the Circuit Court for the Eastern District of Virginia. The case, as stated in the opinion of the court, was as follows:

In the month of June 1829, Smith & Kennedy obtained a judgment in the circuit court, against Reuben Burton, for $1348.75, with interest from the 14th of October 1823, and costs. On this judgment, an *elegit* was issued, on the 31st of December 1827. On the 12th of August, in the same year, Reuben Burton, by deed, conveyed his real estate to certain trustees, in trust to sell the same for the benefit of his creditors; amongst many other debts enumerated in the deed, the judgment already mentioned, recovered

by Smith & Kennedy, was included. These last-mentioned creditors, the appellees, never assented to, nor accepted anything under, the trust deed. Burton having died, the only trustee who accepted the trust, on the 21st of December 1829, sold, under the deed, all the estate, both real and personal conveyed by it; and at that sale, Sarah Burton, by her agent, purchased, at the price of $1000, the interest of Reuben Burton, that is, two-fifth parts of a certain tract of land called Springfield, supposed to contain about 500 acres, and also his interest in certain coal-pits on the same tract. The character of Reuben Burton's interest in the Springfield tract of land, as appeared from the record, was that of a reversion in fee, after an estate for life. And the character *of his interest in the coal-pits, as appeared from an agreement in the record, was this: The heirs of Daniel Burton, of whom Reuben Burton was one, were to have, during the widow's life, the right of occupying, using and working the coal-pits, and the right and power of sinking shafts, and searching for coal on any part of the land, except the yard, &c., paying to the widow, during her life, the yearly sum of $200, for her dower interest. The same agreement showed his interest in a mineral spring included in the decree.

*465]

After the death of Reuben Burton, the appellees, finding that there was no personal estate to satisfy their debt, in September 1834, filed their bill to enforce the lien created by their judgment; making, amongst others, Sarah Burton a defendant, as purchaser of the interest of Reuben Burton before described, in the Springfield tract of land and coal-pits. She answered, saying, that the property conveyed to her was not purchased for her own benefit, but for the benefit of her son, Thomas O. Burton, the appellant. She insisted, in her answer, that the appellees had no right to enforce their judgment, as more than five years had elapsed since the death of Reuben Burton. She denied, that the judgment created any lien on the property purchased by her, which was valid against her. She insisted, that the appellees were entitled to no relief in equity; and that, at all events, a sale should not be decreed. An amended bill was thereupon filed, making Thomas O. Burton a defendant. He filed an answer, insisting on the grounds taken by Sarah Burton.

The cause coming on to be heard, the court held the reversionary interest of Reuben Burton in the Springfield tract of land, and his interest in the right of occupying and working the coal-pits thereon, and also his interest in the mineral spring thereon, with the twenty-five acres of land adjoining thereto, liable to the appellees' judgment; and decreed a moiety of Reuben Burton's interest to be sold. From this decree, an appeal was taken.

The case was submitted to the court, on printed arguments, by *Lyons*, for the appellant; and by *Robinson*, for the appellees.

Lyons:—The appellant insists, that the decree of the circuit court is erroneous, and ought to be reversed.

I. Because the judgment in favor of the appellees against Reuben Burton, gave no lien upon the interest or share of Reuben Burton in the Springfield coal property, which was purchased by Sarah Burton for the appellant; and which, by the decree of the circuit court, was adjudged to be sold.

By the common law, a judgment conferred no lien upon lands. That

lien is the result entirely of the power to extend the lands and is, therefore, a statutory power conferred by the act commonly called *the statute of Westminster. This position is known to be familiar to the court; [*466 but if authority is desired for it, it may be found in the opinion of Lord HARDWICKE, in the case of *Stileman* v. *Ashdown*, 2 Atk. 608, and every subsequent decision upon that subject; and especially, in the opinion of the late chief justice of the United States, in the case of the *Bank of the United States* v. *Winston*, 2 Brock. 252; which is quoted, not only because of the high character of the authority, and the just weight which will be attached to it, but because of the distinct and emphatic manner in which the position is laid down, and the rights of the party claiming under the judgment are, in a court of equity, limited and confined to the right and power conferred by the judgment.

The first inquiry, then, is, could the appellees have extended the interest before mentioned, of Reuben Burton, in the Springfield coal lands? It is submitted, that they could not. It will be perceived by the court, that the entire tract of land upon which the Springfield pits are, with the houses, &c., constituted the mansion establishment of Daniel Burton, the father of Reuben, who died intestate, leaving a widow, Sarah Burton, and several children. Until dower was assigned the widow, she had the right to retain the mansion establishment, and to derive her maintenance from it. While it remained in that condition, therefore, it is assumed, that no *elegit* could be levied upon it; because if an *elegit* issue against one child, so might one issue against each child; and thus the whole would be taken and put into the possession of the creditors, and the widow expelled, and kept out, until by her writ she was restored. The children could not lawfully expel the widow; the creditors of the children, standing in their place, could not, of course, do it. If all could not do it, surely, one could not. The lands, in the hands of the widow, before assignment of dower, could not, therefore, be taken under an *elegit*. No assignment of dower has taken place, unless the court shall regard the agreement entered into by Mrs. Burton and her children (exhibited by defendants) as such assignment. Is the condition of the appellees aided by that paper? It is submitted, that so far from it, the condition is made worse. If that agreement had not been entered into, any creditor of Reuben Burton might have filed his bill against the widow and heirs, and compelled an assignment of dower, which being made, he might have levied his *elegit* upon the share of Reuben Burton; but this agreement deprives the appellees of that power, because it is founded upon a good as well as valuable consideration (was entered into before any right existed in the appellees), and assigns to the widow, for her dower, the entire tract of land, except the mineral spring, with twenty-five acres, and the right to work the coal mines, and charges them with an annuity of $200 per annum to the widow. The rights of the appellees, in respect to this property, are manifestly less than if the agreement had not been entered into. Could Reuben Burton's interest in the coal mines and spring, with the twenty-five acres, have been saken under an *elegit*, after the execution of the said agreement? *It is respectfully submitted, that it could not. By the in- [*467 quisition under the *elegit*, the property is placed in the hands of the creditor, who takes all the profits of it, paying therefor a fair annual rent, to be applied as a credit against his claim; and of the portion thus placed

in his hands, no one has a right to share the profits with him. If this may be done in favor of the creditor of one child, it may be done for the creditor of each; and if two *elegits* issue at the same time, against the same defendant, they take, not a moiety, but the whole; and thus the widow who has renounced her claim to dower in the other lands of her husband, and thereby suffered them to pass away from her, is to be again ousted and deprived of the annuity, in consideration of which, in great part, she has made her relinquishment, under an agreement with the heirs, which is obligatory upon them, and as effectual to charge the property with the rights of the doweress as any which could have been resorted to. It is not necessary to the validity of an assignment of dower that it should be registered: *i. e.* recorded as a conveyance. If it is, however, and this agreement is to be affected by the failure to register (although as to one of the parties it was fully proved, being acknowledged, and should have been recorded), then it cannot diminish the rights of the widow, and the argument, upon the hypothesis that no assignment has been made, applies.

If land is subject to a trust for the use of a grantor and another, *e. g.* to raise an annuity, and a judgment is rendered against the grantor, the land cannot be taken by *elegit*. *Doe on demise of Hull* v. *Greenhill*, 4 Barn. & Ald. 684. In the present case, the land was subject to a trust, and one of the uses charged upon it was to raise an annuity. The agreement here being a case of dower, was as valid to charge it as any form of conveyance, and so to protect it; the reason is the same in each—the right of the annuitant.

What, then, it may be asked, were the rights of the appellees, in reference to this property, when they obtained their judgment? They were twofold—either to take Reuben Burton under a *ca. sa.*, and thus acquire his rights, whatever they were, in the subject, and by express provision of the execution law, the right to sell them; or upon the return of the *fi. fa.*, to file a bill for an account of the rents and profits of the coal mines, and for a receiver, and a decree for the satisfaction of the judgment out of it. In the lifetime of Reuben Burton, they could have done no more. An account of rents and profits cannot be had, in the lifetime of the debtor, even after removing a fraudulent conveyance, if an *elegit* can be levied; and the power of a court of equity to sell the lands, in such a case, is clearly repudiated by Lord Hardwicke in the case of *Higgins* v. *York Buildings Company*, 2 Atk. 107. The proceeding to judgment at law, and the "*lis pendens*" to enforce it in equity, would have given it, if not a lien exactly, a preferable claim; and a purchaser, even for valuable consideration, would have been bound as a purchaser with notice. If a *ca. sa.* had been executed, after the conveyance, the lien of the judgment would have been lost.

*468] *In the absence of a "*lis pendens*," and when, if this view be correct, the appellees had not the power to extend by an *elegit*, and had therefore no lien, viz., on the 12th day of August, in the year 1827, Reuben Burton conveyed the property to trustees for the benefit of his creditors. In the month of December, in the year 1829, more than two years after the rendition of the judgments, during the whole of which time no attempt was made to enforce the judgment, as against the coal lands, by the appellees, who are among the creditors enumerated as the persons for whose benefit the deed of trust is made—a sale of the subject is made, under the deed of trust, by public auction, and the appellant became the purchaser. No step

had been taken, nor any act done, by the appellees, indicating their dissent from the deed of trust, nor was any such step taken, until the month of September, in the year 1834, more than seven years after the judgment was rendered. In the answer, all knowledge of the judgment of the plaintiff, as affecting the coal property, at least, is denied; the impression, it seems, being, that an *elegit* had been levied upon other lands, and it is thought the evidence sustains the answer. Certainly, the answer is not overthrown by the requisite degree of proof—there being only one witness to oppose it; and that witness is opposed in his present recollections, by his own written statement made at the time of the sale.

The appellant stands, then, in the position of a purchaser for a valuable consideration, of property upon which the appellees had acquired no lien, and to which, with equal equity, the appellant holds the legal title. In such a case, the purchaser is entitled to the protection of a court of equity; but if he is not, he is certainly not the proper object for the vindictive exercise of its power, and the court of equity will leave the adversary creditor to his legal rights. Sugd. on Vend. § 5, p. 338–44; and the opinion of Judge GREEN, in *Coutts* v. *Walker*, 2 Leigh 268. The space allowed in this form of argument will not permit a comment on the reason of this rule, if it were necessary. Its justice is apparent; the fair purchaser for a valuable consideration has, upon every principle, at least as much equity as the sleeping judgment-creditor—one who sleeps for seven years. And why should a court of equity seek to turn the scale against him—equity, which always follows and only aids the law? In such a case, the proper language of equity is: "I cannot aid you against one who is equally entitled to my sympathy; if you have any legal advantage over him, assert it; I cannot, and would not if I could, prevent you: but I can do no more." Here, the case is peculiarly strong for the application of the rule. The judgment-creditor has, to say the least, been guilty of the most culpable *laches;* he has laid by for seven years; during which time he took no step against the deed, or the property in question; the property of his debtor, conveyed to secure the payment of his, among other, debts, by a conveyance which gave a priority over him, is sold; and the money *arising from the [*469
sale applied according to the provisions of the deed; more than two years having elapsed between the rendition of the judgment, and the sale under the deed. Here was time most ample for any purpose, and if any step had been taken by the creditor, the priorities of the parties would have been settled and the purchase-money paid over accordingly. Passing by all this: after the trustee has misapplied the purchase-money, as the judgment-creditor contends, he comes into a court of equity to ask, as against the purchaser, that which cannot obtain at law. No principle is conceived, upon which the claim preferred can be sustained.

II. If the judgment did confer a lien, then the appellees, in the case as it now appears to the court, *i. e.*, unless it appeared that the profits would not in a reasonable time pay the debt, had no claim whatever to the aid of a court of equity: that equity follows the law and only aids it, is a principle too familiar and well known to need authority; and has been expressly affirmed in respect to this very question of a lien of a judgment by Lord HARDWICKE, in a case already referred to (2 Atk. 107); and in other cases to which there may be occasion to refer. The power of a court of equity

over the lands of a debtor by judgment, is the consequence of the right acquired by the creditor to redeem prior incumbrances. This is the source and fountain of the power; and if the prior mortgages or incumbrances will not permit him to redeem, or if he is not able to redeem, without a sale of the lands; he may apply to a court of equity to compel a redemption; and therefore, a sale of the property. Sugd. 340.

By degrees, in the absence of any law or legal principle to sustain them, the courts have extended their power; and commencing with the principle of aiding and following the law, they have arrived at the conclusion, that they may do that which the law could not do, and sell the land. But this has been, not in a case like that before the court, but in cases, as it will be presently shown, founded upon obligations which bound the heir. But to recur, did the judgment, in the case before the court, give a lien upon the lands? If it did, then it is respectfully submitted, that the appellees, in the case they have made, had no claim to the aid of a court of equity; because there was nothing to impede their progress, and remedy at law. In the case before cited (2 Atk. 107), where the debtor was living, Lord HARDWICKE decided, that the court of chancery had the power to remove a fraudulent conveyance; it being a principle of equity jurisdiction, that where fraud in fact is charged, a court of equity, therefore, has jurisdiction, because, from its more comprehensive power, it can more fully try the fraud, although a court of law is competent to try it. But having done that, its power ceases, and the parties must be left to their remedy at law upon the *elegit;* and in the case of *Wilders* v. *Chambliss*, 6 Munf. 432, the court of appeals of Virginia affirmed a decree of Chancellor TAYLOR, dismissing the bill of the judgment-creditor, upon the ground, that the *elegit* was the remedy; it appear-
*470] ing in that case, *that the profits of the land would, in a reasonable time, discharge the debt. Here is a decision upon the point, when the debtor was alive, and another when the debtor was dead, concurring in both cases; the claim resting upon an obligation which bound the heirs. It will be shown presently, that the latest Virginia decisions concur with that last cited; at least, in this, that the land should not be sold, when the rents and profits will, in a reasonable time, discharge the debt.

Looking to the reason of the thing, it may well be asked, upon what ground it is, that a court of equity should deny itself the power to sell the land, when the debtor lives; and yet, as soon as he dies, and his children have become more helpless, and therefore entitled to the care of the court, it shall assume the power to sell the lands, to satisfy the very same debt. There is no reason for it, unless in a case in which the obligation binds the heir; and then, as the heir is chargeable to the whole extent of assets descended, the court of equity may, without much stretching its power, order the sale. It is believed, that the power has resulted from confounding the power to redeem prior incumbrances, and the practice in marshalling assets and securities, whereby an entirely new power has been made, not justified by the first head, as the authorities cited show, and not justified by the latter, as will be seen by consulting any work upon the subject, as the latest and most luminous of which, Story's Equity, titles Marshalling Assets, and Marshalling Securities, is referred to. The practice of selling, when the obligation binds the heirs, if it be established, cannot furnish authority for selling in a case like that before the court, because the judgment does not

bind the heir. *Stileman* v. *Ashdown*, 2 Atk. 477. Nor can any authority be derived from the other heads; because, in those cases, there must be two securities and two funds. Here, there was but one fund and one security, and nothing therefore to marshal, *i. e.*, to array and arrange, so as to promote justice and equity.

It is thought, however, that the court will find, in most, if not all, the cases in which decrees for sales have been made, that the case came into court under the power to redeem, as in *Stileman* v. *Ashdown*, or to marshal, or upon claims binding the heirs in some form. In this case, not one of these qualities exists. There is nothing to redeem; if there is, the plaintiff does not ask that privilege: there is no fraud alleged; there is nothing to marshal; and the claim was originally on a simple contract, and therefore, did not bind the heirs; and the judgment does not bind the heirs. The case then presents these peculiarities. One man has a simple-contract claim against another: he sues him, and obtains judgment. If the pleases, he may extend his lands, but he cannot sell them; he extends them, and the debtor dies, and by that event a power is conferred to sell the land, although the reason against selling may be, and generally is, stronger after the death of the ancestor than before. To the heir, it may be a matter of great importance, to be enabled to pay the debt off by the gradual process, or, at the least, to keep it out of the market, where it may be sacrificed at a sheriff's sale; until he can acquire *the means to prevent the sacrifice. How [*471
is it, that the death of the father shall confer the power to do that which could not be done while the father lived? Why should it be so? If it be said, that here the *elegit* was not actually levied in the lifetime of the debtor; that only weakens, if it affects at all the case. Then the case stands thus: the land descends to the heir, and comes into his possession; the creditor pursues with a claim which does not bind the heir, and which, if carried to its utmost extreme, could only take possession, for a limited time, of a moiety of the land; the heir is ready to yield the land to the whole extent to which it was liable in the lifetime of the ancestor, and yet he is to be told, this shall not be; he must pay immediately the debt for which he is not bound, and for the satisfaction of which not even the other moiety of the land could be touched; for which, in the lifetime of his ancestor, no foot of the land could havebeen sold; or the entire moiety must be sold. Whence the right thus to abridge the right of the heir? Let it be supposed, that the profits of the land would, in three years, pay off the debt, and the property is of that description which, at a forced sale, is almost invariably sacrificed, and such is emphatically coal property; whence is derived the power to doom him to this sacrifice, and put his property into the possession of his creditor, perhaps, at half its value? Where is the justice and equity of the proceeding? Many other illustrations might be given, but the limits of a written argument forbid it.

Thus far, the question as affecting the heir has been discussed; but the case is really against a fair purchaser, who is liable only, and can be proceeded against as *terre-tenant*. Is there a case in which the power of the creditor has been enlarged, as against him? Upon what ground is it, that he shall be doomed to a sacrifice of that property for which he has fairly paid; and which, in the hands of the man from whom he purchased it, would not have been liable to such sacrifice? Is it not enough, in such a

case, that the creditor may pay himself, by the use of the property? With him, there is no privity, no liability, not strictly legal; the purchase of the land may have deprived him of the means to redeem; and it may be, that the land will soon pay the debt. Could his land have been sold in the life-time of the vendor? Clearly not, as it could not be sold in the hands of the vendee. How can the subsequent death of the vendor so operate upon the vendee, as to make that property liable to sale after the death, which was not liable before? There can be no pretext of redeeming, or of marshalling either assets or securities; for the land, at the death of the vendor, was no part of his estate. No reason is seen, and no authority is known for it, in a case like the present.

III. If the appellees had a right to come into a court of equity, it was because of a valid lien (which is denied) that could not be enforced at law; and in that case, they were entitled to an account only of the rents and profits accruing, and the application of the payment of the debt. *In *472] *Coutts* v. *Walker*, 2 Leigh 268, land was settled to the use of the grantor and his wife, while they lived; to pay the wife an annuity, if she survived; and at her death, to be divided among the children of the grantor. The wife survived; and during her life, judgments were rendered against one of the sons. The judgment-creditor filed his bill to subject the son's interest; and the court of chancery decreed a sale of it, subject to the rights of the widow, as in this case. The court of appeals reversed the decree, and directed an account of profits; deciding that the plaintiff was not entitled to a sale, but must be paid out of the profits. In the case before the court, the agreement with Mrs. Burton places the property, as to the debtor, just where the settlement in Coutts's case did; subject to the annuity, he was entitled to his share of the profits, and the reversion in fee. The case seems to be in point directly. In a later case, *Tennent's Heirs* v. *Pattons*, 6 Leigh 196, the same court reversed a decree for sale; and decided, that where the rents and profits would, in a reasonable time, pay the debt, it must be paid from them. And in the case of *Mann* v. *Flinn*, recently decided, 10 Leigh 93 (the opinion pronounced by Judge STANARD), the same court affirm the case in 6 Leigh. The case of the *United States* v. *Morrison*, in this court, has been relied upon. That case was ruled chiefly upon authority of *Coleman* v. *Cocke*, 6 Rand. 618. Now, it so happens, that in *Coleman* v. *Cocke*, the question was not raised, as appears by the case; and Judge GREEN, moreover, expressly so declares, in *Blow* v. *Maynard*, 2 Leigh 29.

IV. It is insisted, that the appellees, having made no objection to the deed of trust, although two years elapsed after it was made, and before it was acted upon; and taken no step to prevent the sale, are to be presumed to have acquiesced in it; and by their *laches*, have lost the right to impeach the sale; especially, as nearly five years more elapsed, after the sale, before any move was made. The trustee is the agent of the grantor and *cestui que trust*; and if any wrong has been done, it has been by their agent; and to him the appellees should look.

V. An account of the administration of Reuben Burton's estate should have been ordered, whereby the appellant might have shown a personal fund adequate to the payment of the debt.

VI. An account of the rents and profits of the coal property should have

been ordered; and the surplus, after paying the annuity, applied to the payment of this debt, if it was to be paid from the land in any form.

VII. The widow and heirs of Daniel Burton should have been parties to this suit; the widow at least.

VIII. The judgment was dead and inoperative, when the decree was rendered; and no decree should have been rendered upon it, until it was revived, if it could be. If it could not be, then no decree could be founded on it. *For the foregoing reasons, it is asked that the decree of the circuit court may be reversed, and the bill dismissed; or, if that may not be, that it be reversed and modified according to the views herein submitted. [*473

In *reply* to the argument for the appellees, the counsel for the appellants said; the cases relied upon are cases binding the heirs; and the question was, what constituted assets under the plea of "*reins per descent.*" In such cases, the heir who inherits a valuable reversion cannot make the plea; the reversion is assets in his hands. This is emphatically the case in *Tyndale* v. *Warre*, Jacob 212. But, it is repeated, that when the right of the creditor depends upon the power of the *elegit*, a dry reversion is not liable, because it cannot be extended. It is believed, with due submission, that no such case can be found. How can you extend, at a yearly rent, that which, by the terms of the proposition, has no yearly value? What would be the condition of the creditor, whose debt was annually wasting away by the use of a thing which was not susceptible of use? Who was accounting annually for the profit of that which could not yield profit?

Robinson, for the appellees.—In the court below, the statute of Virginia was relied on, which declares, that no action of debt shall be brought against any executor or administrator, upon a judgment obtained against his testator or intestate, nor shall any *scire facias* be issued against any executor or administrator, to revive such judgment, after the expiration of five years from the qualification of his executor or administrator. 1 Rev. Co. p. 492, § 17. A single answer to this objection will suffice. The qualification of Reuben Burton's administrator was on the 9th of December 1829. This suit was brought the 15th of September 1834. It was, therefore, brought before the expiration of five years from the qualification; and the statute does not apply. This being the case, it is unnecessary to urge upon the court the considerations which forbid such a defence in equity, by a purchaser under a deed of trust, which mentions the judgment, and acknowledges the debt to be due.

The judgment remaining in full force, the question then is, how far it operates as a lien upon the real estate of the judgment-debtor. The writ of *elegit*, given by the statute of Westm. II, has always been in use in Virginia. Every person recovering any debt, damages or costs, may sue out this writ, to charge a moiety of all the lands and tenements whereof the debtor was seised at the day of obtaining the judgment, or at any time afterwards. 1 Rev. Co. 525.

Some years before the judgment, Daniel Burton, the father of Reuben Burton, died intestate, leaving Sarah Burton, his widow, and the following children, as his heirs, to wit: Thomas, a child by the said Sarah; and Susan, Mary, Reuben, Rebecca and William, *by a former marriage. Rebecca afterwards died intestate, and unmarried, leaving her brothers [*474

and sisters as her heirs. As heirs of Daniel Burton, his two sons, Reuben and William, were each entitled to a sixth part of his real estate; and as heirs of Rebecca, they were each entitled to two-ninths of her real estate. Reuben Burton acquired, by purchase, the whole interest of William, as heir of Daniel Burton, and also as heir of Rebecca; and in this way, his share of the real estate of Daniel Burton (taking into account the part of William and the part of Rebecca) was two-sixths, and four-ninths of another sixth, being rather more than two-fifths.

By the terms of the agreement relied on in the defence, the heirs of Daniel Burton were to have, during the widow's life, the right of occupying, using and working the coal-pits, and also the right and power of sinking shafts and searching for coals on any part of the tract of land attached thereto, except the yard, houses and gardens; and also the right and privilege of cutting and taking, on any part of the tract, all necessary timber and wood, for the use and management of the coal-pits, opened, or to be opened, paying to the widow, during her life, a yearly sum of $200 for her dower interest. It has been objected, that Reuben Burton's interest in this part of the subject could not be charged, because the subject was not exclusively his. This objection can present no difficulty. The judgment is clearly a lien upon a moiety of all the lands or tenements of which the debtor is seised. The estate in lands or tenements of a joint-tenant, or tenant in common, is charged, by judgment against such joint-tenant, or tenant in common, as much as any other interest in real estate. It has long been so settled. In 10 Vin. Abr. tit. Execution, N. pl. 25, p. 549, it is laid down, that "if there are two joint-tenants, and one makes a statute, and afterwards joins with his companion in a feoffment of the land, the moiety of the land may be extended upon this statute." As it may be extended upon a statute, it may likewise be extended upon a judgment. See Gilbert on Executions, 41–2.

The question applicable to the tract, generally, with the exception of the interest just mentioned, is, whether a judgment against a debtor, who has a reversion in fee, expectant upon an estate for life, creates a lien upon such reversion. It was upon this part of the case, that the other side relied principally in the court below. We were told, that a rent-seck was not extendible; and from this it was attempted to deduce the conclusion, that a reversion, after an estate for life (a dry reversion as it was called) could not be extended. The case in which it was decided, that a rent-seck could not be extended, was that of *Walsal* v. *Heath*, Cro. Eliz. 656. The action was replevin. The avowry was, that J. S., seised of lands for the life of Sibyl, his wife, in right of his wife, the reversion in fee to the *baron;* he and his *feme* made a lease for years, reserving 4*l.* rent per annum. The *baron* being
*475] indebted by obligation, made the *said Sibyl, his wife, executrix. The debtor brings debt against her, by the name of Isabel, and recovered; and upon a writ of *fieri facias*, a *devastavit* was returned, and thereupon, an *elegit* awarded, and the sheriff returned that Isabel had 4*l.* rent issuing out of that land, upon a demise made by her and her husband, and delivers the moiety of that rent, and thereupon, he avows for the same, and it was thereupon demurred, and adjudged ill, for three causes. First, because a lease for years by *baron* and *feme*, without deed, is void against the *feme.* Secondly, the recovery against Isabel is void against Sibyl; and the sheriff cannot extend her land. Thirdly, the sheriff delivering the rent,

without land, so as there is not any reversion, it is but a rent-seck ; and a bare rent cannot be delivered, *ut liberum tenementum*. This case does not at all go to show, that a reversion in fee is not charged by a judgment.

It would be very remarkable, if the judgment should create no lien upon a reversion, when such reversion is liable to a mere bond-creditor of the ancestor. For it has long been adjudged, that upon an obligation of the ancestor, binding himself and his heirs, the heir may be charged, in respect to any estate of freehold which has descended upon him. A reversion in fee, expectant on a term of years, is regarded as assets in the hands of the heir ; although the term be to continue five hundred years ; as was the case in *Smith* v. *Angell*, 2 Ld. Raym. 733. A reversion in fee, expectant on an estate for life, is also assets ; notwithstanding the life-estate be still continuing. *Rook* v. *Clealand*, 1 Lutw. 303 ; 1 Ld. Raym. 53 ; Vin. Abr. tit. Execution, M. pl. 7, 15. If the party seised of the reversion, devise it for any other purpose than the payment of debts, the devise is void as to specialty creditors ; and the creditor may maintain an action on the specialty, against the devisees, as well as the heirs, and charge them in respect to the reversion. Stat. of W. & M., enacted in Virginia, in 1789 ; 1 Rev. Co. 391–2. And if any heir or devisee, so liable, shall, before action brought, alien the estate descended to him, he will be liable for the value of the land so aliened. Ibid.

The inquiry, then, presents itself, whether a creditor, who has obtained a judgment against a debtor in his lifetime, is worse off, in respect to this matter, than a creditor by specialty merely. In the case of *Cocks* v. *Barnsley*, Brownl. & Golds. 234, where the question was, whether land held in ancient demesne was extendible, the judges held, that it was : saying, " for otherwise, if it should not be extendible, there would be a failure of justice, which the law doth not allow of." There would be an equal failure of justice, if a reversion in fee were not liable to a judgment-creditor. It is well settled, that if a man lease for a year, rendering rent, the reversion may be extended upon an *elegit*, during the lease, and the tenant by *elegit* shall have a moiety of the rent. *Sir Thomas Campbell's Case*, 1 Roll. Abr. 894, pl. 5. It is also settled, that if there be tenant *for life, the reversion in fee, and he in reversion acknowledges a statute, and then [*476 grants the reversion, and then tenant for life dies, this land shall be extended upon the statute. 2 Roll. Abr. part 2, Q. p. 473. This proves that a statute creates a lien upon a reversion expectant upon an estate for life, though the life-estate be still continuing.

The lien upon a reversion created by a judgment, is equal to that of a statute. It was so decided by Lord Hardwicke, in *Gifford* v. *Barber*, 4 Vin. Abr. tit. Charge, A, pl. 17, p. 451. There, the judgment debtor had a reversion after an estate-tail. The estate-tail having terminated, and the reversion coming into possession of the heir of the judgment-debtor, the question was, whether the judgment created a lien upon it. The chancellor held, that a person having an estate of inheritance, subject to intermediate estates, might grant, charge or incumber the reversion, as he should see fit ; and might incumber it by judgment as well as in any other manner.

The whole law upon the subject is laid down with great clearness in Gilbert on Executions 38–9 : he says, " The judgment binds not only the lands and tenements of which the defendant is actually seised, but also the

reversions on leases for lives as well as for years. For though the words of the *elegit* are, 'a moiety of all the lands and tenements of which the said A. was seised,' &c., yet the intent of the writ extends to whatever lands and tenements were actually vested in the defendant; because the statute is a moiety of the lands, which extends to reversions, which are comprised under the name of lands, since they are lands returning to the defendant when the particular estate ceases; and therefore, though this was formerly disputed, the latter resolutions have settled the law to be as we have already mentioned." The law is laid down in the same way by Sir Henry Gwillim, in a volume, which he prepared before his death, of the last edition of Bacon's Abridgment. See tit. Execution, C. vol. 3, p. 381, of Lond. ed. of 1832; And in the late case of *Harris* v. *Pugh*, 4 Bing. 335, it is expressly stated by the court, that if the estate of the debtor in the reversion, had been a legal instead of an equitable estate, the judgment would have bound it, and overreached the subsequent conveyance.

The judgment being a lien upon the property, that lien clearly operates against the alienees of the debtor. *United States* v. *Morrison*, 4 Pet. 124; *Watts* v. *Kinney*, 3 Leigh 272. If there were any difficulty in taking the reversion of the debtor in execution at law, it would, upon the general principles of a court of equity, still be bound in equity: and the lien enforced against the debtor's alienees. *Coutts* v. *Walker*, 2 Leigh 268. In this case, the reason for enforcing the lien against the alienee is stronger than usual; for here, the property subject to the lien was purchased, with full knowledge of the judgment, and knowledge also that the debt was still due.

*477] *The trustees in the deed of trust could, certainly, not object to the court's decreeing a sale of the property, subject to the lien. For they, by the terms of the deed of trust, were to sell at all events. See *Mutual Ass. Society* v. *Stanard*, 4 Munf. 538. Neither can any one claiming under the trust make that objection. It might, indeed, have been seriously contended, upon the authority of the case just cited, that the decree should have been for the sale of the whole property, instead of a moiety merely. But such a decree would, no doubt, have been objected to on the other side, and the objection has been carefully avoided. The decree in this case merely directs a sale of the land, so far as the creditor has a lien upon it.

That equity will, at the suit of the creditor, after the death of the judgment-debtor, accelerate the payment, by directing a sale of the moiety; and not compel the judgment-creditor to wait till he has been paid out of the rents and profits, was settled in *Stileman* v. *Ashdown*, 2 Atk. 608; Ambl. 13; and has been acted on in a great number of cases. *Galton* v. *Hancock*, 2 Atk. 433; *O'Gorman* v. *Comyn*, 2 Sch. & Lef. 137; *O'Fallon* v. *Dillon*, Ibid. 13; *Countess of Warwick* v. *Edwards*, 1 Dick. 51. In Virginia, the principle has been recognised, in *Blow* v. *Maynard*, 2 Leigh 57, 66.

No portion of a debtor's real estate is exonerated from his creditors, or exempted from being sold, because it yields nothing annually. In *Robinson* v. *Tonge*, 2 Str. 879; 3 P. Wms. 401; where the question related to an advowson, which had descended upon the heir, to wit, a right of presentation to a church; and the objection was taken, that it yielded nothing; it was answered, that it might be made available by sale. Lord Hardwicke decided the same way, in *Westfaling* v. *Westfaling*, 3 Atk. 460. Not only

was the adowson decided to be real assets, and directed to be sold; but it was decreed, that the money should be paid to judgment-creditors, according to the priority of their judgments, and then equally to bond creditors. *Tonge* v. *Robinson*, 1 Bro. P. C. p. 114, of Tomlin's edition. In the case of a reversion, where it is impracticable to obtain a discharge of the debt, by any application of rents and profits; and where the only way of making the reversion available, in any reasonable time, is by sale; there is every reason for decreeing a sale. This subject has been fully considered, and the propriety of a sale decided in *Tyndale* v. *Warre*, Jacob 212.

Barbour, Justice, delivered the opinion of the court.—This is an appeal from a decree of the circuit court for the fifth circuit, and eastern district of Virginia. The case was this:

In the month of June 1827, Smith & Kennedy obtained a judgment in the circuit court against Reuben Burton, for $1348.75, with interest from the 14th October 1823, and costs. On this judgment, *an *elegit* was issued on the 31st of December 1827. On the 12th of August, in *[478 the same year, Reuben Burton, by deed, conveyed his real estate to certain trustees, in trust to sell the same for the benefit of his creditors; amongst many other debts enumerated in the deed, the judgment already mentioned, recovered by Smith & Kennedy, was included. These last-mentioned creditors, the appellees, never assented to, nor accepted anything under, the trust deed. Burton having died, the only trustee who accepted the trust, on the 21st of December 1829, sold under the deed, all the estate, both real and personal, conveyed by it; and at that sale, Sarah Burton, by her agent, purchased, at the price of $1000, the interest of Reuben Burton, that is, two-fifth parts in a certain tract of land called Springfield, supposed to contain about 500 acres, and also his interest in certain coal-pits on the same tract. The character of Reuben Burton's interest in the Springfield tract of land, as appears from the record, was that of a reversion in fee, after an estate for life. And the character of his interest in the coal-pits, as appears from an agreement in the record, was this: The heirs of Daniel Burton, of whom Reuben was one, were to have, during the widow's life, the right of occupying, using and working the coal-pits, and the right and power of sinking shafts, and searching for coal, on any part of the land, except the yard, &c.; paying to the widow, during her life, the yearly sum of $200, for her dower interest. The same agreement will show his interest in a mineral spring, also included in the decree.

After the death of Reuben Burton, the appellees, finding that there was no personal estate to satisfy their debt, in September 1834, filed their bill to enforce the lien created by their judgment; making, amongst others, Sarah Burton, a defendant, as purchaser of the interest of Rueben Burton, before described, in the Springfield tract of land and coal-pits. She answered, saying that the property conveyed to her was not purchased for her own benefit, but for the benefit of her son, Thomas O. Burton, the appellant. She insisted in her answer, that the appellees had no right to enforce their judgment, as more than five years had elapsed since the death of Reuben Burton; she denied that the judgment created any lien on the property purchased by her, which was valid against her; she insisted, that the appellees were entitled to no relief in equity; and that, at all events, a sale should

not be decreed. An amended bill was thereupon filed, making Thomas O. Burton a defendant. He filed an answer, insisting upon the grounds taken by Sarah Burton.

The cause coming on to be heard, the court held the reversionary interest of Reuben Burton in the Springfield tract of land, and his interest in the right of occupying and working the coal-pits thereon, and also his interest in the mineral spring thereon, with the twenty-five acres of land adjoining thereto, liable to the appellees' judgment; *and decreed a moiety of Reuben Burton's interest to be sold. From that decree, this appeal is taken.

*479]

Upon this state of facts, two questions arise: 1st. Whether the judgment created a lien on the reversionary interest of Reuben Burton in the land in question? 2d. Whether it was competent to the court to decree a sale of his interest, with a view to accelerate the payment of the debt; or whether the appellees should have been left to such remedy as they had at law?

As to the first point. In relation to lands of which the debtor has the actual seisin, there is no doubt, but that the judgment creates a lien. Upon this subject, this court said, in the case of the *United States* v. *Morrison*, 4 Pet. 124, there is no statute in Virginia, which expressly makes a judgment a lien upon the lands of the debtor. As in England, the lien is the consequence of a right to take out an *elegit*. During the existence of this right, the lien is universally acknowledged. That right unquestionably existed in this case; because an *elegit* did actually issue, within the year after the judgment was rendered. There would then be no sort of difficulty upon the question of a lien, if the debtor had had actual seisin of the land; but the difficulty is suggested, that his interest was reversionary only. Let us inquire, whether this interposes any obstacle. All the authorities, ancient and modern, agree in this proposition, that a reversion, after an estate for life, is assets; or as some of the books express it, *quasi* assets, in the hands of the heir, in regard to the bond of his ancestor, binding heirs; and that in such case, the plaintiff may take judgment of it *quando acciderit*. Dyer 373; Carth. 129; 1 Ld. Raym. 53; Chitty on Descents 336. In Dyer, *ubi supra*, the form of the judgment in such case is given. It is, "that he should recover the debt and damages of the aforesaid reversion, to be levied when it shall fall in." And it is added, that a special writ shall issue to extend the whole. The doctrine upon this subject is laid down very clearly by the master of the rolls, in the case of *Tyndale* v. *Warre*, Jacob 217–18. There are, says he, three cases of reversions; if it be a reversion dependent upon a term of years, the law does not consider the term as anything, and judgment is given against the heir, if he plead *reins per descent*. But if the creditor take out an *elegit*, he is stopped by the term, which is a good defence for the lessee in ejectment, and so there is a *cesset executio* during the term. If it be a reversion after an estate for life, the heir must plead specially, stating that he has no assets except this, and setting forth what it is; the creditor may then take judgment *quando acciderit*. In the case of a reversion after an estate-tail, the authorities say, that the heir may plead, generally, *reins per descent*, distinguishing this from the plea in the case of a reversion after an estate for life; the plaintiff may then reply, that there is this reversion descended to the defendant; and he may then have a judgment

quando acciderit, the same as in the case of a reversion after an estate for life.

*Now, upon principle, it would seem to be clear, that whatever estate descended to the heir, which was liable, as assets, to the bond [*480 debt of the ancestor, must be bound by a judgment obtained against the ancestor in his lifetime. But this is not left to rest upon deductions from general principles, or analogy to the case of assets descended to the heir. Whatever may be the doctrine as to reversions after estates-tail, about which there has been some doubt, as appears from the case before cited from Jacob's reports, there is a current of authority going to prove that a reversion after an estate for life, is bound by a judgment against the ancestor from whom it immediately descends.

The statute of Virginia giving to a party the right, at his election, to have an *elegit*, is almost a transcript of the statute of Westminster the second. The writ itself commands the officer to deliver to the plaintiff a moiety of all the lands and tenements, whereof the debtor, at the time of obtaining the judgment, was seised, or at any time afterwards. Lands and tenements, then, are the subject on which the writ is to operate. Now, in Com. Dig. tit. Grant, E, 2, it is said, that by grant of all lands and tenements, a reversion passes. In the same book, tit. Estate, B, 12, it is said, if a man grant the land itself, the reversion passes. So, in Moore 36, a reversion is said to be a tenement. Thus, it appears, that a reversion falls within each of the terms, lands and tenements. But the party must have been seised at the time of obtaining the judgment, or afterwards.

Now, let us see, what is meant by the seisin spoken of in the statute. And the authorities are clear, that it is not confined to actual corporeal possession. In Gilbert on Executions, 38–9, it is said, that the judgment binds not only the lands and tenements of which the defendant is actually seised, but also the reversions on leases for lives, as well as for years; for although the words of the *elegit* are, that without delay, you cause to be delivered a moiety of all the lands and tenements of which the aforesaid B. was seised, etc., yet the intent of the writ extends to whatever lands and tenements were actually vested in the defendant; because the statute is a moiety of the land, which extends to reversions, which are comprised under the name lands, since they are lands returning to the defendant when the particular estate ceases. So in Wms' Saund. 68 *f*, it is said, judgment binds not only lands of which defendant is actually seised, but also reversions on leases for lives or years; and therefore, a moiety of a reversion may be extended, and plaintiff will have a moiety of the rent. So, in Chitty on Descents 338, it is said, that if judgment be had in the debtor's lifetime, it will bind the property, though no execution be taken out till the property descends to others. Nay, in case of a judgment, it is said to bind, even where it is against a person from whom the estate does not immediately descend, as if it were against *a remainder-man or reversioner; [*481 whereas the contrary would be the case, of a bond on which no judgment had been rendered in the debtor's lifetime, who stood in the same relation. The author last cited, in page 54, quoting Watkins on Descents 40–1, speaking of the subject of seisin of reversions, remarks, that the confusion seems to have been created by the different meanings which have been attached to the word "seisin;" by being used in a general sense, when it

should properly have been confined in its acceptation ; or by being confined, when it should have been taken in a general sense. And in pages 53–4, he thus sums up the doctrine : We must here remember, that the expressions or terms of a seisin in law and a seisin in deed, refer only to the present and actual corporeal possession of the premises, and not to the fixture of an interest which is to come into actual enjoyment in some future event : and here the word "seisin" is used in its strict sense ; and though we frequently use the term "seisin" of a remainder or reversion expectant upon a freehold, yet this signifies no more than that the property in them is fixed in the owner, and that such owner is placed in the tenancy. The particular estates, and those expectant upon them, form, in law, only one estate ; and the delivery of possession to the person taking first, extends to all. All, therefore, may be said to be seised, all being placed in the tenancy, and the property being thus fixed in all. It is upon these principles, that the authorities lay down the doctrine, that a judgment binds a reversion after an estate for life.

We are, therefore, satisfied, that the judgment of the appellees bound the reversionary interest in the land in question ; and as to the other property embraced in the decree, there is no room for doubt or difficulty. And then the question is, whether the court ought to have decreed a sale, with a view to accelerate the payment of the debt ; or whether the appellees should have been left to such remedy as they had at law ? Upon the subject of the power of a court of equity in this respect, the authorities are decisive. More than a century ago, in the case of *Robinson* v. *Tonge*, 3 Vin. Abr. Assets A, pl. 28, p. 145, an advowson was decreed to be sold, at the instance of creditors, as assets descended ; and the decree was affirmed in the house of lords. That is supposed to have been the case, not of judgment, but bond creditors. In *Stileman* v. *Ashdown*, 2 Atk. 607, Lord HARDWICKE decreed a sale of a moiety of the land, to satisfy a judgment-creditor. He confined the decree to a moiety, because the judgment only bound a moiety at law. On that occasion, he said, that whilst equity could not change the rights of the parties, it might accelerate the payment, by directing the sale of a moiety, and not let the creditor wait until he was paid out of the rents and profits. The principle was asserted by Lord REDESDALE in 2 Sch. & Lef. 138, and in the same book, p. 13 ; and such he stated to be the settled doctrine in Ireland. In the first of these cases, he said : "Although this court has been in the habit of selling to pay judgment debts, where it was ascertained that they *482] were *legal liens on the land, the foundation of that was the legal right. The only equity the creditor had, was to render his remedy more effectual, by getting a sale, instead of levying his debt out of rents and profits, which was the only execution the common law gave."

These cases are cited and relied upon, and the doctrine of them approved, in 2 Leigh 30 ; and in page 58 of that volume, Judge GREEN says : "This principle, so far as I am informed, has been uniformly practised on in Virginia in the cases of heirs bound by the obligations of their ancestors. And although I cannot see clearly the foundation of this equity to sell, where the law only authorizes an extent, or a personal judgment, or decree against the heir for the value of the assets descended, whether aliened by him or not (see the statute of fraudulent devises); yet I think we are bound by the practice founded on these precedents, so long acquiesced in." In 6 Leigh

196, which was a suit in equity, brought by creditors to marshal assets, the same authorities were again cited with approbation, and the same doctrine re-asserted by the judges, in their reasoning upon the case. In pages 219–20 of this latter case, Judge CARR went into a review of English cases, which he said, seemed to him, to establish beyond question, the regular and long-established course there, of selling the lands of deceased persons to pay their debts, binding the land, or to marshal their assets: and he added, that it struck him as a novelty, when, in the course of the argument of the case, he heard a doubt suggested of the power of the court to decree a sale in such cases. In the case of *Tyndale* v. *Warre*, Jacob 212, this subject was extensively considered by Sir THOMAS PLUMER, Master of the Rolls; who held, in that case, a reversion expectant upon an estate for life, and even upon estates-tail, limited to unborn children, to be assets for the payment of specialty debts; and accordingly, he decreed it to be sold for that purpose. This last has a peculiar analogy to, and bearing upon, the case before us; because it sustains, in the fullest and most decisive manner, both the grounds on which the decree of the circuit court rests: that is, it proves, first, that a reversion after an estate for life, or even after estates-tail limited to unborn children, is assets, liable to the specialty debt, and, of necessary consequence, to the judgment of the ancestor from whom it immediately descends; and secondly, that a court of equity will decree such a reversion to be sold, in order to accelerate the payment of the debt. The liability of a reversion after a life-estate to be sold, was at once conceded by the counsel for the heir; their effort was to maintain that the reversion in that case could not be sold, because it was after an estate-tail. It was strongly said by the master of the rolls, in that case, that the reversion was a part of the real estate of the ancestor; and according to all general principles, every part of the real estate of the debtor, except copyhold, is considered as applicable to the payment of his specialty debts. There is another part of the reasoning of the master of the rolls which has a most cogent application to this. It having being urged, that a sale ought not to be decreed, out of consideration to the heir, that a higher price might be obtained *he said: [*483 "But I think that such considerations ought not to weigh; for the question is, to whom does the property belong? It is not the habit of the court to consider the interest of the heir, when opposed to that of the creditors. They ought to have the fullest remedy. And upon what principle can the court refuse to give them the benefit of a sale, because another person, whose interest is secondary, and entirely subject to theirs, may be benefited by delay?" So far from its being proper for a court to hesitate about decreeing the sale of an interest, because it is reversionary, we think that the character of the interest affords a stronger reason. For in regard to property in present actual possession, the *elegit*, although a tardy remedy in its operations, yet is in some degree an effective remedy; inasmuch as the creditor will by that means annually receive something towards his debts; whereas, in the case of a dry reversion, as the one in the present case is, if the outstanding life-estate should continue during half a century, the creditor might look on in hopeless despondency, without the possibility of receiving one cent from that source, except through the interposition of a court of equity, in decreeing a sale. Now, if the acceleration of a tardy remedy be cause enough to justify the helping hand of equity, *à fortiori*, it

ought to be extended to him who, during the life of the tenant for life, is without any remedy at all.

As to the objection, that the judgment did not bind the land in the hands of the appellant, because he was a purchaser, we consider it wholly untenable. We have already said, that the judgment created a lien: now, it is of the very nature and essence of a lien, that no matter into whose hands the property goes, it passes *cum onere;* if this were not the case, it would cease to be a lien. If this proposition stood in need of authority to support it, we find it abundantly in the case of the *United States* v. *Morrison*, 4 Pet. 124. In that case, the judgment of the United States, rendered in 1822, was held to overreach several deeds of trust executed in 1823; although the United States, having issued a *fieri facias*, whilst that execution was in the marshal's hands, the agent of the treasury, at the instance of the defendants, instructed the marshal to forbear levying it, on condition of the defendants' paying the costs; and accordingly, the marshal did not make a levy, but made a return within the year 1822, that all further proceedings were suspended in pursuance of said instructions; and that suspension was continued until the year 1825. A very strong application of this doctrine was made in the case of the *Mutual Assurance Society* v. *Stanard*, 4 Munf. 539. In that case, a deed of trust, bearing date 28th April 1808, was held to be overreached by a judgment rendered on the 6th of May; the court applying the legal fiction, that the judgment, in contemplation of law, related back to the commencement of the term, which was before the execution of the deed. A still stronger application of the doctrine was made by the same court, in the case of *Coutts* v. *Walker*, 2 Leigh 268. In that case, the court held, that a judgment-creditor had a lien in equity, upon
*484] *the equitable estate of the debtor, in like manner as he had a lien in law upon his legal estate; and a deed of trust having been executed by the debtor, conveying his equitable estate to a trustee, and that too for the benefit of creditors, between the commencement of the term, and the day on which the judgment was obtained; the same relation of the judgments to the first day of the term, as in the case previously cited, was held to exist; and thus the trust deed was overreached by the judgment.

It is argued, that the judgment in this case was barred by the act of limitations of Virginia. That act provides, that no action of debt shall be brought against any executor or administrator, upon a judgment obtained against his testator or intestate, nor shall any *scire facias* be issued against any executor or admistrator, to revive such judgment, after the expiration of five years from the qualification of his executor or administrator. The facts in the record furnish a decisive answer to this argument. It appears from them, that the administration on Reuben Burton's estate was granted on the 9th of December 1829; and this suit was brought on the 15th of September 1834. So that five years had not elapsed from the time of the qualification of the administrator. This view renders it unnecessary to examine whether the appellees would not have been within the saving of the statute, as contended for by their counsel.

Furthermore, it is objected, that there should have been an account taken of the administration of Reuben Burton's personal estate. Without stopping to inquire, whether that would be necessary, in any case, where the the suit is brought merely to enforce a legal lien; it is a sufficient answer

to this objection, to say, that there is abundant evidence in the record, that there was no personal estate : nothing, therefore, could have been more unnecessary or unprofitable, than to have ordered an account to be taken.

The last objection is, that an account should have been ordered of the rents and profits of the coal property. Here, too, the record furnishes a satisfactory answer. Assuming, for the purpose of meeting this objection, that by analogy to the case of marshaling assets, a court of equity would not decree a sale of real estate to satisfy a judgment, where the rents and profits would discharge it, in a reasonable time, as was held by the court in the case of *Tennent's Heirs* v. *Patton*, 2 Leigh 196 ; yet the facts of this case utterly repel the application of that principle to it. In that case, it will be seen, that the debts of the ancestor were said by one of the judges to amount to $820, and the annual value of the land was ascertained to be $400. In that case, therefore, the debt would be satisfied by the rents and profits, in a short time. In this case, the facts are these. There was an outstanding life-estate in all the Springfield tract of land, except the coal-pits and the mineral spring. Reuben Burton's interest in the coal-pits was two-fifths, in the privilege of working them during the lifetime of the tenant for life ; she receiving annually $200 *for the whole. Reuben [*485
Burton's real interest, then, is only two-fifths of any surplus which might remain, after deducting two-fifths of the annual rent to be paid. But the parties themselves seem to have considered $200 per annum as the full value of the whole privilege of working them. If the agreement of the parties were to be taken as the standard of the annual value, his interest would really be worth nothing ; because he would have to pay precisely the same proportion of the rent which he received of the profits ; and it must be assumed, that they were worth more than the parties fixed as the value, in order to make any surplus at all. But, at all events, there is nothing in the case to justify the belief, that there would be any surplus that would discharge the judgment, in a reasonable time, or even in a long time ; for, at the date of the decree, the whole debt, including principal, interest and costs, amounted to about $2500 ; and the principal being $1348.75, there would be an annually accruing interest of about $80, besides the annual payment of two-fifths of the $200 for rent, which would be $80 more. Thus it will appear, that his interest of two-fifths must produce $160 annually, in order even to prevent the debt from being increased. To allow $160 for his two-fifths would require that the whole should be worth annually $400, which is precisely double the sum at which the parties fixed the rent.

This, then, seems to us, to be, emphatically, a case in which the established principles of equity justify the sale of the property, with a view to accelerate the payment of a debt due to a judgment-creditor. In every respect in which we have viewed the case, we think, that the decree of the circuit court is correct ; and it is, therefore, affirmed, with costs.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the eastern district of Virginia, and was argued by counsel : On consideration whereof, it is adjudged and decreed by this court, that the decree of the said circuit court in this cause be and the same is hereby affirmed, with costs.

*Jonathan Meredith and Thomas Ellicott, Plaintiffs in error, *v.* United States, Defendants in error.

Action for duties.—Recoupment.

An action was instituted by the United States, to recover from the assignees of S. Smith & Buchanan, insolvent merchants, the duties on merchandise imported by them, and for which bonds had been given, but which remained unpaid; the United States had retained, from money awarded under the treaty with France, to Lemuel Taylor, who was the surety in the bonds, a sufficient sum to pay the bonds; but had not appropriated the same towards their satisfaction; the assignees claimed to set off against the demand of the United States, the amount due by Lemuel Taylor to the estate they represented, he having been discharged by the insolvent laws of Maryland. The court said, "whatever might be the merits of such an equitable claim, in any suit brought by Lemuel Taylor, the insolvent, or by his assignee, against S. Smith & Buchanan, or against their assignees, it could have no proper place in a suit brought by the United States to recover demands justly due to them for duties. It was, as to them, *res inter alios acta*, and the United States were not called upon to engage in, or to unravel, any of the accounts and set-offs existing between those parties, in a suit at law like the present."

Importers of goods do, in virtue of the importation thereof, become personally indebted to the United States for the duties thereon; and the remedy of the United States for the duties is not exclusively confined to the lien on the goods, and the security of the bond given for the duties; the duties due upon all goods imported constitute a personal debt due to the United States from the importer, independently of any lien on the goods and of any bond given for the duties.[1] The consignee of goods imported is, for this purpose, treated as the owner and importer.

The right of the government to the duties accrues, in the fiscal sense of the term, when the goods have arrived at the port of entry; the debt for the duties is then due, although it may be payable afterwards, according to the regulation of acts of congress.

The debt due to the United States for duties on imported merchandise, is not extinguished, by the giving of bonds, with surety, for the same. The revenue collection act of 1799, ch. 128, requires that the collector should take the bonds for the duties, from all the persons who are the importers, whether they be partners or part-owners.

The government of the United States have a right to retain money in their hands, belonging to a surety in a bond given for duties, which is unpaid, until a suit shall be terminated for the recovery of the amount of the duties on the goods due by the importers; the government is not obliged to appropriate the money of the surety to the satisfaction of the bond, but may hold it as a security, until the suit is determined.

Error the Circuit Court of Maryland. The United States instituted an action of *assumpsit* against Jonathan Meredith and Thomas Ellicott, to recover from them, as the assignees of Samuel Smith, James A. Buchanan and Thomas A. Buchanan, formerly trading as merchants, under the firm of S. Smith & Buchanan, a certain amount due to the United States for duties—the United States claiming a right of priority of payment against the estate in the hands of the trustees. The deed of trust to the plaintiffs in error was executed by S. Smith & Buchanan, on the 9th of November 1820.

In July 1818, there was imported into Baltimore, by S. Smith & Buchanan, and by Hollins & McBlair, a quantity of merchandise, from Canton, on board the brig Unicorn, and in February 1819, the same persons imported from Calcutta a quantity of merchandise, on board of the ship Brazilian. In
*487] the importation by the *Unicorn, S. Smith & Buchanan had an interest of two-thirds, and of five-ninths in the cargo of the Brazilian; the remaining interest in both importations beloging to Hollins & McBlair. Entries of the merchandise of both cargoes were made by John Smith Hol-

[1] United States *v.* George, 6 Bl. C. C. 406; United States *v.* Dodge, 1 Deady 124.

lins, one of the joint importers, and a partner in the firm of Hollins & McBlair; who, with James A. Buchanan, also one of the joint importers, and a partner in the firm of S. Smith & Buchanan, and a certain Lemuel Taylor, executed to the United States their joint and several bonds for the payment of the duties.

Upon these bonds, the United States afterwards instituted actions against each of the obligors, and recovered judgments in the circuit court for the district of Maryland. These judgments had been twice revived by *scire facias*, and were in full force and unreversed. S. Smith & Buchanan afterwards became insolvent, as also did Lemuel Taylor. A large sum of money was awarded under the treaty with France, to Lemuel Taylor, which was claimed by Mr. Colt, his assignee; but the United States withheld a part thereof, being the amount of the bonds given for the duties on the importations by the brig Unicorn and ship Brazilian, for which Lemuel Taylor was surety. A large sum of money was also awarded to Smith & Buchanan, under the treaty with France, which was paid to Meredith and Ellicott, their assignees. The sum so received by the assignees was sufficient to pay the amount claimed by the United States for the duties on the portions of cargoes of the Unicorn and Brazilian, which had been imported by S. Smith & Buchanan, but not enough to pay their partnership debts. The United States had not adverted to the alleged liability of S. Smith & Buchanan, for the duties unpaid on their importations, when the awards under the French treaty were paid to their assignees.

The case was tried before the circuit court of Maryland, and a verdict rendered in favor of the United States. The defendants prosecuted this writ of error.

In the progress of the trial, the defendants, now plaintiffs in error, offered evidence to prove, that at the time of Lemuel Taylor's application for the benefit of the insolvent laws of Maryland, he was indebted, and still remained indebted, to the estate of S. Smith & Buchanan, in a sum more than sufficient to pay the whole amount due upon the several bonds for duties before mentioned; but the admissibility of this evidence was objected to by the counsel for the United States, and the court sustained the objection.

The case was argued by *Johnson* and *Meredith*, for the plaintiffs in error; and by *Nelson*, for the United States.

For the plaintiffs in error, it was contended:—That the evidence ought to have been admitted. And upon the main questions in the case it was further contended: *1. That the debt to the United States for the duties on the two joint importations by the Unicorn and Brazilian, arose exclusively upon the bonds given therefor; and that the United States had never any other cause of action for said duties. 2. That if S. Smith & Buchanan were liable to the United States for said duties, before the execution and delivery of the bonds, then the same, having been given and accepted, operated in law as an extinguishment of such previous liability. 3. That the United States had been fully paid and satisfied the amount due for duties on the said joint importations, out of the moneys received on account of the awards in favor of the trustees of Lemuel Taylor, under the French treaty. [*488

Meredith and *Johnson*, for the plaintiffs in error, contended, that the set-off of the debts due by Lemuel Taylor to S. Smith & Buchanan should have been allowed. The real parties in the cause were the assignees of S. Smith & Buchanan, and the assignee of Lemuel Taylor. The United States had no interest in the controversy. The suit was brought in the name of the United States, and its effect, if successful, would be to relieve from the lien of the United States, the funds retained by them from the French indemnity, and to enable the assignees of Lemuel Taylor to receive the amount from the treasury of the United States. The case, therefore, stood, in fact, as a controversy between the estates of the insolvents, represented by assignees. The United States have expressly disclaimed, by their law-officer, all interest in the cause. Under such circumstances, the law of set-off fully applies. Cited, 1 T. R. 621 ; 1 W. C. C. 427 ; 3 East 257 ; 10 Wend. 504.

The bonds operated as an extinguishment of the debt for the duties which were due by the importers, and which were a lien on the goods, until the bonds were given. On the execution of the bonds, which were received by the collector as the substitute for the responsibility of the importers, and the lien on the goods, the claim of the United States was upon the bonds only. The only case which interfered with this position, is that of the *United States* v. *Lyman*, 1 Mason 481. This is the only case in which an action for debt has been brought for duties claimed by the United States. It stands alone among the decisions of the courts of the United States ; for although Mr. Justice WASHINGTON, in 2 W. C. C. 508, affirms the law as stated in the case of the *United States* v. *Lyman*, yet it was not the question before him. In the case of the *United States* v. *Assignees of Inskeep and Bradford*, 3 W. C. C. 508, it was decided by Mr. Justice WASHINGTON, that the assignees of Bradford & Inskeep, the assignors having become insolvent, were not liable, out of the estate assigned, for duties on merchandise imported by Bradford & Inskeep, for which Bradford had given a bond to the United States. The bond was an extinguishment of the original debt. Cited also, *9 Bing. 341 ; 23 Eng. Com. Law 300 ; 10 Ibid. 55 ; 1 Mass. 53. There is nothing in the act of congress which looks to any other obligation for the duties, but the bond. In that act, the bonds are called bonds for the payment of the duties, and bonds for the duties.

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Nelson, for the defendants in error, insisted :—1. That S. Smith & Buchanan, by virtue of the importations of 1818 and 1819, in the Unicorn and Brazilian, became personally liable to pay to the United States two-thirds of the duties accruing upon the first, and five-ninths of the duties accruing upon the last importation. 2. That being so personally liable, they were debtors to the United States to the extent of that liability, on the 9th of November 1820. 3. That the deed of conveyance from S. Smith & Buchanan to the plaintiffs in error, of the 9th of November 1820, was such as to entitle the United States to a priority in the distribution of the funds received under said deed, &c. 4. That having shown the sum of $60,000 in the hands of the plaintiffs in error, received under the said conveyance, the circuit court did not err in giving the instructions asked for by the defendants in error, at the trial below.

In support of the first proposition, Mr. Nelson referred to the acts of

congress of the 27th of April 1816, § 7; and of the 3d March 1799, §§ 30, 36, 49, 53, 56, 62. To show that the duties accrued upon the importation, he referred to *Attorney-General* v. *Stannyforth*, Bunb. 97; Hargrave's Law Tracts 212–13; *The Schooner Boston*, 1 Gallis. 240; *The Mary*, Ibid. 206; *United States* v. *Arnold*, Ibid. 348; s. c. 9 Cranch 104; *Prince* v. *United States*, 2 Gallis. 204; *United States* v. *Vowell*, 5 Cranch 368; *United States* v. *Lyman*, 1 Mason 499. And that the obligation for the payment of the duties thus accruing, attached to the importers personally and immediately, he maintained, by a reference to *Salter* v. *Malapere*, 1 Roll. 382; Com. Dig. tit. Debt, A. 9; 2 Anstr. 558; Park. 279; *United States* v. *Lyman*, 1 Mason 499; *United States* v. *Aborn*, 3 Ibid. 130. The third and fourth propositions, Mr. Nelson stated, were clear, upon the terms of the conveyance, which was for all the property of the grantors. 1 Kent's Com. 229–33; Gordon's Dig. 62, and notes.

Having thus shown a once subsisting claim against S. Smith & Buchanan, whose assignees the plaintiffs in error were, Mr. Nelson proceeded to inquire, whether there was anything in the case made by the evidence offered by the plaintiffs in error at the trial below, to impair or discharge that claim: and he argued that there was not. 1. Because the bonds exhibited in the record operated no extinguishment of the demand for duties. *2. Because the judgments and the proceedings thereon, offered in evidence [*490 by the defendants below, could produce no such effect: and 3. Because the record showed no payment or satisfaction of the claim, in law or in fact.

The bonds, Mr. Nelson argued, did not extinguish the claim for duties arising upon the importations; since, if even taken in pursuance of the acts of congress, they were mere securities, and collateral to the original liability. That the provisions of the acts of congress must be regarded as incorporated in the bonds, and as evidencing the terms upon which they were taken at the custom-house. That those provisions showed, that it never was the design of their enactment, that the bonds should be taken in satisfaction; but, on the contrary, were looked to as mere securities. And in support of this view, Mr. Nelson referred and commented upon the acts of congress, of the 4th of July 1789; of 1799, ch. 128, §§ 36, 49, 62; 1 Mason 482; 3 Ibid. 130; *Knox* v. *Deven*, 5 Ibid. 395; *Tom* v. *Goodrich*, 2 Johns. 213; *Sluby* v. *Chaplin*, 4 Ibid. 465; *United States* v. *Astley*, 3 W. C. C. 508.

But he insisted, that the bonds in question were not statutory instruments; that they were voluntary, and therefore, collateral; and consequently, operated no extinguishment. That no one but the owner or owners, importer or importers, consignee or consignees, was authorized to demand a credit for duties, and to give bonds. Act of 1799, ch. 127, § 62; *Harris* v. *Dennie*, 3 Pet. 304. That in this case, the importers were Hollins & McBlair, and S. Smith & Buchanan. That the bonds were not executed by them, but by John S. Hollins, as principal, and James A. Buchanan and Lemuel Taylor, as sureties. That they were, therefore, the bonds of others than the importers and consignees; of a third person, or mere stranger, which could not operate an extinguishment of the simple-contract debt, they being voluntary.

That John S. Hollins was one of the firm of Hollins & McBlair, Mr. Nelson argued, could make no difference, since the acts of congress provide for no such case; and although it might be true, as between individuals,

that the bond or other specialty of one partner would extinguish a simple-contract debt due from the partnership, the law presuming, in the absence of proof to the contrary, that the creditor, in accepting such bond or specialty, receives it in payment; yet under the acts of congress, bonds of like character could have no such effect: precisely, because no such presumption could exist in relation to an officer purely ministerial, the collector having no authority to assent to any bonds other than such as conform to the requirements of the statute. That such an interpretation of the act of congress
*491] was repugnant *to the obvious policy of its framers, since it would be calculated to defeat the priority claim of the government against partnership effects, which it was their manifest design effectually to protect.

But Mr. Nelson denied, that these were bonds given by a partner for a partnership debt; maintaining, that the evidence and verdict stated in the record showed, that S. Smith & Buchanan were separate importers for their proportions of the cargoes upon which the duties accrued; and that the bonds being given by John S. Hollins, who was not a member of their firm, were clearly the bonds of a stranger, which could not extinguish the simple-contract liability. That the judgments and the proceedings thereon did not extinguish the claim of duties, he maintained, since the bonds being collateral and the obligation created by them co-existing with the original liability, it was competent to the United States to pursue all proper remedies upon the securities, without discharging the original responsibility of the importers; and he referred, in support of this position, to *Drake* v. *Mitchell*, 3 East 251.

To show that there had been no payment in law, he referred to the provisions of the treaty with the King of the French, of the 4th of July 1831, and to the act of congress of the 13th of July 1832; to the *United States* v. *Aborn*, 3 Mason 130; and *Martin* v. *Mechanics' Bank of Baltimore*, 6 Har. & Johns. 235; 2 Esp. 668. That there had been no payment in fact, he showed, by a reference to the correspondence contained in the record.

Upon the first exception, Mr. Nelson contended, there was no error, because Lemuel Taylor was no party to the suit; the United States were the plaintiffs, not only nominally, but substantially and really; and that their right of recovery could be in nowise affected by the state of the accounts between S. Smith & Buchanan and Lemuel Taylor.

Story, Justice, delivered the opinion of the court.—This is a writ of error to the circuit court for the district of Maryland. The original action was *assumpsit*, brought by the United States against the plaintiffs in error, who were the original defendants, to recover from them, as assignees under a general assignment of the property of the firm of Smith & Buchanan, the amount of certain duties alleged to be due from the said firm, upon certain importations in the brig Unicorn and the ship Brazilian, out of the funds in the hands of the assignees, upon the ground of an asserted right of priority of the United States to payment out of the same funds. At the trial, upon the general issue, the material facts appeared as follows:

In the years 1818 and 1819, Smith & Buchanan, and Hollins & McBlair, two separate commercial firms in Baltimore, imported, on their own account, as owners, a quantity of goods from Calcutta in the brig Unicorn and ship
*492] Brazilian above mentioned, *on which the present duties were claimed. Smith & Buchanan were the importers and owners of two-thirds of

the cargo of the ship, and five-ninths of that of the brig; and that proportion went to their possession and use. The remainder of both cargoes belonged to Hollins & McBlair. The entries of both cargoes were made at the custom-house at Baltimore, by John S. Hollins, one of the firm of Hollins & McBlair, as imported in the vessels, respectively, by Hollins & McBlair, and Smith & Buchanan; and Hollins gave bonds for the duties, in the common form, in his own name; and James A. Buchanan, of the firm of Smith & Buchanan, and Lemuel Taylor, who is admitted to be a mere surety, also executed the same bonds. The condition of the bonds was for the payment of the duties on the goods "entered by the above-bounden John S. Hollins, for Smith & Buchanan, and Hollins & McBlair, as imported" in the ship and brig respectively. Upon these bonds, the United States afterwards instituted actions against each of the obligors, and recovered judgments in the circuit court for the district of Maryland. These judgments have been revived, and are now in full force and unreversed. Smith & Buchanan became insolvent; and after the rendition of the judgments, Taylor also became insolvent, under the insolvent laws of Maryland. On Rosewell L. Colt became the trustee of Taylor; and afterwards, under the treaty of indemnity with France, a large sum of money was awarded to him by the commissioners; and a large sum of money was also awarded to Smith & Buchanan, which has been received by the original defendants, as their assignees, and is more than sufficient to pay the sums now claimed by the United States, but not enough to pay the partnership debts of the firm of Smith & Buchanan. Taylor applied to the treasury department for the usual certificates granted to claimants by the awards under the treaty; but they were refused by the department, upon the ground of Taylor's indebtedness to the United States upon the aforesaid bonds and judgments. Since that period, an arrangement has been made between the government and Colt, the trustee, by which a sufficient sum of the moneys so due by Taylor, is reserved in the treasury, to secure the amount of the judgments on the bonds against Taylor, and the residue has been paid over the trustee. And the present action has been brought by the United States, for the benefit of Taylor's trustee, in order to give to the latter the full rights and remedies of the United States to a priority of payment out of the moneys of Smith & Buchanan, in the hands of the defendants, as their assignees. To repel the supposed equity in Taylor, as a surety, defendants offered to prove, that at the period of the application of Taylor for the benefit of the insolvent laws, he was largely indebted to Smith & Buchanan, and in a sum more than sufficient to cover the whole amount due upon the duty bonds aforesaid, and still remained so indebted. The court rejected the evidence, and to this rejection, the defendants excepted; and this constitutes the first bill of exceptions.

*Upon this we have no more to say, than that we think the ruling of the court was clearly right. Whatever might be the merits of such an equitable claim, in any suit brought by Taylor, or his assignee, against Smith & Buchanan, or their assignees; it could have no proper place in a suit brought by the United States to recover demands justly due to them for duties. It was, as to them, *res inter alios acta;* and the United States were not called upon to engage in, or to unravel, any of the accounts and set-offs existing between those parties, in a suit at law like the present. [*493

Afterwards, the United States asked an instruction to the jury, which

was given to the jury, to which the defendants excepted. The defendants then prayed certain instructions to the jury, which the court refused to give; to which refusal, the defendants also excepted. These exceptions are spread at large upon the record, and constitute the second bill of exceptions. It is unnecessary to recite them at large, as they are all resolvable into the leading points which have been so fully argued at the bar; and we shall, therefore, proceed at once to the consideration of these points.

The first question is, whether Smith & Buchanan were ever personally indebted for these duties; or, in other words, whether the importers of goods do, in virtue of the importation thereof, become personally indebted to the United States for the duties due thereon; or the remedy of the United States is exclusively confined to the lien on the goods, and the security of the bond given for the duties. It appears to us clear, upon principle, as well as upon the obvious import of the provisions of the various acts of congress on this subject, that the duties due upon all goods imported constitute a personal debt due to the United States from the importer (and the consignee for this purpose is treated as the owner and importer), independently of any lien on the goods, and any bond given for the duties. The language of the duty act of the 27th of April 1816, ch. 107, under which the present importations were made, declares, that "there shall be levied, collected and paid," the several duties prescribed by the act, on goods imported into the United States. And this is a common formulary in other acts laying duties. Now, in the exposition of statutes laying duties, it has been a common rule of interpretation, derived from the principles of the common law, that where the duty is charged on the goods, the meaning is, that it is a personal charge on the owner, by reason of the goods. So it was held in *Attorney-General* v. ———, 2 Anstr. 558, where a duty was laid on mash in a still; and it was said by the court, that where duties are charged on any articles, in a revenue act, the word "charged" means, that the owner shall be debited with the sum; and that this rule prevailed even when the article was actually lost or destroyed, before it became available to the owner. Nor is there anything new in this doctrine; for it has long been held, that in all such cases, an action of debt lies in favor of the government, against the importer, for the duties, whenever, by *accident, mistake or fraud, no duties, or short duties, have been paid.

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The question has also been asked, at what time the right of the government to the duties accrues, in the fiscal sense of the terms. The answer is, at the time when the goods have arrived at the proper port of entry. This is the established rule, adopted by the government, in all cases where there has been a new act passed, increasing or diminishing the duties to be paid on goods imported after a specified period. The same doctrine was affirmed by this court in the cases of the *United States* v. *Vowell*, 5 Cranch 368; and of *Arnold* v. *United States*, 9 Ibid. 104. But although the duties thus accrue to the government, as a personal debt of the importer, upon the arrival of the goods in the proper port of entry; yet it is but a *debitum in præsenti solvendum in futuro*, according to the requisitions of the revenue collection act of the 2d of March 1799, ch. 128; and therefore, if a deposit of the goods is made by the importer, or a bond is given by him for the duties, pursuant to the provisions of that act, the importer is entitled to the full credit allowed by that act. But it is a mistake to suppose, that if a

deposit is made of the goods, either with or without a bond given for the duties, the rights of the government for the duties are limited to the lien upon the goods; and cannot, if they are lost or destroyed, be made a personal charge against the importer. On the contrary, the revenue collection act of 1799, ch. 128, § 62, expressly declares, that the goods deposited shall be kept by the collector, with due and reasonable care, at the expense and risk of the party on whose account they have been deposited. Our opinion, therefore, on this point, is, that the duties due upon goods imported, constitute a personal debt and charge upon the importer, as well as a lien on the goods themselves.

In the next place, was the debt due for the duties on the goods imported, in the present case, extinguished by giving the bond by Hollins, in the manner before stated? We have no doubt, that these bonds, being voluntary bonds, are valid; and that Hollins and his sureties are estopped to deny their validity. But the question is not, whether they are valid; but whether they are the proper statute bonds, contemplated by the revenue act of 1799, ch. 128. It is to be observed, that the present case is not one where the bonds were given by the sole importer of the goods; so that the sole question would then be, whether the bond of the same party, who was personally liable for the duties, supposing the bond to cover all the duties due and payable on the goods, was an extinguishment of the simple-contract debt for those duties. But the present is a case where one of several partners, and one of several joint importers, has given his separate bonds for the duties due by law, by all the importers, either as partners or as part-owners; and therefore, where the true question is, whether such bonds, under such circumstances, amount to an extinguishment of the debt due by all the *other importers, as partners or as part-owners. It is certainly incumbent upon those who assert the affirmative, to show by some clear [*495 and determinate language of the revenue collection act of 1799, ch. 128, that the collector was thus authorized to take the separate bonds of one of the importers for the debt of all; and that it was the legislative intention, that such separate bonds, when taken, should operate as an extinguishment of the liability of all the other importers. Now, it is plain, that where the goods are received on deposit, the whole goods, and not merely the share of the partner giving the bonds, are liable for the duties.

Upon a careful review of the other provisions of the act, we are equally well satisfied, that in every case within the act, the bond for the duties is required to be given by all the persons who are the importers, whether they be partners or part-owners; and that the collector is not by law authorized to take the separate bond of one of the importers, in extinguishment of the joint liability of all. The language of the 62d section of the act is, "that all duties on goods, wares or merchandise imported, shall be paid, or secured to be paid, before a permit shall be granted for landing the same; and where the amount of such duty on goods imported in any ship or vessel, on account of one person only, or of several persons jointly interested, shall not exceed fifty dollars, the same shall be immediately paid; and if it exceed that sum, shall, at the option of the importer or importers, be paid, or secured to be paid, by bond." Now, construing this language distributively, as in our judgment it ought to be construed, to mean, by the importer, when there is one only, and by all the importers, when there is more than one,

there is not the slighest difficulty in giving full effect to every word of the act. Construe it the other way, and the word "importers" has no appropriate use, which is not included in the other language. The very form of the bond, given in the same section, also shows, that it was the intent of the act, that all the importers should be parties to the bond; for it prescribes, "Know all men by these presents, that we (here insert the name of the importer or consignee; or if by an agent, the name of such agent, and of the importers or consignees, and the sureties, there place of abode, and occupation,) &c." It is not unimportant also, to consider what would be the consequence of a different construction of the act; for if it would lead to great insecurity in the collection of the public revenue, and enable importers to substitute, almost at their own discretion, the liability of one of the firm, or one part-owner, for the liabilities of all, it would open the way not only to many intentional evasions and frauds upon the just right of the government, but also, in cases of the death or insolvency of the acting partner, or part-owner, leave the government without redress against those who had almost exclusively enjoyed all the benefits of the importation. On the other hand, the construction which we put upon the act, imposes the burden upon those who have enjoyed the benefits, and creates a common interest in a *496] vigilant and prompt *discharge of that burden. Nor is there any inconvenience in it; for if all the importers are not present, a letter of attorney may readily be executed, which will meet every exigency of commercial business. And we cannot but think, that the 25th section of the act of 1823, ch. 149, which provides, that any bond to the United States, entered into for the payment of duties, by a merchant belonging to a firm, in the name of such firm, shall equally bind the partner or partners in trade of the person or persons by whom such bond shall have been executed, was intended to meet cases of this sort; and that it demonstrates the understanding of congress, that by the existing law then in force, all the partners were required to join in the bond for the duties.

The remaining point is, whether, under the circumstances of the present case, the government has actually received payment of the duties in controversy. We think it has not. By the payment of the moneys due under the French treaty, and the awards of the commissioners, there was originally in the hands of the government, the sum of $60,000 awarded to Smith & Buchanan, which was properly and primarily applicable to the discharge of these very duties. But by mere mistake, arising from the circumstance that Hollins alone appeared the principal in the bonds, and Smith & Buchanan being unknown to have been the original importers, that sum was paid over by the government to the present defendants, as assignees. Had the facts been known, the present controversy would have stopped at the threshold, by recouping or retaining the amount from the awards. The government has now in its possession the funds, under the awards, due to Taylor, the surety on these bonds; and it certainly had the power, if it pleased, to appropriate the same in payment of the debt. The question is, whether it has so done. Looking to the whole transaction, we are satisfied, that it has not. It retains the funds of Taylor, in its hands, as security for payment, if the present suit should not be successful; and it has allowed the suit to be brought in the name of the United States, for the benefit of Taylor. It has thus carried out the intent and spirit of the act of

1799, ch. 128, § 65, which declares, that the surety paying a bond for duties shall have and enjoy the like advantage, priority or preference for the receipt of the said moneys out of the effects of the insolvent, as are reserved and secured to the United States. We think, then, that no payment has been made, but that Taylor's funds have been held as a mere special deposit for the indemnity of the government, and to abide the event of the suit; and that to give a different construction to the acts of the officers of the government, would defeat their true objects, as well as the purposes of substantial justice. Upon the whole, we are of opinion that the judgment of the circuit court ought to be affirmed.

The case of Nathaniel Williams and another *v.* United States, which was submitted to the court, upon the argument in *the present case, is far less stringent in its circumstances in favor of the defendants; [*497 and involves far less difficulty. The judgment in that case is also affirmed.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Maryland, and was argued by counsel: On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said circuit court in this cause be and the same is hereby affirmed.

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*De la Fayette Wilcox, Plaintiff in error, *v.* John Jackson, on the demise of Murray McConnel, Defendant in error. [*498

Public lands.—Military reservations.—State legislation.

Ejectment for a tract of land in Cook county, Illinois, being a fractional section, embracing the military post called Fort Dearborn; at the time of the institution of the suit, in the possession of the defendant as the commanding officer of the United States. The post was established in 1804, and was occupied by the troops of the United States, until August 16th, 1812, when the troops were massacred, and the fort taken by the enemy; it was re-occupied by the United States in 1816, and continued to be so held until May 1823, during which time some factory houses, for the use of the Indian department, were erected on it; it was evacuated, by order of the war department, in 1823, and was, by order of the department, again occupied by troops, in 1828, as one of the military posts of the United States; was again evacuated in 1831, the government having authorized a person to take and keep possession of it; it was again occupied by troops of the United States, in 1832, and continued so to be, at the commencement of this suit, being generally known at Chicago to be occupied as a military post of the United States. The buildings about the garrison were not sold in 1831, when it was evacuated, although a great part of the movable property in and about it was sold; in 1817, Beaubean bought of an army contractor, for $1000, a house built on the land; there was attached to the house an inclosure, occupied as a garden or field, of which Beaubean continued in possession until 1836. In 1823, the factory houses on the land were sold by order of the secretary of war, and were bought by Beaubean, for $500; of these he took possession, and continued to occupy them, and to cultivate the land, without interruption by the United States, until the commencement of this suit. The United States, in May 1834, built a lighthouse on the land, and kept twenty acres inclosed and cultivated; the land was surveyed by the government of the United States, in 1821; and in 1824, at the instance of the Indian agent, at Chicago, the secretary of war requested the commissioner of the general land-office to reserve this land for the accommodation and protection of the property of the Indian agency; who, in 1821, informed the secretary of war that he had directed this section of land to be reserved from sale, for military purposes. In May 1831, Beaubean claimed this land, at the land-office in Palestine, for pre-emption; this claim was rejected, and, by the commissioner of the land-office, he was, in February 1832, informed that the land was reserved for military purposes;

this information was also given to others who applied on his behalf. In 1834, he applied for this land, in the office in Danville, and his application was rejected; in 1835, Beaubean applied for the land to the land-office at Chicago, when his claim to pre-emption was allowed; and he paid the purchase-money, and procured the register's certificate; Beaubean sold and conveyed his interest to the plaintiff in the ejectment: *Held*, that Beaubean acquired no title to the land by his entry; and that the right of the United States to the land was not divested or affected by the entry of the land-office at Chicago; nor by any of the previous acts of Beaubean.[1]

The decision of the register and receiver of a land-office, in the absence of fraud, would be conclusive as to the facts, that the applicant for the land was then in possession, and of his cultivating the land during the preceding year; because these questions are directly submitted to those officers. Yet, if they undertake to grant pre-emptions to land, on which the law declares they shall not be granted; then they are acting upon a subject-matter clearly not within their jurisdiction; as much so, as if a court, whose jurisdiction was declared not to extend beyond a given sum, should attempt cognisance of a case beyond that sum.

Appropriation of land by the government is nothing more or less than setting it apart for some particular use. In the case before the court, there was an appropriation of the land, not only in fact, but in law, for a military post, for an Indian agency, and for the erection of a light-house.

By the act of congress of 1830, all lands were exempted from pre-emption which were reserved from sale by order of the president of the United States. The president speaks and acts through the heads of the several departments, in relation to subjects which appertain to their respective duties. Both military posts and Indian affairs, including agencies, belong to the
*499] war department; a reservation of lands, made at the request of the *secretary of war for purposes in his department, must be considered as made by the president of the United States, within the terms of the act of congress.[2]

Whensoever a tract of land shall have once been legally appropriated to any purpose, from that moment, the land thus appropriated becomes severed from the mass of public lands, and no subsequent law, or proclamation, or sale, would be construed to embrace it, or to operate upon it, although no other reservation were made of it.

The right of pre-emption was a bounty extended to settlers and occupants of the public domain; this bounty, it cannot be supposed, was designed to be extended to the sacrifice of public establishments, or of great public interests.

Nothing passes a perfect title to public lands, with the exception of a few cases, but a patent; the exceptions are, where congress grants lands, in words of present grant; the general rule applies as well to pre-emptions as to other purchases of public lands.

The act of the legislature of Illinois, giving the right to the holder of a register's certificate of the entry of public lands, to recover possession of such lands in an action of ejectment, does not apply to cases where a paramount title to the lands is in the hands of the defendant, or of those he represents. The exception in the law of Illinois, applies to cases in which the United States have not parted with the title to the land, by granting a patent for it.

A state has a perfect right to legislate as she may please in regard to the remedies to be prosecuted in her courts; and to regulate the disposition of the property of her citizens, by descent devise or alienation; but congress are invested, by the constitution, with the power of disposing of the public land, and making needful rules and regulations respecting it.

Where a patent has not been issued for a part of the public lands, a state has no power to declare any title, less than a patent, valid against a claim of the United States to the land; or against a title held under a patent granted by the United States.

Whenever the question, in any court, state or federal, is, whether the title to property which had belonged to the United States has passed, that question must be resolved by the laws of the United States. But whenever the property has passed, according to those laws, then the property, like all other in the state, is subject to state legislation; so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States.

The judgment of every tribunal, acting judicially, whilst acting within the sphere of its jurisdiction, where no appellate tribunal is created, is final; and even where there is such an appellate power, their judgment is conclusive, where it only comes collaterally in question, so long

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[1] See United States *v.* Fitzgerald, 15 Pet. 407.

[2] Wolsey *v.* Chapman, 101 U. S. 755.

as it is unreversed. But directly the reverse is true, in relation to the judgment of any court, acting beyond the pale of its authority. This principle is concisely and accurately stated by this court in the case of Elliott *v.* Peirsol, 1 Pet. 340.

Jackson *v.* Wilcox, 2 Ill. 344, reversed.

ERROR to the Superior Court of the state of Illinois. In the circuit court of Cook county, in the state of Illinois, an action of ejectment was commenced, in February 1836, by John Jackson, on the demise of Murray McConnel, against De la Fayette Wilcox, for the recovery of a part of the military post of Fort Dearborn, at Chicago, in the state of Illinois ; the defendant being then in possession of the premises, as the commander of the post. The defendant appeared, and after the usual pleadings, the cause was brought to trial in October 1836, and submitted to the court on an agreed statement of facts, which was to be taken as if found as a special verdict.

The premises sued for were part of fractional section 10, in township 39 north, of range 14 east of the third principal meridian, in the county of Cook, and state of Illinois ; and embraced the military post called Fort Dearborn, of which post, at the time of the bringing of this suit, and the service of the declaration therein, the said defendant, De la Fayette Wilcox, was in the possession, *and was the commanding officer under the authority of the United States ; which post was established by the [*500 United States in 1804, and was thereafter occupied by the troops of the United States, till August 16th, 1812, when the troops were massacred, and the post taken by the enemies of the country. It was re-occupied by the troops, on the 4th of July 1816 ; in which year, the United States caused to be built upon the fractional section, No. 10, T. 39 N., R. 14 east, some factory houses for the use of the Indian department. The troops continued to occupy the post until the month of May 1823, when it was evacuated by order of the government, and was left in possession of Dr. A. Wolcott, Indian agent at Chicago. On the 19th of August, in the year 1828, the military post was again occupied by the troops of the government, acting under the order of the secretary of war, as one of the military posts of the United States. The post was again evacuated by the troops of the government, in the month of May 1831, though the government never gave up the possession of the military post, called Fort Dearborn ; but left the same in the possession of one Oliver Newberry, who authorized George Dole to take and keep the same in repair ; which said Dole accordingly did. Said post was again occupied by the troops of the government, in June 1832, under the command of Major Whistler, an officer in the army of the United States. At the time Major Whistler took possession, being at the time of the war with the Sac and Fox Indians, several hundred persons were in the fort for security against the Indians. The military post had been occupied by the troops, and was generally known at Chicago to be so occupied, from that date up to the commencement of this suit, and was still used for that purpose.

When the military post was evacuated in 1831, the quartermaster at the post, acting under orders, sold a greater part of the movable property, in and about the garrison, belonging to the government, but sold none of the buildings belonging to the military post. In the year 1817, John Baptiste Beaubean bought of one John Dean, who was an army-contractor at the post, a house built upon said land, by the said Dean, and gave him therefor

$1000 ; attached to the house was an inclosure used and occupied by said Dean, as a garden and field, and Mr. Beaubean then took possession of the house and inclosure, and continued in possession, cultivating a part of the inclosure every year, from the year 1817 to the 17th of June 1836. In 1823, the factory houses built at the post, upon the tract of land, were, by order of the secretary of the treasury, sold, and Capt. Henry Whiting became the purchaser thereof. In the same year, Whiting sold said improvements to the American Fur Company, and the company, for the sum of $500, sold to said Beaubean, who took possession thereof, and continued to occupy the same, together with a part of the quarter section of land, to the *date
*501] of the commencement of this suit. Mr. Beaubean continued to occupy said houses and inclosure upon the land, and to cultivate a part of the land, unmolested and undisturbed by any person whatever, from the year 1817 up to the day of the commencement of this suit. The land in question was surveyed by the government in the year 1821.

After the military post was re-occupied by the United States troops in 1832, as before stated, to wit, before the first day of May 1834, the United States built a lighthouse upon part of the land, and had kept constantly inclosed and cultivated, for the use of the said garrison, at least twenty acres of said land. The United States troops, by order and consent of the government, had also used and occupied various other government lands near and adjoining the quarter section of land.

On the 2d of September 1824, Dr. A. Wolcott, Indian agent, then stationed at Chicago, wrote the following letter to the secretary of war of the United States, to wit :

"Fort Dearborn, Chicago, Sept. 2, 1824.

"Sir :—I have the honor to suggest to your consideration, the propriety of making a reservation of this post, and the fraction on which it is situated, for the use of this agency. It is very convenient for that purpose, as the quarters afford sufficient accommodation for all the persons in the employ of the agency, and the storehouses are safe and commodious places for the provisions and other property that may be in charge of the agent. The buildings and other property, by being in possession of a public officer, will be preserved for public use, should it ever be necessary to occupy them again with a military force. As to the size of the fraction, I am not certain, but I think it contains about sixty acres ; a considerable greater tract than that is under fence ; but that would be abundantly sufficient for the use of the agency, and contains all the buildings attached to the fort, such as a mill, barn, stable, &c., which it would be desirable to preserve. I have the honor to be, &c., Alexander Wolcott, Jun.,

Hon. J. C. Calhoun, Secretary of War. Indian Agent."

Which letter John C. Calhoun, then secretary of war of the United States, on the 30th of September 1824, inclosed with the following note to George Graham, Esq., commissioner of the general land-office of the United States.

"Department of War, 30th Sept. 1824.

"Sir :—I inclose herewith a copy of a letter from Dr. Wolcott, Indian agent at Chicago, and request you will direct a reservation to be made for

the use of the Indian department at that post, agreeably to his suggestions. I have the honor to be, &c. J. C. CALHOUN."

"GEORGE GRAHAM, Esq.,
Commissioner of the General Land-Office, Treasury Department."

*And thereupon, on the first day of October 1824, George Graham then commissioner of the land-office, addressed a letter in reply, to the [*502 secretary of war, at the same time subjoining to the letter of the said secretary of war, this note, to wit: "Answered the first of October 1824, and the frac. sec. 10, T. 39 N., R. 14 E., colored and marked on the map, as reserved for military purposes." The letter in reply was as follows, to wit:

"General Land-Office, 1st of October 1824.

"Sir:—In compliance with your request, I have directed that the fractional section 10, Township 39 N., R. 14 E., containing 57.50 acres, and within which Fort Dearborn is situated, should be reserved from sale for military purposes. I am, &c. GEORGE GRAHAM."

"HON. J. C. CALHOUN, Secretary of War."

Which fractional section, mentioned in the foregoing letter of George Graham, embraced the premises sued for, and Fort Dearborn, occupied by the United States as aforesaid.

After the writing and receipt of the letters aforesaid, to wit, on the 29th day of May 1830, congress passed a law granting the right of pre-emption upon the public lands to every person who cultivated any part of a quarter section of said land in 1829, and was in the actual possession thereof, on the 29th day of May 1830; but which pre-emption right did not extend to any land which was reserved from sale by act of congress, or by order of the president, or which might have been appropriated for any purpose whatsoever, or for the use of the United States, or either of the states in which any of the public lands might be situated. Mr. Beaubean having cultivated a part of F section, in 1829, and having been in possession of a part so cultivated, on the 29th day of May 1830; on the 7th day of May 1831, made application to the register and receiver of the United States land-office, at Palestine, in Illinois, and offered to prove a pre-emption upon the land, and purchase the same at private sale, under the pre-emption law, which claim of pre-emption upon the land was not, by the register and receiver, at Palestine, allowed to Mr. Beaubean.

One Robert Kenzie, on the 7th day of May 1831, made application to the register and receiver of the land-office, to be allowed to enter at private sale a part of the same fractional section 10; and the claim by the said register and receiver was then passed and allowed, and Robert Kenzie was then permitted to enter at private sale, under the pre-emption law, the north fraction of fractional section ten.

After the application of Mr. Beaubean to the register and receiver, at Palestine, as aforesaid, to wit, on the 7th and 12th of May 1831, Joseph Kitchell, then register of the land-office, addressed letters to Elijah Hayward, Esq., then commissioner of the general land-office of the United States, informing him of the application of the said Beaubean to enter said S. W. F section 10, *town. 39 north, of range 14 east, under the pre-emption act; and on the 2d of November 1831, Mr. Beaubean addressed a [*503

letter to the said Hayward, commissioner, &c., stating that in the month of May preceding, he had filed in the office at Palestine aforesaid, proof of his right of pre-emption to the land, and insisting, that he was entitled to have the claim allowed ; and in answer thereto, was informed by the commissioner, by letter, dated the 2d of February 1832, that said south-west quarter of said fractional section ten, T. 39 N., R. 14 E., was reserved for military purposes. On the 1st of October 1824, several other persons, in behalf of said Beaubean, after his application as aforesaid, prior to the said 2d of February 1832, made inquiry by letter of said commissioner touching the same, and were informed by the commissioner that the tract of land had been reserved for military purposes, and said Beaubean's application as aforesaid was rejected.

Afterwards, to wit, on the 19th day of June 1834, congress passed an act to revive the pre-emption law of the 29th of May 1830, by the first section of which act was provided, that every settler or occupant of the public lands, prior to the passage of that act, who was then in possession, and cultivated any part thereof, in 1833, should be entitled to all the benefits and privileges of the act, entitled an act to grant pre-emption rights to settlers on public lands, approved 29th May 1830, and the act was hereby revived, and should continue in force two years from the passage of this act and no longer ; and Mr. Beaubean having cultivated a part of the fractional quarter of section ten, in 1833, and having been in the actual possession and occupancy of the part, so by him cultivated, on the 19th day of June 1834, the day of the passage of the last-recited law, did, in the month of July 1834, apply to the register and receiver of the United States land-office at Danville, in Illinois, for leave to prove a pre-emption, and enter the fractional quarter, under the last-recited act ; which application and claim of Beaubean was rejected by the said register and receiver at Danville aforesaid, who informed Beaubean that said land was reserved for military purposes.

After the writing of the letters by Dr. Wolcott, Indian agent, and J. C. Calhoun, secretary of war, and George Graham, commissioner of the general land-office, above before referred to and set forth, to wit, on the 26th day of June 1834, congress, by a law approved upon that day, created two additional land-districts in Illinois ; one called north-west and the other the north-east land districts of the state of Illinois, and the last-mentioned district included the land in controversy. By the fourth section of said act, it was provided, that the president should be authorized, as soon as the survey should be completed, "to cause to be offered for sale, in the manner prescribed by law, all the lands lying in said land district, at the land-offices in the respective districts in which the lands so offered is embraced, reserving only section sixteen in each township, the tract reserved for the village of Galena ; such other tracts as have been granted to individuals
*504] *and the state of Illinois, and such reservation as the president shall deem necessary to retain for military posts ; any law of congress heretofore existing to the contrary notwithstanding." It was further provided by said act, that there "shall be established in each of said land-districts a land-office, at such time and place as the president may deem necessary ;" and a land-office was established in said north-east land district, before the 1st of May 1835, which is the land-office at Chicago. After the passage

of this act, and after the land-office aforesaid was established, the president of the United States, on the 12th day of February 1835, made and published his proclamation, directing various lands in said north-eastern land district to be sold at said land-office at Chicago. Among said lands so proclaimed for sale, is the said fractional section 10, in town. 39 N., R. 14 E., unless the same was excepted by the general exception in said proclamation, in the words following, to wit: "The lands reserved by law for the use of schools, and for other purposes, will be excluded from the sale."

The lands were directed by the proclamation to be sold at Chicago land-office aforesaid, on the 15th day of June 1835, and before the said 15th day of June, to wit, in the month of April 1835, the commissioner of the general land-office caused to be transmitted to said land-office at Chicago the extended plat of the land in the said proclamation mentioned, marking and coloring upon said plat certain lands to be reserved from sale; but neither the fractional section 10, nor any of the divisions thereof, were so marked or colored to be reserved from sale.

At the bottom of the president's proclamation was a general notice requiring all persons who claimed the right of pre-emption to any of the lands in the proclamation mentioned, to appear before the register and receiver of the land-office, before the day appointed by said proclamation for the sale of said lands, and prove their pre-emption; and after the notice, the said John Baptiste Beaubean did, on the 28th day of May 1835, appeared before the register and receiver of the land-office at Chicago, there proved to the satisfaction of the said register and receiver, that he was entitled to the right of pre-emption to the said south-west fractional quarter of fractional section ten, and Mr. Beaubean did, on the 28th day of May 1835, enter and purchase at private sale, of the United States and of the register of said land-office, the south-west fractional section ten, and then and there paid to the receiver of said land-office one dollar and twenty-five cents per acre, in full payment for said land, and obtained from the receiver aforesaid the following receipt, to wit:

"Land Office, at Chicago, Illinois, 28th May 1835.

"Pre-emption Act, 19th June 1834.

No. 6. Received of John Baptiste Beaubean, of Cook county, Illinois, the sum of ninety-four dollars and sixty-one cents, being in *full payment for the south-west fractional quarter of section No. 10, in township No. 39 north, of range No. 14 east of the third principal meridian, containing seventy-five acres and sixty-nine hundredths of an acre, at the rate of $1.25 per acre. [*505

E. D. Taylor, Receiver.

$94 61.—Michigan paper."

Mr. Beaubean also obtained from the register of the last-mentioned land-office a certificate, in the words and figures following, to wit:

"Land Office at Chicago, Illinois, May 28th, 1835.

"No. 6. It is hereby certified, that, in pursuance of law, John Baptiste Beaubean, of Cook county, state of Illinois, on this day purchased of the register of this office, the lot or south-west fractional quarter of section number ten, in township number 39 north, of range fourteen east, containing seventy-five and sixty-nine hundredths acres, at the rate of one dollar

and twenty-five cents per acre, amounting to ninety-four dollars and seventy-five cents, for which the said John Baptiste Beaubean has made payment in full, as required by law. Now, therefore, be it known, that on the presentation of this certificate to the commissioner of the general land-office, the said John Baptiste Beaubean shall be entitled to receive a patent for the lot above described. JAMES WHITLOCK, Register."

"Pre-emption act, 1834."

Which certificate was presented to the commissioner of the general land-office, and filed in the office.

Afterwards, to wit, on the 4th day of March 1836, the register of the said land-office at Chicago made, signed, and delivered to Mr. Beaubean his certificate, in the words and figures following, to wit:

"Land-Office Chicago, Illinois.

"I, James Whitlock, register of the land-office at Chicago, in the state of Illinois, do hereby certify, that John Baptiste Beaubean, of the town of Chicago, and state of Illinois, did, on the 28th day of May, in the year of our Lord 1835, under and by virtue of an act of congress, passed on the 19th day of June 1834, entitled, "an act to revive an act granting pre-emption rights to settlers on the public lands, passed the 29th day of May 1830, prove to the satisfaction of the register and receiver, that the said Beaubean was entitled to the right of pre-emption, under said act of the 19th of June 1834, to the south-west fractional quarter of fractional section number ten, in township 39 north, of range number fourteen east, and the said Beaubean did then enter and purchase of the United States, and of the register of said office, the said south-west fractional quarter of fractional section number ten, in township thirty-nine north, of range number fourteen east, and the said Beaubean did then enter and purchase of the United States, and of the register of said office, the said south-west fractional quarter of fractional section number ten, in township number thirty-nine north, of range number fourteen east of the third principal meridian, situated in the district of lands offered for sale at the land-office at Chicago aforesaid, and
*506] is included in the north-east *land-district of the state of Illinois, which tract of land contains seventy-five acres and sixty-nine hundredths of an acre; for which tract of land he, the said Beaubean, paid the sum of ninety-four dollars and sixty-one cents, being one dollar and twenty-five cents per acre, in full payment for the same. All of which appears by the papers on file in said land office, and by the maps, plats and records of said office now here. Given under my hand, as register as aforesaid, at the land-office aforesaid, this 4th day of March, in the year of our Lord 1836.

JAMES WHITLOCK, Register."

Afterwards, to wit, on the 2d day of July 1836, congress passed an act entitled an act to confirm the sales of public lands in certain cases: by the second section of which, it was provided, that "in all cases where any entry has been made under the pre-emption laws, pursuant to instructions sent to the register and receiver from the treasury department, and the proceedings have been in all other respects fair and regular, such entries and sales are hereby confirmed, and patents shall be issued thereon as in other cases."

It was admitted, that the defendant, Wilcox, at the commencement of

this suit, and at the time of the service of the declaration in ejectment therein, was in the occupancy and possession of the premises in said declaration mentioned, which was a stockade of pickets, including some wooden buildings in which the soldiers and officers resided, and that the rents and profits of said premises then, and still were of the value of three dollars per month. It was also admitted, that said defendant Wilcox then and still was an officer in the United States army, and was ordered into possession and command of the military post on the premises, together with the United States troops under his command, by order of the secretary of war of the United States; and that said Wilcox claimed no right of ownership in himself to the land, but was in possession of and occupied the same, not in his own right, but as an officer of the army of the United States only, in the command of the post, acting under order of the secretary of war, and of his superior officer, and of the United States.

After the purchase of the said land by Mr. Beaubean, as before stated, to wit, on the sixth day of February 1836, he, the said Beaubean, by deed duly executed, acknowledged and recorded, according to the laws of the said state of Illinois, for and in consideration of the sum of ——— dollars, therein expressed, sold and conveyed the said premises in the declaration mentioned to Murray McConnel, the lessor of the plaintiff; who purchased with a knowledge that a controversy existed between Mr. Beaubean and the government about said land.

It was further admitted, that after the purchase of the land by J. B. Beaubean, as before stated, Elijah Hayward, Esq., then commissioner of the general land-office, on the 31st of July 1835, addressed a letter to the register and receiver of the land-office *at Chicago, stating that it had been represented to the department that the land-officers at Chicago had [*507 permitted to be sold said south-west fractional section ten, T. 39 N., R. 14 E., including the site of Fort Dearborn, and informing them, that such sale was invalid, in consequence of the reservation and appropriation of said fraction for military purposes, since the year 1824, and directing the receiver to refund to Mr. Beaubean the amount of the purchase-money paid thereon, which money was tendered by the receiver to Mr. Beaubean, who refused to receive the same.

On the 23d of January, in the year 1834, Elijah Hayward, then commissioner of the general land-office, addressed a note to the Hon. Lewis Cass, then secretary of war of the United States, inclosing a copy of the letter of the 30th of September 1824, from the then secretary of war, Mr. Calhoun, requesting that said tract of land at Chicago, upon which Fort Dearborn was situated, might be reserved for the Indian department, and a copy of the commissioner Graham's reply, of the 1st of October 1824, before set forth, stating that he had directed the land to be reserved for military purposes, and after stating that the tract of land in question, designated as fractional section ten, T. 39 N., R. 14 E., was claimed under the act of congress, granting pre-emption rights; and Mr. Commissioner Hayward then requested said Secretary Cass to advise the office, whether it was then (to wit, on the 23d of January 1834), needed by the war department, and if so, whether it is considered a military reservation, or as a reservation for the use of the Indian department; and on the 21st of March 1834, the secretary of war addressed a letter, in answer to the inquiry of the commissioner, informing

him that the reservation at Chicago, alluded to in the letter of the commissioner, of the 23d January 1834, was wanted, and was actually used for military purposes.

It was admitted, that various persons, from time to time, had resided upon the fractional quarter section ten, as well as Mr. Beaubean, but all those persons were all, in some way, connected with the army, and acting under the command of the United States' officers; and that one Samuel T. Brady (who was a settler at said military post), in June 1835, presented his claim to the right of pre-emption to the land, before the register and receiver of the said land-office at Chicago, but which claim was rejected by the land-officers, or never acted upon by them.

All the facts above stated were admitted to be true; but they are not admitted to be evidence in the cause, unless the court should be of opinion, upon the hearing of the case, that the facts, or any of them, would be admissible as evidence, if offered in evidence by one party, and objected to by the other, upon the trial of the cause before a jury.

It was agreed, that if the court should be of opinion, upon the hearing of the case, that the law of the case was with the plaintiff, a judgment should be rendered, that he recover its term aforesaid; and that he have his writ of possession, &c., and that a judgment be rendered *against the defendant, in favor of the plaintiff, for the use of the said lessor, for the amount of the rents and profits in the said plaintiff's declaration mentioned, together with his costs. But should the court be of opinion, that the law of the case was with the defendant, then the plaintiff should take nothing by his suit, and a judgment should be rendered against the lessor of the plaintiff, for the costs of this suit. Each party retained the right to remove the cause to the supreme court of the state of Illinois, by appeal or writ of error.

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The judge of the circuit court of Illinois gave judgment for the defendant; and an appeal was taken to the supreme court of Illinois, by which court, the judgment of the circuit court was reversed, and judgment entered for the plaintiff below. To reverse this judgment, this writ of error was sued out, at the instance of the United States; they being the parties interested in the case.

The case was argued by *Butler* and by *Grundy*, Attorney-General, for the plaintiffs; and by *Key* and *Webster*, for the defendant.

For the *plaintiff* in error, it was contended:—

I. Even if it be admitted, that Beaubean was entitled to right of pre-emption, and that the sale and the certificates thereof were properly made to him; still the plaintiff cannot recover in this suit. 1. On the true construction of the several acts of congress applicable to the case, a patent is necessary to the completion of the legal title, and nothing short of it can, as against the United States, defeat their title in an action of ejectment. 2. The plaintiff can derive no aid from the law of Illinois, referred to in the opinions of the courts below; because that law, if it attempts to make the certificate of the register of the land-office evidence of title, as against the United States, is repugnant to the ordinance of 1787; to the constitu-

tion of the United States ; and to the acts of congress for the disposal of the public lands ; and is, therefore, null and void.

II. The land-officers at Chicago had no jurisdiction or authority to allow, or act on, the pre-emption claim of Beaubean ; and the entry and pretended purchase by him were, therefore, as against the United States, utterly null and void : 1. Beaubean's possession and occupancy were subject to the control of the officers and troops of the United States stationed at Fort Dearborn ; and therefore, he could not acquire, within the meaning of the acts of congress, a pre-emption right to any part of the premises. 2. The premises in question were withdrawn from the general operation of the pre-emption and other laws, by the act of congress of March 3d, 1819, "to authorize the sale of certain military sites." *3. If not so withdrawn, they were yet excepted from the pre-emption laws of the 29th of [*509 May 1830, and the 19th of June 1834 ; because reserved and appropriated, or at least appropriated, for use of the United States, within the meaning of those acts. 4. The act of June 26th, 1834, creating additional land-districts, gives no right of pre-emption ; and the plaintiff can, therefore, derive no title therefrom ; and the premises were also excepted from that law, because reserved, within the meaning thereof, as necessary to be retained for a military post.

Barbour, Justice, delivered the opinion of the court.—This is a writ of error to the supreme court of the state of Illinois, prosecuted under the 25th section of the judiciary act of 1789. It was an action of ejectment, brought by the defendant in error against the plaintiff in error. From an agreed case stated in the record, the following appear to be the material facts upon which the questions to be decided arise.

The land in question is part of fractional section 10, in township 39 north, of range 14 east of the third principal meridian, in the county of Cook, and state of Illinois ; and embraces the military post called Fort Dearborn, of which post, at the time of bringing the suit, Wilcox was in possession, as the commanding officer of the United States ; which post was established by the United States in 1804, and was thereafter occupied by the troops of the United States States, until the 16th August 1812, when the troops were massacred, and the post taken by the enemy. It was re-occupied in 1816, when the United States built upon said fractional section some factory houses for the use of the Indian department. The troops continued to occupy it until May 1823, when it was evacuated by order of the government, and was left in possession of the Indian agent at Chicago. In August 1828, it was again occupied by the troops, acting under the orders of the secretary of war, as one of the military posts of the United States. It was again evacuated by the troops, in May 1831 ; but the government never gave up possession of it, but left it in possession of one Oliver Newberry, who authorized a certain George Dole to take and keep it in repair ; which he accordingly did. It was again occupied by the troops of the government, in June 1832, under command of an officer of the army of the United States. It has been occupied by the troops, and was generally known at Chicago to be so occupied, from that time up to the commencement of the suit ; and was, at the time of the trial, still used for that purpose. When it was evacuated in 1831, the quartermaster at the post, acting under orders,

sold the greater part of the movable property in and about the garrison, belonging to the government, but sold none of the buildings. In the year 1817, John B. Beaubean bought of one John Dean, who was an army contractor at the post, a house built upon the land by Dean, at the price of $1000 ; there was attached to the house an inclosure occupied by Dean as a garden and field ; Beaubean then took possession *of the house and inclosure, and continued in possession, cultivating a part of the inclosure every year, from 1817 to 1836. In 1823, the factory houses on the land at said post were sold by order of the secretary of the treasury, which, after an intermediate sale, were bought by Beaubean, at $500 ; who took possession, and continued to occupy the same, together with a part of the quarter section of land, until the commencement of this suit. Beaubean continued to occupy the houses and inclosure, and to cultivate a part of the land, without interruption, from 1817 to the commencement of this suit. The land was surveyed by government in 1821. Since it was re-occupied by the troops in 1832, and before the 1st of May 1834, the United States built a lighthouse on part of the land, and have kept at least twenty acres constantly inclosed and cultivated for the use of the garrison. In the year 1824, at the instance of the then Indian agent at Chicago, who suggested that it would be convenient for the accommodation of the persons and protection of the property of the agency, the secretary of war requested the commissioner of the general land-office to direct a reservation to be made for the use of the Indian department at that post ; and in October 1824, the commissioner answered, saying that he had directed the section now in question to be reserved from sale, for military purposes. In May 1831, Beaubean made a claim for pre-emption of the land in question, at the land-office in Palestine, which was rejected. In February 1832, in answer to a letter from Beaubean on the subject, the commissioner of the general land-office informed him, that the land in question was reserved for military purposes. The same information was given to others who made application in behalf of Beaubean. In 1834, he made claim for a pre-emption in the same, at the Danville land-office, which was also rejected. In 1835, Beaubean applied to the land-office at Chicago, when his claim to pre-emption was allowed ; and he paid the purchase-money, and procured the register's certificate thereof. Wilcox went into and continued in possession, claiming no right of ownership ; but as an officer of the United States only, in command of said post, acting under the orders of the secretary of war, his superior officer, and the United States. Beaubean sold and conveyed his interest to the lessor of the plaintiff.

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Upon this state of facts, two questions arise, which, in our opinion, embraces the whole merits of the case ; and which we will now proceed to examine. The first is, whether, under the facts of the case, and the law applying to them, Beaubean acquired any title whatsoever to the land in question? The second is, whether if he did acquire any title at all, is it such an one as will enable the lessor of the plaintiff to recover in this action?

As to the first question. The ground of the claim is the right of Beaubean as a settler, to a pre-emption, under the act of the 19th June 1834, entitled, "an act to revive an act granting pre-emption rights to settlers on the public lands, passed 29th of May 1830." Now, as this act gives to the

persons claiming under it the benefits *and privileges provided by the act of 1830, which it revives, we must look to this last act, in order to ascertain what are those benefits and privileges, or, in other words, what is the character of the pre-emption right thus claimed, and on what lands the claim is allowed to operate. It authorizes every settler or occupant of the public lands, under the circumstances therein stated, to enter with the register of the land-office in which the land lies, by legal sub-divisions, a quantity of land, not exceeding a quarter section, subject to the following limitations and restrictions: "That no entry or sale of any land shall be made under the provisions of the act, which shall have been reserved for the use of the United States, or either of the several states, or which is reserved from sale by act of congress, or by order of the president, or which may have been appropriated for any purpose whatsoever."

Before we proceed to inquire whether the land in question falls within the scope of any one of these prohibitions, it in necessary to examine a preliminary objection which was urged at the bar, which, if sustainable, would render that inquiry wholly unavailing. It is this: that the acts of congress have given to the registers and receivers of the land-offices the power of deciding upon claims to the right of pre-emption; that upon these questions they act judicially; that no appeal having been given from their decision, it follows as a consequence, that it is conclusive and irreversible. This proposition is true, in relation to every tribunal acting judicially, whilst acting within the sphere of its jurisdiction, where no appellate tribunal is created; and even when there is such an appellate power, the judgment is conclusive, when it only comes collaterally into question, so long as it is unreversed. But directly the reverse of this is true, in relation to the judgment of any court acting beyond the pale of its authority. The principle upon this subject is concisely and accurately stated by this court in the case of *Elliott* v. *Peirsol*, 1 Pet. 340, in these words: "Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But if it act without authority, its judgments and orders are regarded as nullities; they are not voidable, but simply void." Now, to apply this. Even assuming that the decision of the register and receiver, in the absence of fraud, would be conclusive as to the facts of the applicant then being in possession, and his cultivation during the preceding year, because these questions are directly submitted to them; yet if they undertake to grant pre-emptions in land in which the law declares they shall not be granted, then they are acting upon a subject-matter clearly not within their jurisdiction; as much so as if a court, whose jurisdiction was declared not to extend beyond a given sum, should attempt to take cognisance of a case beyond that sum.

We now return to the inquiry, whether the land in question falls within any of the prohibitions contained in the act of congress. Amongst others, lands, which may have been appropriated for any purpose *whatsoever, are exempt from liability to the right of pre-emption. Now, [*512 that the land in question has been appropriated, in point of fact, there can be no doubt, for the case agreed states that it has been used from the year 1804, until and after the institution of this suit, as well for the purpose of a military post, as for that of an Indian agency, with some occasional interrup-

tion. Now, this is appropriation, for that is nothing more nor less than setting apart the thing for some particular use. But it is said, that this appropriation must be made by authority of law. We think that the appropriation in this case, was made by authority of law. As far back as the year 1798, see act of May 3d, of that year (1 U. S. Stat. 554), an appropriation was made for the purpose, amongst other things, of enabling the president of the United States to erect fortifications in such place or places as the public safety should, in his opinion, require. By the act of 21st of April 1806 (2 Ibid. 402), the president was authorized to establish trading houses at such posts and places, on the frontiers, or in the Indian country, on either or both sides of the Mississippi river, as he should judge most convenient for carrying on trade with the Indians. And by act of June 14th, 1809, he was authorized to erect such fortifications as might, in his opinion, he necessary for the protection of the northern and western frontiers. We thus see, that the establishing trading houses with the Indian tribes, and the erection of fortifications in the west, are purposes authorized by law; and that they were to be established and erected by the president. But the place in question is one at which a trading house has been established, and a fortification or military post erected. It would not be doubted, we suppose, by any one, that if congress had by law directed the trading house to be established and the military post erected, at Fort Dearborn, by name; that this would have been by authority of law. But instead of designating the place themselves, they left it to the discretion of the president, which is precisely the same thing in effect. Here then is an appropriation, not only for one but for two purposes, of the same place, by authority of law. But there has been a third appropriation in this case, by authority of law. Congress, by law, authorized the erection of a lighthouse at the mouth of Chicago river, which is within the limits of the land in question, and appropriated $5000 for its erection; and the case agreed states, that the lighthouse was built on part of the land in dispute, before the 1st of May 1834. We think, then, that there has been an appropriation, not only in fact but in law.

There would be difficulty in deciding to what extent this appropriation reached, if there were not materials furnished by the record which reduce it to precision. At the request of the secretary of war, the commissioner of the general land-office, in 1824, colored and marked upon the map this very section, as reserved for military purposes, and directed it to be reserved from sale for those purposes. We consider this, too, as having been done by authority of law; for amongst other provisions in the *act of 1830, all hands are exempted from pre-emption, which are reserved from sale by order of the president. Now, although the immediate agent, in requiring this reservation, was the secretary of war, yet we feel justified in presuming, that it was done by the approbation and direction by the president. The president speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties. Both military posts and Indian affairs, including agencies, belong to the war department. Hence, we consider the act of the war department, in requiring this reservation to be made, as being in legal contemplation the act of the president; and consequently, that the reservation thus made was, in legal effect, a reservation made by order of the president, within the terms of the act of congress.

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It is argued, however, that by the 4th section of the act of the 26th of June 1834, the president was authorized to cause to be sold all the lands in the north-east district of the state of Illinois, embracing the land in question, with certain reservations only, within which it is contended, that the land in question is not included; that a proclamation was issued, directing various lands in said district to be sold, and that amongst the lands so proclaimed, was the land in question, unless excepted by the following exception "the lands reserved by law for the use of schools, and for other purposes, will be excluded from the sale." And that an extended plat was forwarded from the general land-office, marking and coloring certain lands to be reserved from sale; but that the land in question was not marked or colored, to be reserved from sale.

In the first place, we remark, that we do not consider this law as applying at all to the case. That has relation to a sale of lands, in the manner prescribed by general law, at public auction, whilst the claim to the land in question is founded on the right of pre-emption, and governed by different laws. The very act of 19th of June 1834, under which this claim is made, was passed but one week before the one of which we are now speaking, thus showing that the provisions of the one were not intended to have any effect upon the subject-matter on which the other operated. But we go further, and say, that whensoever a tract of land shall have been once legally appropriated to any purpose, from that moment, the land thus appropriated becomes severed from the mass of public lands; and that no subsequent law, or proclamation, or sale, would be construed to embrace it, or to operate upon it; although no reservation were made of it.

The very act which we are now considering will furnish an illustration of this proposition. Thus, in that act, there is expressly reserved from sale the land, within that district, which had been granted to individuals, and the state of Illinois. Now, suppose, this reservation had not been made, either in the law, proclamation or sale, could it be conceived, that if that land were sold at auction, the title of the purchaser would avail against the individuals or state to whom the previous grants had been made? If, as we suppose, this *question must be answered in the negative, the same principle will apply to any land which, by authority of law, shall [*514 have been severed from the general mass. Let us for a moment consider, to what results a contrary doctrine would lead; and the case before us will furnish a very striking illustration of them. If the party claiming the pre-emption right here, were to succeed, together with the land, he would recover all the improvements made upon it at the public expense. The lighthouse and improvements alone, it seems, by reference to the act making an appropriation for its erection, cost $5000. How much was expended in the buildings at the military post, we have no means of knowing, but probably a considerably larger sum. Thus, besides the land purchased for the sum of $94.61, he would recover property, and that too property necessary for the military defence and commerce of the country, which cost the United States many thousands of dollars; and if there had been expended upon it as many hundreds of thousands, as there have been thousands, the same result would follow. A principle leading to such startling consequences cannot, in our opinion, be a sound one. The right of pre-emption was a bounty extended to settlers and occupants of the

public domain. We cannot suppose, that this bounty was designed to be extended, at the sacrifice of public establishments, or great public interests. When the act of 1830 was passed, congress must have known of the authority which had, by former laws, been given to the president, to establish trading houses and military posts. They must have known, for it was part of the public history of the country, that a military post had been long established at Fort Dearborn; and was at the date of the law, occupied as such, by the troops of the United States. They seem, therefore, to have been studious to use language of so comprehensive a kind, in the exemption from the right of pre-emption, as to embrace every description of reservation and appropriation which had been previously made for public purposes. We have already said, that we think the language in which these exemptions are expressed is comprehensive enough to embrace the present case, so as to place it beyond the reach of the right of pre-emption.

It is further argued, that this case is embraced by the second section of the act of July 2d, 1836, entitled, "an act to confirm the sales of public lands, in certain cases." That section is in these words: "And be it further enacted, that in all cases where an entry has been made under the pre-emption laws, pursuant to instructions sent to the register and receiver, from the treasury department, and the proceedings have been, in all other respects, fair and regular, such entries and sales are hereby confirmed; and patents should be issued thereon, as in other cases." Now, the first remark we make upon this act is, that when the previous law had totally exempted certain lands from the right of pre-emption, if there were nothing else in the case, it would be a very strong, not to say strained, construction of this section, to hold that congress meant thereby, by implication, to repeal the former law in so important a provision. But we are *satisfied, that *515] there were other cases to which it was intended to apply; where the instructions from the treasuary department assumed, to say the least, a doubtful, if not an illegal, power. As, for example, the instructions of the 7th February and 17th October 1831, by which entries were allowed to be made and certificates issued under the act 1830; which was only in force for one year from its passage; after the expiration of the year, where the persons claiming had been deprived of the benefits of the act of 1830, by reason of the township plats not having been furnished by the surveyor-general, and where, nevertheless, proofs of the claim had been filed before the expiration of the year. To this case, and others similarly situated, the law may well apply; because, without affecting the general principles of the system, they present instances in which innocent parties would have been injured by the acts or omissions of public officers, or by some other cause, as to which no fault was imputable to them. But further, the entries to be saved by this section must have been pursuant to instructions sent to the register and receiver from the treasury department. Now, it not only is not shown, that any instructions were so sent, which would authorize this pre-emption; but, on the contrary, the agreed case shows that the register and receiver at the Palestine land-office rejected it in 1831; that the commissioner of the general land-office, in the same year, in answer to a letter of Beaubean, complaining of that rejection, informed him that the land was reserved for military purposes; and that in July 1834, after the pre-emption law of that year, he applied to the register and receiver of the Danville

land-office to prove a pre-emption to the same land, who also rejected the application, and again informed him, that it was reserved for military purposes. Finally, by the express terms of this section, entries under the pre-emption laws, to be protected by it, must be, in all other respects, fair and regular. Now, as the patents were to be issued by the commissioner of the general land-office, and as they were only to issue where the proceedings were fair and regular, that officer must, of necessity, be the judge of that fairness and regularity. But as he refused to issue the patent, we know not whether he considered the proceedings in this case as being fair and regular. If they were not so, then they were not confirmed. We think, therefore, that the claimant can derive no aid from the act of 1836. Our conclusion, then, in relation to the first question is, that under the facts of the case, and the law applying to them, Beaubean acquired no title whatsoever to the land in question.

This being the case, it would not be absolutely necessary to decide the second question; but as it arises in the case, and has been fully argued, we will bestow upon it a very brief examination. That question is, whether, if he had acquired any title at all, it was such an one as would enable the lessor of the plaintiff below to recover in this action? Wilcox, the defendant in the original suit, did not claim, or pretend to set up, any right or title in himself. He held possession as an officer of the United States; and for them, and under *their orders. This being the state of the case, [*516
the question which we are now examining is really this, whether a person holding a register's certificate, without a patent, can recover the land, as against the United States.

We think it unnecessary to go into a detailed examination of the various acts of congress, for the purpose of showing what we consider to be true, in regard to the public lands, that with the exception of a few cases, nothing but a patent passes a perfect and consummate title. One class of cases to be excepted is, where an act of congress grants land, as is sometimes done, in words of present grant. But we need not go into these exceptions. The general rule is what we have stated; and it applies as well to pre-emptions as to other purchases of public lands. Thus, it will appear by the very act of 1836 which we have been examining, that patents are to issue in pre-emption cases. This, then, being the case, and this suit having been in effect against the United States; to hold that the party could recover as against them, would be to hold, that a party having an inchoate and imperfect title could recover against the one in whom resided the perfect title. This, as a general proposition of law, unquestionably, cannot be maintained.

But it is argued, that a law of the state of Illinois declares, that a register's certificate shall be deemed evidence of title in the party, sufficient to recover possession of the lands described in such certificate, in any action of ejectment or forcible entry and detainer; but the same law declares, that this shall be the case, unless a better legal and paramount title be exhibited for the same. Upon the construction of the law itself, it would not apply to this case, because the United States, not having parted with a consummate legal title, by issuing a patent, a better legal and paramount title was exhibited for the same. Where that was not the case, but the suit should be against any person not having the right of possession, or against a tres-

passer, these are the kinds of cases in which it would seem to us, by the proper construction of the act, that it was intended to operate.

A much stronger ground, however, has been taken in argument. It has been said, that the state of Illinois has a right to declare by law, that a title derived from the United States, which, by their laws, is only inchoate and imperfect, shall be deemed as perfect a title as if a patent had issued from the United States; and the construction of her own courts seems to give that effect to her statute. That state has an undoubted right to legislate as she may please, in regard to the remedies to be prosecuted in her courts, and to regulate the disposition of the property of her citizens, by descent, devise or alienation. But the property in question was a part of the public domain of the United States; congress is invested by the constitution with the power of disposing of, and making needful rules and regulations respecting it. Congress has declared, as we have said, by its legislation, that in such a case as this, a patent is necessary to complete the title. But in this case, no patent has issued; and therefore, by the laws of the United States the *517] legal title has not passed, *but remains in the United States. Now, if it were competent for a state legislature to say, that notwithstanding this, the title shall be deemed to have passed; the effect of this would be, not that congress had the power of disposing of the public land, and prescribing the rules and regulations concerning that disposition, but that Illinois possessed it. That would be to make the laws of Illinois paramount to those of congress, in relation to a subject confided by the constitution to congress only. And the practical result in this very case would be, by force of state legislation, to take from the United States their own land, against their own will, and against their own laws. We hold the true principle to be this, that whenever the question in any court, state or federal, is, whether a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States; but that whenever, according to those laws, the title shall have passed, then that property, like all other property in the state, is subject to the state legislation; so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States.

It was urged at the bar, that the case of *Ross* v. *Barland*, in this court, 1 Pet. 656, sustained the ground taken as to the obligatory force of the law of Illinois. A very brief examination of that case will show, that it falls greatly short of what it is supposed to decide. That was a conflict between two patentees, both claiming under the United States. The elder patent was founded upon a certificate of the register of the land-office west of Pearl river. The junior patent was issued on a certificate of the board of commissioners west of Pearl river. The court below instructed the jury, that the junior patent of the plaintiff in ejectment, emanating upon a certificate for a donation claim, prior in date to the patent under which the defendant claimed, would overreach the elder patent of the defendant, and in point of law, prevail against it. It appears, that by the mode of proceeding in Mississippi, they look beyond the grant. This court, remarking upon that, said, that in so doing, and in applying their peculiar mode of proceeding to titles derived though and under the laws of the United States, they violated no provisions of any statute of the United States. But the

court then proceeded to say: "The important question in the case is this: in applying its own principles and practice in the action of ejectment, as might well be done in this case, has the court misconstrued the act of congress, in deciding that the grant of the plaintiff, emanating upon the donation certificate of the board of commissioners west of Pearl river, set forth in the record, would overreach the defendant's grant, and should prevail against it in the action of ejectment." They then proceed to examine the various acts of congress upon the subject; declare their opinion to be, that the determination of the commissioners was final; and come to the conclusion, that the supreme court of Mississippi had *not misconstrued the acts of congress, from which the rights of the parties were derived; [*518 and consequently, affirmed the judgment. Thus, it will appear, that in that case, whilst the form and mode of proceeding by the law of Mississippi were recognised, yet the rights of the parties depended exclusively upon the construction of acts of congress; and that this court thought that the court below had construed them correctly. This case, then, affords no countenance whatever to the argument founded upon it.

Upon the whole, we are of opinion, that the judgment of the supreme court of Illinois is erroneous: it is, therefore, reversed, with costs.

This cause came on to be heard, on the transcript of the record from the supreme court of the state of Illinois, and was argued by counsel: On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said supreme court in this cause be and the same is hereby reversed and annulled, with costs; and that this cause be and the same is hereby remanded to the said supreme court, that such further proceedings may be had therein, in conformity to the opinion and judgment of this court, and as to law and justice may appertain.

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*Bank of Augusta, Plaintiffs in error, *v.* Joseph B. Earle, [*519
Defendant in error.

Bank of the United States, Plaintiffs in error, *v.* William D. Primrose, Defendant in error.

New Orleans and Carrollton Railroad Company, Plaintiffs in error, *v.* Joseph B. Earle, Defendant in error.

Powers of corporations of other states.

An action was instituted in the circuit court of the United States for the district of Alabama, by the Bank of Augusta, Georgia, against the defendant, a citizen of Alabama, on a bill of exchange drawn at Mobile, Alabama, on New York, which had been protested for non-payment, and returned to Mobile; the bill was made and indorsed for the purpose of being discounted by the agent of the bank, who had funds in his hands belonging to the plaintiffs, for the purpose of purchasing bills of exchange, which funds were derived from bills and notes discounted by the bank, in Georgia; the bill was discounted by the agent of the bank, in Mobile, for the benefit of the bank, with their funds, to remit the said funds to the bank. The defendant defended the suit, on the facts; the Bank of Augusta was a corporation incorporated by an act of the legislature of Georgia, and had power such as is usually conferred on banking institutions, as to purchase bills of exchange, &c. The circuit court held, that the plaintiffs could not recover on the bills of exchange, and that the purchase of the bills, by the agent of the plaintiffs, were prohibited by the laws of Alabama, and gave judgment for the defendant.

In the case of the Bank of the United States of Pennsylvania *v.* Primrose, the plaintiffs, a corporation by virtue of a law of the state of Pennsylvania, authorized by its charter to sue and be sued in the name of the corporation, and to deal in bills of exchange, and composed of citizens of Pennsylvania, and of states of the United States, other than the state of Alabama, the agent of the bank, resident of Mobile, and in possession of funds belonging to the bank, and intrusted with them for the sole purpose of purchasing bills of exchange; purchased a bill of exchange, and paid for the same in notes of the branch of the bank of Alabama, at Mobile; the bill was protested for non-payment, and a suit was instituted in the circuit court against the payee, the indorser of the bill. The question for the opinion of the circuit court was, whether the purchase of the bill of exchange, by the bank of the United States, was a valid contract, under the laws of Alabama; the circuit court decided that the contract was void, and gave judgment for the defendant.

The case of the New Orleans and Carrollton Railroad Company *v.* Joseph B. Earle, was similar to that of the Bank of Augusta *v.* Joseph B. Earle. The supreme court reversed the judgment of the circuit court in the three cases; and held the contracts for the purchase of the bills valid; and that the plaintiffs acquired a legal title to the bills, by the purchase.

In the case of the bank of the United States *v.* Deveaux, the supreme court decided, that in a question of jurisdiction, they might look to the character of the persons composing a corporation; and if it appeared, that they were citizens of another state, and the fact was set forth by proper averments, the corporation might sue in its corporate name in the courts of the United States; but in that case, the court confined its decision, in express terms, to a question of jurisdiction; to a right to sue; and evidently went, even so far, with some hesitation, The propriety of that decision is fully assented to, and it has ever since been recognised as authority in this court; but the principle has never been extended any further than it was carried in that case; and has never been supposed to extend to contracts made by a corporation, especially in another sovereignty.

The nature and character of a corporation created by statute, and the extent of the powers which it may lawfully exercise, have upon several occasions been under consideration in this court. The cases of Head *v.* Providence Insurance Company, 2 Cranch 167; and Dartmouth College *v.* Woodward, 4 Wheat. 636, cited.

Whenever a corporation makes a contract, it is the contract of the legal entity—of the artificial being created by the charter—and not the contract of the individual members; the only rights it can claim are the rights which are given to it in that character, and not the rights which belong to its members as citizens of a state.

*520] *It may be safely assumed, that a corporation can make no contracts, and do no acts, either within or without the state which creates it, except such as are authorized by its charter; and those acts must also be done by such officers or agents, and in such manner as the charter authorizes; and, if the law creating a corporation does not, by the true construction of the words used in the charter, give it the right to exercise its powers beyond the limits of the state, all contracts made by it in other states would be void.[1]

It is very true, that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created; it exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence; it must dwell in the place of its creation, and cannot migrate to another sovereignty. But although it must live and have its being in that state only, yet it does not by any means follow, that its existence there will not be recognised in other places; and its residence in one state creates no insuperable objection to its power of contracting in another; it is, indeed, a mere artificial being, invisible and intangible; yet it is a person, for certain purposes, in contemplation of law; and has been recognised as such by the decisions of this court. It is sufficient, that its existence as an artificial person, in the state of its creation, is acknowledged and

[1] A corporation is an artificial being, existing only in contemplation of law; and being a mere creation of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incident to its very existence. Runyan *v.* Coster, 14 Pet. 122; Perrine *v.* Chesapeake and Delaware Canal Co., 9 How. 172; Commonwealth *v.* Erie and North-east Railroad Co., 27 Penn. St. 339; Diligent Fire Co. *v.* Commonwealth, 75 Id. 291; Bank of Kentucky *v.* Schuylkill Bank, 1 Pars. 291. But, unless restrained by law, every corporation has the incidental power to make any contract necessary to advance the objects for which it was created. Legrand *v.* Manhattan Mercantile Association, 80 N. Y. 638.

recognised by the law of the nation where the dealing takes place; and that it is permitted by the laws of that place, to exercise there the powers with which it is endowed.[1]

Courts of justice have always expounded and executed contracts made in a foreign country according to the laws of the place in which they were made; provided that law was not repugnant to the laws or policy of their own country. The comity thus extended to other nations is no impeachment of sovereignty; it is the voluntary act of the nation by which it is offered; and is inadmissible, when contrary to its policy, or prejudicial to its interests; but it contributes so largely to promote justice between individuals, and to produce a friendly intercourse between the sovereignties to which they belong, that courts of justice have continually acted upon it, as a part of the voluntary law of nations.

The court can perceive no sufficient reason for excluding from the protection of the law, the contracts of foreign corporations, when they are not contrary to the known policy of the state, nor injurious to its interests; it is nothing more than the admission of the existence of an artificial person, created by the law of another state, and clothed with the power of making certain contracts; it is but the usual comity of recognising the law of another state.

The states of the Union are sovereign states; and the history of the past, and the events which are daily occurring, furnish the strongest evidence that they have adopted towards each other the laws of comity in their fullest extent.

In the legislation of congress, where the states and the people of the several state are all represented, we find proof of the general understanding in the United States, that, by the law of comity among the states, corporations chartered by one, are permitted to make contracts in the others.

It is well settled, that by the law of comity among nations, a corporation created by one sovereignty is permitted to make contracts in another, and to sue in its courts; and that the same law of comity prevails among the several sovereignties of this Union. The public, and well-known and long-continued usages of trade, the general acquiescence of the states; the particular legislation of some of them, as well as the legislation of congress; all concur in proving the truth of this proposition.[2]

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[1] Re-affirmed in Tombigbee Railroad Co. *v.* Kneeland, 4 How. 16. A corporation has power to make a contract outside the jurisdiction of the state by which it was created, unless expressly restrained by its charter or by the *lex loci contractûs*. New York Floating Derrick Co. *v.* New Jersey Oil Co., 3 Duer 648; Bank of Columbus *v.* Black, 1 Bl. C. C. 425. Corporations are the creatures of the local law; they have no powers out of the state of their creation, except such as are conceded to them by the *lex loci*. Paul *v.* Virginia, 8 Wall. 168; Ducat *v.* Chicago, 10 Id. 410; Liverpool Ins. Co. *v.* Massachusetts, Id. 566. A state allowing a foreign corporation to do business within its limits, may impose such reasonable conditions as it thinks fit. Lamb *v.* Lamb, 6 Biss. 420; St. Louis *v.* Ferry Co., 11 Wall. 429; Doyle *v.* Continental Ins. Co., 94 U. S. 540. But such conditions must not be repugnant to the constitution and laws of the United States nor inconsistent with those rules of public law which secure the jurisdiction and authority of each state from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defence. La Fayette Ins. Co. *v.* French, 18 How. 407. And therefore, a condition that no such company shall remove a suit against it into a federal court, is illegal and void. Insurance Co. *v.* Morse, 20 Wall. 445; Doyle *v.* Continental Ins. Co., 94 U. S. 535; Railroad Co. *v.* Kurtz, 104 Id. 10. But wherever a corporation goes for business, it carries with it its charter, as that is the law of its existence. Relfe *v.* Rundle, 103 Id. 226. And such being the law, it follows, that whoever deals with a foreign corporation impliedly subjects himself to such laws of the foreign government, affecting the powers and obligations of the corporation with which he voluntarily contracts, as the known and established policy of that government authorizes. To all intents and purposes, he submits his contract with the corporations to such a policy of the foreign government, and whatever is done by that government, in furtherance of that policy, which binds those in like situation with himself, who are subjects of the government, in respect to the operation and effect of those contracts with the corporation, will necessarily bind him. He is conclusively presumed to have contracted with a view to such laws of that government, because the corporation must, of necessity, be controlled by them, and it has no power to contract with a view to any other laws with which they are not in entire harmony. It follows, therefore, that anything done at the legal home of the corporation, under the authority of such laws, which discharges it from liability there, discharges it everywhere. Canada Southern Railroad Co. *v.* Gebhard, 109 U. S. 537–8.

[2] The clause of the constitution which declares that the citizens of each state shall be

Franchises are special privileges conferred by government upon individuals, and which do not belong to the citizens of the country generally, of common right; it is essential to the character of a franchise, that it should be a grant from the sovereign authority; and in this country, no franchise can be held, which is not derived from a law of the state.

The comity of suit brings with it the comity of contract, and where the one is expressly adopted by the courts, the other must also be presumed, according to the usages of nations, unless the contrary can be shown.

The state of Alabama has not merely acquiesced by silence, but her judicial tribunals have declared the adoption of the law of international comity, in the case of a suit.

The state of Alabama never intended, by its constitution, to interfere with the right of selling or purchasing bills of exchange.

When the policy of a state is manifest, the courts of the United States would be bound to notice it, as a part of its code of laws; and to declare all contracts in the state, repugnant to it, to be illegal and void.

*521] *Error to the Circuit Court for the Southern District of Alabama. These cases were brought from the circuit court of the southern district of Alabama, by the plaintiffs in each case, by writs of error. The cases of the Bank of Augusta *v.* Joseph B. Earle, and of the Bank of the United States *v.* William D. Primrose, were argued by counsel. The case of the New Orleans and Carrollton Railroad Company was submitted by Mr. *Ogden*, on the argument in the other causes.

In the case of the Bank of Augusta *v.* Joseph B. Earle, the facts were the following: The Bank of Augusta, incorporated by the legislature of the state of Georgia, instituted in the circuit court for the southern district of Alabama, in March 1837, an action against Joseph B. Earle, a citizen of the state of Alabama, on a bill of exchange, dated at Mobile, November 3d, 1836, drawn at sixty days sight, by Fuller, Gardner & Co., on C. B. Burland & Co., of New York, in favor of Joseph B. Earle, and by him indorsed, for $6000. The bill was accepted by the drawees, but was afterwards protested for non-payment; and was returned with protest to the plaintiffs. The following facts were agreed upon by the counsel for the plaintiffs and the defendant; and were submitted to the circuit court:

"The defendant defends this action upon the following facts that are admitted by the plaintiffs: that plaintiffs are a corporation, incorporated by an act of the legislature of the state of Georgia, and have powers usually conferred upon banking institutions, such as to purchase bills of exchange, &c. That the bill sued on was made and indorsed for the purpose of being discounted, by Thomas McGran, the agent of said bank, who had funds of the plaintiffs in his hands, for the purpose of purchasing bills, which funds were derived from bills and notes, discounted in Georgia by said plaintiffs, and payable in Mobile, and the said McGran, agent as aforesaid, did so discount and purchase the said bill sued on, in the city of Mobile, state aforesaid, for the benefit of said bank, and with their funds; and to remit said funds to the said plaintiffs. If the court shall say that the facts constitute a defence to this action, judgment will be given for the defendant, otherwise for plaintiffs, for the amount of the bill, damages, interest and costs; either party to have the right of appeal or writ of error to the supreme

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entitled to all the privileges and immunities of citizens of the several states, does not embrace corporations. Paul *v.* Virginia, 8 Wall. 168; Ducat *v.* Chicago, 10 Id. 410; Liverpool Ins. Co. *v.* Massachusetts, Id. 566.

court, upon the statement of facts, and the judgment thereon." The circuit court gave judgment for the defendant.

The Bank of the United States, incorporated by the legislature of the state of Pennsylvania, as the holders of a bill of exchange protested for non-payment, for $5350, drawn by Charles Gascoine, at Mobile, on the 14th January 1837, at four months, on J. & C. Gascoine, of New York, in favor of W. D. Primrose, and by him indorsed, instituted, in October 1837, an action against the indorser of the bill, in the circuit court for *the [*522
southern district of Alabama. The agreed facts of the case, which were submitted to the circuit court, were as follows:

"The plaintiffs are a body corporate, existing under and by virtue of a law of the state or Pennsylvania, authorized by its charter to sue and be sued by the name of the president, directors and company of the Bank of the United States, and to deal in bills of exchange, and is composed of citizens of Pennsylvania, and of states of the United States, other than the state of Alabama; the defendant is a citizen of the state of Alabama. George Poe, Jr., was the agent of the plaintiffs, resident in Mobile, and in the possession of funds belonging to the plaintiffs, intrusted to him for the sole purpose of purchasing bills of exchange. The said George Poe, Jr., as such agent, on the 14th day of January, A. D 1837, purchased at Mobile the bill declared upon, and paid for the same in notes of the branch of the Bank of the State of Alabama, at Mobile. The defendant is the payee of the bill, and indorsed it to plaintiffs, the present holders. The bill was presented at maturity to the acceptors, and duly protested for non-payment; and due and legal notice given to the defendant. The question for the opinion of the court on the foregoing statement of facts is, whether the purchase of the said bill of exchange by the plaintiffs, as aforesaid, was a valid contract under the laws of Alabama. If the court be of opinion, that the said contract was valid, and that the said plaintiffs, as holders of the said bill, acquired the legal title thereto by the said purchase, then judgment to be rendered for the plaintiffs for the sum of $5350, with interest at eight per cent. since 20th May 1837, and ten per cent. damages on it. But if the court be of opinion, that the said purchase was prohibited by the laws of Alabama, and the contract was, therefore, invalid and void, judgment to be rendered for the defendant." The circuit court gave judgment for the defendant.

The action of the New Orleans and Carrollton Railroad Company, incorporated by an act of the legislature of Louisiana, was upon a bill of exchange, drawn by Fuller, Gardner & Co., of Mobile, in favor of Joseph B. Earle, upon Fuller & Yost, of New Orleans, for $5210, protested for non-payment. The action was against the indorser of the bill, which had been purchased at Mobile, by an agent of the plaintiffs, who had funds in his hands belonging to the plaintiffs, for the purpose of purchasing bills of exchange, as a means of remittance to New Orleans. The circuit court gave judgment for the defendant.

The case of the Bank of Augusta was argued by *D. B. Ogden*, for the plaintiffs; and by *C. J. Ingersoll*, for the defendant. Mr. Ogden also submitted the case of the New Orleans and Carrollton Railroad Company to the court, on the argument in the case of the Bank of Augusta, &c. The

case of the Bank of the United States *v.* Primrose, was argued by *Sergeant* and *Webster*, *for the plaintiff in error; and by *C. J. Ingersoll* and *Van de Gruff*, for Joseph B. Earle. A printed argument for W. D. Primrose, was also submitted by Mr. *Crawford.*

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Ogden, for the Bank of Augusta, contended, that the bank had a right to become the purchaser of the bill of exchange on which the suit was brought; and they had a legal right to recover its amount against the defendant, as the indorser of the bill. The plaintiffs were the owners of a bill or bills of exchange, which they had purchased at Augusta, in Georgia, drawn on persons in Mobile, which were remitted by them to Mobile, and were there paid. The funds thus obtained were invested in the bill of exchange which is the subject of this suit, for the purpose of a remittance. The question for the determination of this court is, whether the plaintiffs had authority to make the purchase. The circuit court of Alabama decided this to be contrary to the laws of Alabama.

If the decision of the circuit court shall be sustained by this court, a deeper wound will be inflicted on the commercial business of the United States than it has ever sustained. The principal means by which the commercial dealing between the states of the United States and Alabama is conducted, will be at an end; and there will no longer the facilities of intercourse for the purposes of traffic, by which alone it is prosperous and beneficial. Nor will the effect of such a decision be confined to the state of Alabama. The principles of law which forbid the dealing in exchange by a corporation established under the laws of another state, and by the terms of its charter expressly authorized to purchase bills of exchange, will prevail to the full extent of inhibiting the same purchases in other states; and thus exclude the principal operations of commerce between the states of the Union. In the state of Alabama, such a condition of things will operate most injuriously. The purchases of bills of exchange in that state, are extensively made by the agents of corporations of other states; and thus, by the competition which is produced, the rates of exchange are kept in a due proportion to those of other states. The large productions of cotton in that state, are thus enabled to realize to the planter a proper, and an equal price to that obtained by the planters in the neighboring states. Should the banks of Alabama and the capitalists of that state have the exclusive right to deal in exchange, the effect of such a monopoly will be felt extensively. Such operations in exchange as those out of which this controversy has arisen, have been transacted in every state of the Union. Until now, their legality has never been doubted; and in no court of the United States, nor in any state court, has their validity been before questioned or denied. The Union has existed for more than half a century, the transactions between the states composing it, of the same character with that which is now before the court, have, for a large portion of that period, been extensive and constant; and they have been universally found to be beneficial. No state, whatever *the power of its legislature may be to act upon the matter (a power which it is not intended to admit or deny in this argument), has attempted to interpose a prohibition and forbid such dealing.

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The proposition in the circuit court, and on which its decision is founded, is that a corporation of one state can do no commercial business, can make

no contract, and can do nothing in any other state of the Union, but in that in which, by the law of the state, it has been created. This proposition is the more injurious, as in the United States associated capital is essentially necessary to the operations of commerce, and the creation and improvement of facilities of intercourse, which can only be accomplished by large means. Associated capital here, supplies the place of the large individual accumulations which are found in Europe. The question is not on the powers of a corporation, but as to whom and to what objects those powers can be exerted. A corporation is the creature of the law, and it is clothed with all the powers of a person. The position on the other side is, that when it leaves the state which gave it existence, by granting its charter, it loses its personal existence, and has no existence whatever. This is a harsh doctrine, and seems at war with the principles of those who assert and maintain state rights. It is certainly true, that a corporation in one state, is not a corporation in another state, as to the full exercise of corporate powers. In Georgia, if it was brought into being by a law of that state, it may carry on any business authorized by its charter; but in Alabama, it can do nothing but what the laws of Alabama authorize it to do, as a corporation, or which these laws do not forbid. It may institute suits in Alabama. If a debt is contracted in Augusta, in Georgia, and the debtor removes to Mobile, can no suit be instituted to recover the debt in Mobile? It can be sued at Alabama, as it may sue.

Congress, in 1825, passed an act authorizing steamboat companies to own ships and vessels, and to take out a register on the oath of the president of the company. Suppose, a steamboat owned and registered in New York shall put into Mobile, and shall there be unlawfully taken possession of; could no action be brought by the company for such a trespass? Could not the company make an agreement to have the boat repaired in Mobile? Is it possible, that such a construction can be given to the law? Nothing is better settled, than that a corporation may institute suits in the courts of other states and countries than those under whose laws they may have been established. 1 Roll. Abr. 531; 2 Bulst. 32; Hob. 113; 9 Ves. 347; *Nabob of the Carnatic* v. *East India Company*, 1 Ves. jr. 371; 2 Ld. Raym. 152; 1 Str. 612; 10 Mass. 91; 5 Cow. 550; *King of Spain* v. *Oliver*, Pet. C. C. 276; *Society for Propagating the Gospel in Foreign Parts* v. *Wheeler*, 2 Gallis. 105; 2 Rand. 465.

It is admitted by those who maintain the decision of the circuit *court of Alabama to be correct, that by the laws of nations, corporations of other countries may institute suits out of the states or countries in which they were created; but it is said, this principle and established practice does not apply to suits which are claimed to be instituted by a corporation of one state of the United States, in the courts of another state; that the states are not nations towards each other, and that the rules and principles of international law do not apply to them; that all the states compose one nation, and each is absorbed in the nation of the United States. This is a strange doctrine as to the states of the Union. The same governments, having similar laws, are said to owe to each other less comity than is admitted to be due to foreign nations. The contrary to this position would seem just and proper. Between the states, comity is doubly due; and is an obligation of the highest influence. The states between each other are [*525

sovereign and independent. They are distinct and separate sovereignties, except so far as they have parted with some of the attributes of sovereignty by the constitution. They continue to be nations, with all their rights, and under all their national obligations, and with all the rights of nations in every particular; except in the surrender by each to the common purposes and objects of the Union, under the constitution. The rights of each state, when not so yielded up, remain absolute. Congress have never provided for the proof of the laws of the states when they are brought forward in the courts of the United States, or in the courts of the states; and they are proved as foreign laws are proved. There must be special legislation of every state as to the mode of proof of the laws of other states. New York has legislated on this subject, and a provision has been made which is applicable to it.

Every principle of law which allows foreign states to sue in the courts of other countries, applies to corporations. The laws respecting mortgages are necessarily local in their character and provisions; and yet it has been held, that a corporation of one state may become a mortgagee of lands in another state. This was decided by Chancellor KENT, in the case of the *Silver Lake Bank*, 4 Johns. Ch. 370. In this case, the chancellor held, that corporations created by the legislature of Pennsylvania had a right to enforce a mortgage on real property in New York, by a proceeding in the court of chancery of New York.

It is said, that a right to sue and a right to contract are different; that a corporation may sue, because it is a person recognised by the laws of Alabama, and may take a stand as a person in the courts of Alabama. Thus a corporation of Georgia is considered a person in Alabama. It can give a warrant of attorney; for no suit can be sustained, without such a warrant. Why is such a right allowed? It is because a corporation is recognised as having a personal existence. How can they sue to enforce a contract, and not have a right to make a contract? In principle, there can be no differ-
*526] ence. *Does not a right to sue give a right to make a compromise of the matter in controversy in the suit? This is a right to make a contract; for a compromise is a contract. He who institutes a suit may discontinue it; this is a contract. The declaration in a suit in a court of Alabama, must aver that the contract was made in Alabama; but this is not traversable.

A *chose in action* is assignable only to a limited extent; but it has been held, that the assignees appointed under the bankrupt laws of England may sue in the courts of the United States. This is giving an extra-territorial existence to the laws of England. This is on the principles of the comity of nations; and such principles are essential to sustain the intercourse between nations. But if no express contract can be made in another state, by a corporation, it cannot be a party to an implied contract. The law will not suffer a contract to be implied, where no express contract can be made. Look at what this would lead to. The Bank of Augusta may buy a bill on Mobile, and the bill may be sent by the bank to Mobile for collection. It may be paid in Mobile, to the agent of the bank; but if a corporation cannot make a contract, no implied promise of the agent to remit the money collected to the Bank of Augusta can be raised; and he may keep the whole amount. Suppose, a note given by him to the bank for the money, it would be void. The doctrine is monstrous.

The constitution of the United States was formed to establish a national government, and this court is a most important part of the government thus formed. The great object of the constitution was to erect a government for commercial purposes, for mutual intercourse, and mutual dealing. The prosperity of every state could alone be promoted and secured, by establishing these on principles of reciprocity; and on the security and protection of the citizens of each state, in all the states united by the government. This court will hesitate a long time, before it will make a decision which will either break down or cripple the whole of the commercial intercourse between the states, and shake the foundationsof all our internal commerce.

One of the most important objects and interests for the preservation of the Union is the establishment of railroads. Cannot the railroad corporations of New York, Pennsylvania or Maryland make a contract out of the state, for materials for the construction of a railroad? Cannot these companies procure machinery to use on their railroads, in another state? They cannot get on, without this right. These railroads often run into other states, with the permission of those states; and it never has been doubted, that every contract for construction made by the corporations to which the railroads belong, although out of the state in which they were originally created, is valid. Manufacturing corporations established in one state by the law of the state cannot sue in another state for debts due for articles made by such corporation, if the decision of the circuit court of *Alabama is sustained by this court. Policies of insurance made in another [*527 state than that in which the property insured was, at the time of the insurance, will be void. The legislature of New York have by a special law prohibited insurances against fire being made in New York by foreign corporations. This shows that the legislature thought, that without such a law, foreign corporations had a right to make such insurances, and to sue upon contracts made in New York, or contracts flowing out of policies of insurance. Revised Laws of New York, 52; Act of March 18th, 1814.

It is admitted, that a corporation may not carry on the business for which it was created, out of the state whose laws gave it existence. But this does not interfere with the right claimed by the plaintiffs in this case. The Bank of Augusta cannot carry on the business of banking in Alabama, for by the laws of Alabama this is forbidden. But if not forbidden by the law of that state, it could transact the business of banking there. At common law, every man has a right to become a banker, and to carry on the business of banking. The acts of parliament in England impose restrictions on this common-law right. 15 Johns. 379.

The plaintiffs in this case are citizens of the state of Georgia. They are so called in the writ by which the suit was commenced; and by the constitution of the United States they have a right to transact any business, which any persons, citizens of the state of Alabama, may carry on, and which is not prohibited by the laws of the state. The laws of New York authorize special partnerships. Have not these partnerships a right to deal in Georgia and Alabama, to the same extent and in the same manner as in New York? This shows that an association under the name of one person, can do any and all acts which citizens of New York or of any other state can do.

Large collections have been made by the Bank of England, in the United States, on bills of exchange drawn in the United States, and returned protested for non-payment. There has not been a suggestion, that the Bank of England, a foreign corporation, could not pursue such claims in the courts of the states and of the United States, in the same manner as individuals. All those bills have been collected but a very small amount; and this after many of them had been put in suit. Large and numerous sales of the stocks of states of the United States, and of corporations established by states, have been made in other states, and in England. These would be void, on the same principle as that claimed on the part of the defendant in this case. Alabama has herself issued stock, as the basis of her banking capital; and this stock has been sold out of the state of Alabama. Yet she will not be bound to pay the amount of this stock, or even to pay the interest on it, if as a corporation she cannot contract out of her territories.

Mr. Ogden went into an examination of the cases which had been referred
*528] to by the circuit court of Alabama, and which were *considered by that court, as sustaining the principle that the plaintiffs in error could not maintain this suit. He examined particularly the case of *Head* v. *Providence Insurance Company*, 2 Cranch 127. *The Dartmouth College Case*, 4 Wheat. 519; *Goszler* v. *Corporation of Georgetown*, 6 Ibid. 593; *Bank of the United States* v. *Donnally*, 8 Pet. 361.

There is another class of cases and authorities cited in the opinion of the circuit court of Alabama, which go to show that a corporation has no power which is not given to it by the law which created it, and from which all its functions are derived. It is not necessary to examine these authorities, because the principle laid down by the circuit court is fully admitted; and because in this case, it is not a question as to the powers of the corporation, but as to the place where those powers may be executed.

There is another view upon this branch of the argument, which appears worthy of the serious consideration of this court. This is an action commenced in the circuit court of the United States. How does the court acquire jurisdiction of the course? Certainly, not under the state law of Georgia, constituting the plaintiffs a corporation. A state legislature has no power to give to or take away jurisdiction from the courts of the United States.

Again, as it regards the United States, and the courts of the United States, a corporation created by one of the states is much a foreign corporation as a corporation created by Georgia is a foreign corporation in Alabama, created by a different government, with different powers and different local jurisdiction. How does the court of the United States acquire its jurisdiction in this case? From the constitution, and the laws of congress passed under the constitution. Now, the constitution gives the courts of the United States no jurisdiction where a corporation created by a state is a party, and a citizen of another state is the other party; but it does give the courts of the United States jurisdiction in all cases between citizens of different states. In the case of the *Hope Insurance Company* v. *Boardman*, this court, many years ago, decided, that the courts of the United States had no jurisdiction in cases where a state corporation was a party; but the plaintiff must aver, in order to give the court jurisdiction, that the stockholders and persons interested in and composing the corporation were citizens

of one state, and the defendant a citizen of another state. And the practice has been uniform, ever since, to make such an averment, in order to bring the case within the jurisdiction of the courts of the United States. This averment is material, and its truth must be proved, if put in issue by a plea in abatement. It is manifest, then, that the circuit court, had jurisdiction in this case; because it appeared on the record, that the plaintiffs, or the persons interested as plaintiffs, were citizens of Georgia, and the defendant was a citizen of Alabama. And when the courts of the United States sustain an action in the name of a state corporation, it is only because citizens of the *state have associated together under the name and in the form of a corporation. Still it is those citizens only who are the parties before the court, and not the corporation, *quasi* corporation. Upon no other hypothesis, can the courts of the United States have any jurisdiction in the cause, none other being justified or authorized by the constitution. [*529

Now, it is asked of this court, if citizens of the state of Georgia have a right to sue in the courts of the United States, in the state of Alabama, under the name of an association called the Bank of Augusta; does not this amount to a recognition on the part of the courts of the United States of their rights to act under that associated name? And if they may act under that name in one thing, why not in all things? If you recognise their right of acting, in bringing a suit to enforce a contract, why not in making the contract itself, which is the foundation of the suit? In principle, there is seen no difference. Twenty merchants in Augusta, in Georgia, may be concerned as partners in carrying on business, in the name of one of them, or they may assume any other name. Can it be contended for a moment, that under that assumed name they would not have a right to make contracts, purchase cotton, bills of exchange, or do any other business not forbidden by the laws of Alabama? If this is not so, what becomes of the provision in the constitution of the United States, which declares that a citizen of one state shall be entitled to all the rights of a citizen of the other states? It is no answer to this, to say, that in an action in such a case you must bring the suit in the names of all the partners. This is a question as to the remedy; but it can in no wise affect the power of contracting, or of suing. One is a matter of form, the other is matter of substance.

There remains another point in the case to which the attention of the court is respectfully called. By the constitution of Alabama, it is declared, that there shall be established a bank, to be called "The Bank of the State of Alabama;" and that the legislature may, from time to time, establish as many branches of that bank, to be located in different parts of the state, as they may think proper. This constitutional provision has been construed as a prohibition on the legislature, which precludes them from establishing any other bank in the state; and upon the argument of this cause, it is presumed, that it must be taken for granted, that the construction given to the constitution in this particular, is the true construction. A large portion of the stock of the bank and of its branches is reserved for the state; intending, no doubt, thereby to acquire a revenue for the state by means of their interest in the bank. Now, it is supposed, that to permit a bank of Georgia, or of any other state, to transacts its business in Alabama, would interfere with the profits of the Bank of Alabama; and would, therefore,

be in direct opposition to the settled policy of the state, as declared and established by the constitution.

*530] Let us examine this argument. It is readily admitted, for the *purposes of this case, that the state of Alabama has a right to pass a law declaring that no bank shall exist and do its business in that state, unless it be chartered by the legislature of the state. This is an admission as broad as can be called for: but it by no means follows, that the transaction which is the subject of the present controversy is an illegal one. What is legitimate banking business? If consists of three things. First, discounting notes. Second, receiving money on deposit. Third, issuing notes or bills to be circulated as money. It seems to be clear and certain, that all these operations must be combined, to constitute banking, as understood among us, and in the commercial world. The mere discounting notes is not of itself a banking operation. It is, indeed, doing one thing which banks are authorized to do, but it is not, therefore, banking. May not a merchant discount his own notes, without being considered a banker? The mere receiving money on deposit, to be paid out again, whenever called for, is not banking. Surely, a man may deposit his funds in safe-keeping in the hands of a friend, without making that friend what is known in our law and in the commercial law, as a banker. Issuing a note to be put into circulation as money, may, perhaps, be evidence, of itself, of an act of banking; and this may be the most important power which a bank possesses.

Now, there is no pretence that the bank of Augusta received deposits in Alabama. It is not pretended, that the Bank of Augusta ever put into circulation, in Alabama, one of its notes or bills, to be circulated as money in that state; and it is contended, that if they had discounted a promissory note in Alabama, it would not of itself have been such a banking operation as would render the transaction illegal, if there where a law in Alabama absolutely prohibiting any bank but the Bank of the State from carrying on the banking business in the state. An individual might discount a note, without violating the law, and so might the plaintiffs in error.

It is admitted, that under a charter given by the state of Georgia, the plaintiffs could not establish a bank in the state of Alabama. No such right is claimed by the plaintiffs. But it is contended, that becoming lawfully possessed of funds in the state of Alabama, common sense, common justice, and common law require, that the plaintiffs should have the ordinary means of withdrawing those funds from the state of Alabama. The purchase of a bill of exchange is among the ordinary means of transmitting funds from one place to another.

Again, the act complained of is the purchase of bills of exchange. Now, dealing in the purchase and sale of bills of exchange is not banking. It is true, the power of dealing in bills of exchange is often expressly given to banking corporations; and the fact that it is expressly given, is evidence of the general understanding that, without it is so given, a bank would not have the right or power of dealing in exchange, and that is, strictly speaking, no part of the *ordinary business of a bank. Some banks have

*531] the power of making a canal; and yet it is hardly to be contended, that making canals is a part of banking business. If, therefore, there be an express prohibition in the law and constitution of Alabama, prohibiting the

business of banking in that state, by any other than their own incorporated banks, it would in no wise prohibit the plaintiffs from purchasing a bill of exchange in Alabama.

There remains yet another view of this question, which it is thought the duty of counsel to submit to the consideration of this court. It has heretofore been contended, that the dealing in bills of exchange, being no part of the business of banking, does not come within the prohibitions of the constitution of Alabama against banking. But let us now suppose, that the legislature of Alabama had passed a law, prohibiting any body but one of their own incorporated banks, from dealing in bills of exchange. This would present a more important question. In the present state of the commercial world, bills of exchange are one of the great means of carrying on the commerce of the world. Our commerce with the East Indies is principally carried on by means of bills of exchange. These are now sent, instead of specie, to China, to Batavia and to Calcutta. By means of bills of exchange, our northern merchants are enabled to obtain funds in the south, for the purchase of the cotton and tobacco, the rich productions of that portion of our country. By means of bills of exchange, the merchants of the south are enabled to purchase goods in the north. By means of bills of exchange, the manufacturers of the north are enabled to receive remittances from the south, for the carriages, shoes, cabinet furniture, and numerous other articles shipped and sold there. It will not be said, that no commerce can be carried on, without the use and facilities of bills of exchange; but it is said, with emphasis, that without their use, it would be a cramped, and crippled, and an unproductive commerce. Our ships would be almost useless, and the trade and intercourse between the states would be prostrate.

Now, by the constitution of the United States, power is given to congress to regulate commerce with foreign nations, and among the states. This power to regulate commerce necessarily includes in it the power to regulate the means by which commerce is to be carried on. Hence, the laws relative to ships or vessels. No express power is given over them by the constitution, but they are the great means by which commerce is carried on, and therefore, congress, having the power to regulate commerce, has exercised the power of regulating them. It is submitted, that the legislature of Alabama has as much right to declare that no ship or vessel shall come into the ports of that state, which does not belong to one of her own citizens, and is not registered in some office established by a law of Alabama, as she has to prohibit any but her own citizens from dealing in exchange *within her territories. She may as well say, a merchant shall not [*532
sell or buy a bale of goods, as that he shall not buy or sell a bill of exchange.

Sergeant, for the United States Bank.—The case stated admits the right of the plaintiffs to sue in Alabama, and in the circuit court for that district. It admits the right to recover a judgment in such suit. It admits the right of the plaintiffs, therefore, to be, to appear, and to act as a corporation under its charter, in Alabama. This concession, approved and sanctioned as it is by the judgment of the court, would seem to make it unnecessary to consider the question whether a foreign corporation can sue in Alabama; unless it be deemed doubtful in this court, where it is perhaps open upon

the record, notwithstanding the concession. If thought necessary, it will accordingly be considered.

But, first in order, it is proposed to consider the question directly presented, being the one decided by the circuit court, which is thus stated in the record: "Whether the purchase of the said bill of exchange by the plaintiffs as aforesaid, was a valid contract under the laws of Alabama." Before proceeding to the general question here presented, it is right to give some attention to the nature and state of the transaction, as embraced in the words "as aforesaid;" in order to exhibit one view of the case of itself sufficient for its decision. It is necessary only to premise, for this purpose, that the bank was authorized by its charter to purchase and to hold bills of exchange, without restriction of time or place; that the defendant had a right by law to sell the bill of exchange; and that the contract of sale was executed and at an end. It was no longer executory. The suit is not upon the contract of sale, nor to enforce that contract. It is upon the bill sold, against the defendant as indorser, and upon his contract as indorser.

How does that contract arise? It consists of two parts, the indorsement, and the delivery of the bill indorsed. Neither alone would create a liability, and neither alone makes a contract as indorser. The indorsement by itself makes no contract with anybody, either to pass the bill or to create the liability. It is the delivery which effects both these ends. The ordinary form of the declaration proves this; the settled law of bills and notes establishes it. The parties on the bill make a new contract with every successive holder, by the delivery. This is the law as to bills and notes payable to bearer; it is equally so as to indorsed bills; the delivery makes the contract. The time and place of indorsement, material for some purposes, are wholly immaterial for this. Whenever and wherever the name may have been written, the delivery gives it effect, whether it be to pass the bill merely, or to pass it with a liability on the part of the indorser.

The question, then, is, where was the delivery made? This is a *question of legal construction, and not a mere matter of fact. Suppose, the transaction to have been carried on by means of correspondence, where would the delivery be considered in law to have been made? The bill being indorsed by the one party, and the full consideration paid by the other, it must surely be construed to have been made where the party is capable of receiving it. Nothing less than this would be giving the stipulated equivalent. It is indispensable to the justice of the case, and according to the intention of the parties. Upon any construction but this, the one party would get the money of the other, without a consideration. An interpretation leading to such a conclusion would be a disgrace to the law. Both parties must be supposed to intend what is fair and in good faith. Does it make any difference, that the transaction is conducted by means of an agent, and not by written correspondence? There is no reason why it should. Persons who are distant from each other can only treat through intermediaries; and it is of no consequence, what they are. The agent acts under instructions, which are his contract, and the essence of that contract is to obtain a lawful and valid delivery. But it is superfluous to argue in favor of a position already established by the highest judicial authority in the land. *Cox* v. *United States*, 6 Pet. 172, 202; *Duncan* v. *United States*, 7 Ibid. 435, 449. The delivery, then, in contemplation of

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law, was at the bank. That delivery passed the bill to the bank, with all the rights accruing by it against the parties.

But it may be alleged, that admitting all this to be so, the contract created by delivery of the bill is affected by the illegality of the original contract of purchase, so as to render the indorsement also illegal. To this there are several answers. In the first place, the original contract was executed and at an end, by delivery of the thing bargained for. Can what was so delivered be recovered back? The full consideration has been paid. There is no offer to refund it; and there is nothing immoral in the transaction. Again, the very reverse of the allegation is the truth. This construction makes the original contract good and valid, by making its end and object lawful. In legal intendment, it transfers the whole contract to Philadelphia, as the place of performance. If the delivery was to be made there, the contract arising from that delivery was also there. For this purpose, it is not material, where the money was paid; it is not material, where the indorsers name was written on the bill. The place of indorsement may fix the measure of liability in case of dishonor of the bill; the delivery makes the contract with the particular holder. This must especially be the case, where an agent is employed. His authority is to make a lawful and valid purchase. He must do it in a lawful mode; and in favor of justice, he will be intended to have done so. *Still further, it cannot be admitted, [*534
that even the alleged illegality is of such a character as to defeat the claim upon the bill. To produce that result, there must be a clear prohibition by statute, or by the common law; or a penalty, which implies a prohibition. See the cases collected in *Wheeler* v. *Russell*, 17 Mass. 258. In the case now under consideration, there is no such prohibition. There is at most an infirmity in the contract of sale, from the want of capacity to make the purchase. Admit, for the purpose of this argument, that the contract of sale could not have been enforced at law by the buyer; it does not follow, that the execution of the contract is illegal; still less, that it is criminal. The bill was good, before the contract; it is good after the contract. If it had been made expressly to be negotiated to a bank out of the state, that would not affect its validity, even though the policy of the state were against foreign banks carrying on business within its limits. *Reese* v. *Conococheague Bank*, 5 Rand. 326.

If this be so, the more general question does not arise. At all events, it will, however, receive some light from the view which has been taken. I will now proceed to consider it. That question is, whether the Bank of the United States can lawfully become the holder of a bill of exchange, by purchase in Alabama. The general ground taken against the bank is, that no corporation can make such purchase, nor enter into any contract, out of the state in which it is chartered. A vastly important position this must be admitted to be. Its bearing is very extensive. For, observe some of its effects.

1. It will follow, as an unavoidable consequence, that no corporation can buy a bill of exchange at all, unless, which rarely happens, it be strictly a domestic bill, that is, wholly within a state. There must be different parties on the bill, at different places. Each makes a new contract with the holder, and each contract has its own locality. If a corporation be incapable of contracting out of the state where it is chartered, it cannot be the holder

of such a bill. Nor is this all; no title can be derived through a corporation.

2. This doctrine once introduced into the law as a principle, no one can foresee the extent of its operation. It must apply to all contracts whatever, express or implied, primary or secondary, avoiding them all. It must apply to them according to some legal determined method of fixing the locality. What that is, is a construction of law upon the facts. Is this construction to continue as heretofore, or will a new set of principles become necessary? If they continue, the contract, otherwise moral and just, may be made void by construction of law.

3. It would operate, suddenly and without notice, to condemn a long-established usage and practice, universally understood, adopted and approved. It operates upon the past and the present, as well as the future, so as to avoid all existing contracts to an extent which can neither be limited nor defined. The method of proceeding by *legislation is very different. It acts prospectively. It acts with precision, and with due limitation and exception. Its action is restricted to the sphere of legislative power, leaving each state free to pursue its own policy, within the limits of its constitutional power; and leaving in rightful force all that is not prohibited. But a principle like that contended for, judicially established, sweeps over all the states, and embraces all cases whatsoever, even such as the true policy of the state may require should be supported.

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Partial legislation, forbidding certain acts of foreign corporations, has been adopted in many of the states; for example, in Pennsylvania, New York and Virginia. Whether such acts be within the constitutional competency of the state legislatures or not, yet it is most clear, that they all assume as their basis, the general power of corporations to contract, where there is no statutory prohibition; the continuance of that power, except in the prohibited cases; and its unlimited existence, where it has not been curtailed or restricted. There cannot possibly be higher or stronger proof of the law—the universal law—than this is. It is the most authoritative and conclusive evidence. To such acts, when duly passed, the common law lends its aid to give them effect. What they prohibit, the law will in no manner aid to support, but the contrary.

Having stated these preliminary objections, we now come to the very question: Does the law of Alabama prohibit a corporation chartered in another state from buying a bill of exchange in Alabama? Does it, in other words, prohibit such a corporation from making a contract? The broad ground is here taken.

What, then, let us inquire, is the law of Alabama? Of what does it consist? It is made up of the common law, the constitution and statutes of the state, and the constitution and statutes of the United States where they are applicable. The common law is regularly derived to it, and is coeval with its existence. In Prince's Dig. Laws of Georgia 551, is a declaration of the boundaries of the state of Georgia, the same as admitted for the United States by the treaty of peace with England: § 23, 119. In page 552, is the authority to sell to the United States a part, comprehending the present states of Alabama and Mississippi: § 23. This part was accordingly ceded and the consideration received: p. 526. Thus ceded, it retained its former laws till altered. What was that law? The common law had been adopted

by the state of Georgia, by express statutory enactment, on the 25th February 1784. Prince 310, § 1. This is sufficient. But further, the fifth section of the articles of cession (Prince 527), refers to the ordinance of 13th January 1787, for the government of the western territory of the United States, which provides for the common law. (1 U. S. Stat. 52, art 2.) And finally, the common law is saved by the present constitution of Alabama. Schedule, § 5 ; Aik. Dig. 45. There can be no doubt, therefore, that the common law is in force in Alabama. The common law is said to be "common right." The expression *seems a quaint one, but it is true to the sense. Right is antecedent to all law. The object of law is to secure [*536 right ; not so much to define as to enforce it, and to prevent wrong. When we speak of what is *malum in se*, we have an accurate and explicable meaning. We say at once, that it is against law, referring to a standard to which all laws must be supposed to conform. So, of the obligation of promises, and the like, derived from a source above the law. It is this common law, which in every state and nation protects and secures the great body of our rights, and enforces obligations founded in morality. In all civilized nations, this law is substantially the same. Even in nations not admitted to be within that description, there is a strong resemblance ; for example, in the laws of the Hindoos. The reason is obvious. Whether expounded in codes or disclosed by judicial investigation and decision, the great principles of justice are identical ; and it is the aim of all law to cultivate, extend and enforce them. Statutes are but few in comparison. They are exceptions ; the common law is the great body. The legislator acts chiefly upon matters which are indifferent.

Constitutions of states are frames of government. They give no civil rights. The utmost they aim at, in this respect, is to secure some of the most important of them (as existing things), by a solemn assertion of them, by excepting them from the encroachments of power, or by placing around them strong and permanent guards. This is the proper office of a bill of rights. In all forms of government, these rights are the same ; however they may be trodden down in arbitrary ones, where there is no independent judiciary to protect them. The common law acknowledges and aids them. Of this common law, the law of nations is a part, and the law-merchant is a part, as binding and obligatory upon courts of justice, and upon individuals, as any other part of the common law. Surely, it cannot be necessary to quote authority for this. It is self-evident. It must be so, for the rights and interests of individuals are concerned in the law of nations ; they depend upon it. No body of municipal law would be complete without it ; unless the whole transactions of a community were confined within its limits, and the people never went abroad. It furnishes the only rule of decision, in a vast variety of cases ; there would be no rule without it. It is the common law of nations, that is, of all the inhabitants of the civilized world. It is said, with great propriety, to be the law of nature, applied to nations ; the unwritten law, founded upon rights. Take, for example, one of the most simple of its elements : the owner of property going abroad with it, is the owner still. If taken from him by force or by fraud, he is robbed of it. When the wrong is done by individuals, under the law of nations, he is entitled to redress. When by a state or nation, his own nation compels reparation to be made. This law is thus the rule of decision for individuals,

and between individuals, the only rule. What a sovereign may do, is another question. He is responsible as a sovereign, if he do wrong. But between
*537] individuals, it is the only rule of decision. *"The principle of international law on the subject of co-existing commissions on the estate of a bankrupt, in concurrent operation in different countries, is a rule of decision, not a question of jurisdiction, and does not affect the right of territorial sovereignty." *Holmes* v. *Remsen*, 4 Johns. Ch. 466; s. c. 20 Johns. 229. Where this rule is properly applicable, it is, for all judicial purposes, a part of the law of the land—it is the law of the land. Every judge is bound to administer it as the law of the case. He can no more disregard or disobey it, than any other part of the law. It is "common right," the right of every suitor.

May not this rule, it will be asked, be controlled by the sovereign law-giving power? Admit that it may—that if a statute be so made as to prohibit what the law of nations permits, the statute must be obeyed. The common law cannot do this: there is an evident contradiction, for the common law cannot repeal or overrule itself. The judge cannot do it, for he is to administer the law, and this is the law. No general notions of policy or impolicy can effect such an end; and for this plain reason, that these are considerations to be entertained by the sovereign power. To that power, the responsibility belongs; the state or nation is answerable. Upon this ground, our claims on foreign nations have rested, that they have disregarded the law of nations; upon this ground, they have been acknowledged and paid. To the generality of the proposition, namely, that the law of nations is a part of the common law, or law of the land, there is no exception. Every chapter and section of the law of nations is embraced by it; it is true of the whole, and it is true of every part, no matter what its foundation. If there be a title of comity, as there certainly is, still it is a title of the law of nations; and therefore, a title of the common law, as binding in the administration of justice as any other part. The name, whatever it may seem to the ear to import, does not detract from its obligatory force. The law-making power may have authority over it, as it has over the common law. But, in the absence of a statute plainly to the contrary, if a case arise within the law of nations, that is the law to be applied to it in judgment.

No nation has ever more implicitly acknowledged this truth than the United States. The construction of our courts is such as to secure an inflexible administration of justice to foreigners as well as to our own citizens. No bending to the winds of occasional doctrine. Steady, erect and independent, they have no guide and no teacher but the law. Even our courts of admiralty (a description of courts elsewhere too subject to extraneous influence) have here been furnished with no direction but the law. No nation has had more occasion to insist upon the vigorous application of the law of nations. We have felt, as every nation similarly circumstanced must feel, that a large portion of the justice due to our fellow-citizens is to be
*538] obtained only by means of the law of *nations; and we acknowledge it, not only for its justice, but that we may have the benefit of its provisions. It is a feeble exhibition of its virtue, to speak only of its regulating the intercourse of nations. Its operation is upon individuals, and upon individual rights.

The position that the law of nations is part and parcel of the common law, is supported by the highest and most venerable authority; indeed, it has never been questioned, and more especially the law-merchant. 1 Bl. Com. 273; 4 Ibid. 67. Magna Charta, c. 30, contains an express provision in favor of merchant strangers; which occasioned the striking remark of Montesquieu, lib. 20, ch. 14, that the English have made the protection of foreign merchants, one of the articles of their own liberty. In *Triquet* v. *Bath*, 3 Burr. 1480–81, Lord MANSFIELD quotes Lord TALBOT, as declaring a clear opinion, "that the law of nations, in its full extent, was part of the law of England." "That the law of nations was to be collected from the practice of different nations, and the authority of writers." He quotes Lord HARDWICKE to the same effect, and Lord HOLT. Four names being thus associated, either of them alone sufficient to establish a point; and collectively, making a weight of authority, only surpassed by the splendor of such an assemblage of luminaries. In *Respublica* v. *Longchamps*, 1 Dall. 111, a criminal case, the indictment was upon the law of nations. MCKEAN, Chief Justice, a very learned lawyer, and a very eminent man, says, "the law of nations form a part of the municipal laws of Pennsylvania." "This law, in its full extent, is part of the law of this state, and is to be collected from the practice of different nations, and the authority of writers."

But why accumulate authorities upon a point which is every day adopted, acted upon and confessed? The occasions for its application are of daily occurrence, and its application is daily made (sometimes unconsciously, I admit) by every tribunal in the land, from the highest to the lowest. Why take up time in insisting upon what is so manifest, so universally conceded? Manifest and conceded though it be, yet there is not always a full sense of its force and authority. This makes it necessary to say, as the truth really is, that the authority of the law of nations is exactly the same as that of the common law; it is as binding in matters of judicature; it is imperative and of absolute power. Its principles, being known, can no more be set aside, evaded or disregarded than a settled principle of the common law. Call it comity; still it is law, and part of the rights of individuals, who are wronged if it be denied to them.

This law is a part of the law of Alabama towards foreign nations. Its authority towards the states of this Union is even greater. They are united by an association at once national and federal. To their national character, belongs the faculty of regulating all their commerce, of cultivating its growth, and improving and strengthening the commercial intercourse between the different parts of the nation. The spirit of such an association, which aims at an intimate, *and easy, and equal intercourse, demands, [*539
that whatever there is of comity between nations, or by the practice of nations, should be enlarged among the associates. More especially is this true, as the care of commerce is intrusted to the government of the whole, as a common concern, affecting the general welfare. If, by the practice of these states, under the influence or this spirit of the constitution of the United States, there were to be an enlarged comity; it would become among them an enlargement of that branch of the law of nations, of full authority. That practice is inquirable into (for no formal convention is necessary), and if ascertained, has the effect of law. This does not at all detract from the

sovereignty of the states. On the contrary, it is the work of sovereign power, attesting its existence. If it has been the universal practice, to acknowledge each others' charters of incorporation, in contracts, that would make the law ; even though (which is by no means the case) it were not so among independent nations. Of such a practice, some of the evidences will hereafter be adverted to, not as necessary, but because they may be useful. Certainly, there can be no good reason for frowning upon, or seeking to destroy, a practice, which is in harmony with the spirit of the constitution ; tends to the growth of commerce ; and has a kindly influence upon the intercourse of brethren of one family.

Is this in any manner derogatory, or can it be prejudicial, to the sovereignty or to the policy of the states ? We have heard it argued, that laws have no extra-territorial force, and many authorities cited to maintain the position. Properly understood, it is as true as it is familiar. The meaning is, that, *proprio vigore*, they have no such power ; that is, they have none by virtue of any authority in the law-giver. He cannot make a law to govern in another territory. It is because this is so, that the law of nations is necessary, founded in mutual convenience and in common consent, to ascertain a rule in individual cases. The comity of nations has furnished the rule. It is not, on this account, the less a rule of binding force. Huberus says, "every nation, from comity, admits that the laws of each nation, in force within its own territorial limits, ought to be in force in all other nations, without injury to their respective powers and rights." De Confl. Leg. lib. 1, tit. 3, § 2, p. 538. The proudest nations have adopted this maxim. How, then, can its adoption be derogatory to states closely confederated ? But if, at any time, such a practice, however long continued, should be found derogatory, impolitic or inconvenient, is the evil without a remedy ? The law-making power is to apply the corrective.

And here, we naturally recur to the other branch of the law of Alabama, the statutory law, the exercise of the power of the law-making authority. Within the limits of the constitution, this is admitted to be plenary ; there is no other restriction. The legislature is competent to decide upon both points—the evil and the remedy. Of the duty of the courts to respect the decision, when clearly made, there is no doubt. But that it belongs to the judiciary originally *to deal with either, cannot be assented to. The courts are to expound the laws, not to make them ; they have no faculties for such an inquiry. There is still another objection. The will of the legislature, however pronounced, is binding upon the judiciary. Their enactment is a positive exercise of legislative power. Their refusal to enact, where they have power, is equally significant of their opinion. Either is the will of the community, which is paramount. The legislature, too, can precisely adapt the remedy to the evil. Courts of justice cannot ; they have no power to change the law from what it has been. Here, then, is the saving of what Huberus calls "their respective powers and rights." It is in the sovereign law-making power, and not in the administration of the law, that the saving authority is lodged.

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Having thus established that the law of nations is part of the law of Alabama, we come to these the only remaining inquiries :—1. What is the law of the case, according to the laws of nations ; as they exist among

independent nations, and by the practice of these states? 2. Is there any statute of Alabama which alters the law?

1. But here we are met by an objection which, if well founded, puts the law of nations and the comity of nations entirely out of the case. It is said, they do not apply, because the states of this Union are confederated and not independent states. (Opinion of the judge of the circuit court.) These states are at once confederated and independent states. They are, to all intents and purpose, independent and sovereign, except so far as they have given up their powers to the Union. "For all national purposes, embraced by the federal constitution, the states and their citizens are one—united under one sovereign authority. In all other respects the states are necessarily foreign and independent of each other." *Buckner* v. *Finley*, 2 Pet. 586, 590. Have congress then the power, and have they exercised it, to supply the rule in all cases, where, between independent sovereignties, it is furnished by the law of nations; and where, from some cause, it is indispensably requisite that it should be supplied? Do the laws of the United States define the rights of the domicil in cases of intestacy and succession? Do they decide, what law shall govern the construction of contracts? Do they tell us, where a contract shall be deemed to have been made? Do they determine, how the capacity of parties shall be ascertained? Do they provide, how the ages of majority, for different purposes, shall be determined? Do they settle, or afford the means of settling, any one of the innumerable questions arising from the conflict of laws? The constitution makes provision for the cases of fugitives from justice and fugitives from labor, and that is all.

But, speaking historically, there was a time when these states (then provinces) were entirely independent of each other. There was a time, afterwards, when they were united by a very loose and inadequate confederation. What law governed at those respective *periods? When and how has it been altered? There has been no alteration. There is scarcely [*541 a volume of reports in this Union, the reports of the decisions of this court included, which has not the title Foreign Laws, and Foreign States; and does not embrace under them, these states and their laws. There is not a digest, with any pretension to the character of completeness, but has such a title. There is not a case discussed, in which a question arises, where the law of nations is not appealed to. The learned and most useful work of Judge STORY, upon the Conflict of Laws, applies it to the states throughout. And this court has decided, sanctioning the judgment of the circuit court for the district of Pennsylvania, *Lonsdale* v. *Brown*, 4 W. C. C. 86, that a bill drawn in one state upon another state, is a foreign bill. If this be an error, there certainly never was another instance of one so pervading and deeply rooted, and which so long escaped detection. We submit, however, respectfully, but confidently, that it is not an error. A law among these states, deciding those questions of continual occurrence which fall under the title of comity of nations, is of indispensable necessity, much more important among themselves, than between any one of them and nations foreign to our Union. In proportion as intercommunication becomes more rapid and easy, or, in other words, as the great ends and objects of the Union are attained, it becomes more and more important. Precisely, because these states are at once confederated and independent, because

there is a union, and yet these are sovereign states, we cannot dispense with a law, which is in the spirit of union, but is essential to independent sovereignties. Comity is a sovereign attribute. It would, indeed, be very singular, if it were true, that a British corporation was entitled to be acknowledged in our courts, but a corporation of one of our own states was not.

Assuming that the law of nations does apply between the states of the Union; what is the rule of that law as applied to the present question? The rights of a corporation, that is, its corporate rights, are all conferred by its charter, are all of equal authority, and from the same source of power. What are they? To have a corporate name and style; to have a common seal; to have succession; to sue and be sued by its corporate name; to be, by that name, a person in law, capable of contracting; to make by-laws. The power to transact business is not, properly speaking, granted by the charter, but the rights of the associators, which they would have individually or collectively, are restricted by it. The grant is limited to the particular kind of business, whatever it may by, or other kinds are expressly prohibited; in either case, the body cannot transcend these limits. Thus incorporated, the body becomes a person in law; and is embraced by statutes which speak of persons, as well in criminal as in civil proceedings. *United States* v. *Amedy*, 11 Wheat. 392; *United States* v. *State Bank of North Carolina*, 6 Pet. 29; *Beaston* v. *Farmers' Bank of Delaware*, *12 Ibid. 134–5. Such a recognition of state corporations, by the laws of the United States, as persons, having a lawful existence, is, of course, a recognition of them, by the same laws, as persons possessing all the faculties and attributes conferred upon them by their charters. To acknowledge them to be persons, when they are so by creation of law, is to acknowledge all that, by law, constitutes the persons so created. There can be no distinction. All the corporate privileges are of equal authority, as before remarked; and are from the same source.

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This person, thus constituted, is not so entirely artificial as to conceal or destroy the substantial character of the individuals associated under its name; nor to take away their rights, or release them from their obligations as citizens. Thus, a corporation composed of citizens of one state, with proper averments on the record, may sue a citizen of another state in the courts of the United States. *Bank United States* v. *Deveaux*, 5 Cranch 61. Where a corporation is sued in the circuit court, it is *primâ facie* evidence, to support the averment of citizenship, that it is incorporated by a law of the state where it is sued. *Catlett* v. *Pacific Insurance Company*, 1 Paine 594. It is only *primâ facie* evidence. A bill in equity was filed by A., a citizen of New Jersey, against B. and the Lehigh Coal and Navigation Company, an incorporated body in Pennsylvania. A plea to the jurisdiction set forth that four of the corporators, naming them, were citizens of New Jersey. The plea was sustained; the corporators being the real defendants, by their corporate name, and represented by their officers. *Kirkpatrick* v. *White*, 4 W. C. C. 595. A foreign corporation, for the purpose of jurisdiction, is an alien. *Society for Propagation of the Gospel* v. *Wheeler*, 2 Gallis. 105; 8 Wheat. 464. The very case before the court admits the jurisdiction, and of course, admits the ground upon which the jurisdiction must rest.

Here, then, is an association of individuals, clothed by law with certain faculties, which, as individuals, they would not have, to transact business, which as individuals they might lawfully transact. The former are their franchises or privileges. They are united, and one and all conferred by territorial legislation. The substance of the matter is, that it is an exercise of individual rights, under a form authorized by law. It cannot be distinguished in principle, from the case of special partnerships under the laws of Pennsylvania and New York; where one person becomes the representative of all, just as the corporate name represents the individual corporators. They all make up the one person in law.

It must be very obvious (and this is the conclusion sought), that the acknowledgment of this person, for any one of its legal attributes, is as full a recognition of the law which created it, as an acknowledgment of the whole. Such a recognition is equally giving effect to extra-territorial legislation. In truth, it is an acknowledgment of the whole, for it admits the person created by law. As a person, having a lawful existence, all the faculties which constitute *the person are admitted, unless there be some of them that are prohibited. This seems an unavoidable, though a tedious deduction. [*543

Of the privileges conferred by the charter, one is to sue and be sued by the corporate name. Can such a corporation, being a foreign corporation, sue and be sued by its corporate name? If it can, the law which created it is acknowledged as operating, and of course, the person is acknowledged as the law has made it; and that law, it cannot be denied, does give the power to contract in the corporate name. The right of foreign states and corporations to sue, can be traced in the books of the law, for more than two centuries. The earliest case is that in Bac. Abr. 531, E. 3, tit. Court de Admiralite, *King of Spain's Case in Admiraltie.* Prohibition was granted and trover directed at common law in the name of the King of Spain. 2 Bulstr. 222 (13 Jac. I.); 1 Roll. 133. In Hob. 113 (Jac. I., between 1614 and 1625), the bill was dismissed, because it was in the name of the ambassador, and not of the king of Spain. Then follows the case of the *Dutch West India Company* v. *Van Moses*, 2 Ld. Raym. 1532; 1 Str. 612. (2 Geo. II. A. D. 1729.) The company, a foreign corporation, sued by its name of reputation, The suit was sustained; and though the case was much litigated, and carried to the house of lords, the right to sue was never denied. This case has always been considered as having finally settled the question. The cases which have since occurred have already been brought into view in the cause last argued (by Mr. Ogden) excepting *King of Spain* v. *Mullett*, 2 Bligh 31. There is still another case, of some note, in which we were all interested, where a great political corporation was allowed to sue, without dispute, and to recover in the courts of England. *United States* v. *Smithson's Executors*, for the Smithsonian legacy.

The authorities in the United States are equally uniform. There are decisions in Massachusetts, Connecticut, New York, Pennsylvania, Virginia, Louisiana, and probably in other states. The point is so thoroughly established, as to be assumed in argument. In *Bushel* v. *Commowealth Insurance Company of Boston*, 15 Serg. & Rawle 173, the question was, whether a foreign corporation was liable to the process of foreign attachment. Judge ROGERS, delivering the opinion of the supreme court of Pennsylvania, says,

"The power of corporations to sue in personal actions is not restricted to corporations created by the laws of this commonwealth. If they can sue within a foreign jurisdiction, why should they not also be liable to suit, in the same manner and under the same regulations as domestic corporations?" See also *Williamson* v. *Smoot*, 7 Mart. (La.) 31. Nor is the authority of this high court wanting. In the *Society for Propagating the Gospel* v. *New Haven*, 8 Wheat. 464, the right of a foreign corporation to sue is admitted. In *The Same* v. *Town of Pawlet*, 4 Pet. 480, the right is sustained; and the court further decided, that the corporate capacity is
*544] *admitted, by pleading the general issue. If contested, it must be by a special plea in abatement, or in bar.

Innumerable cases have occurred, in which the question might have been raised. Instead of this, there are rules of pleading and rules of evidence, which assume the right to sue, as unquestionable. If the charter be put in issue, the foreign law must be produced. In no one of the decided cases was the suit maintained by virtue of any special law or right. They were all upon the ground of the common law. In no one of them (unless it be in *Pindall* v. *Marietta Bank*), was the power to contract drawn in question, denied or doubted. In 2 Bligh. 21, Lord ELDEN puts a case of contract. "Suppose, the king were to send his jewels to be set by Rundell & Bridge, and the jewellers were not to deliver them up to the king, do you think the courts of the country would not interfere?" Lord REDESDALE says, "I conceive there can be no doubt, that a sovereign may sue. If he cannot, there is a right without a remedy." "As to the proposition, that a sovereign prince cannot sue, it would be against all ideas of justice." No learning is necessary to understand such arguments as these. The highest legal attainments are never more fully exhibited than in direct appeals to good sense and justice.

The doctrine, as has been seen, of the right of the corporations of one state to sue in the other, is thoroughly incorporated into our system of jurisprudence. How then can it be said, there is no comity between the states? It is established, that the law of the charter is recognised, though granted by another state. The corporation is clothed everywhere with the character given by the charter. The whole question is thus settled, as to all corporations. Can it be necessary further to examine the principle upon which this rests? In giving corporate powers, the foreign law operates rightfully within its own territory, as it does in giving validity or construction to a contract between individuals. It is the exercise of a strictly territorial power in the one act, as it is in the other. There is nothing extra-territorial in either. The question is, what respect is yielded to it in another state? And the answer is found in the fact, that it is capable of suing as a domestic corporation may, which is evidence of unbounded respect. Story's Conflict of Laws 64, § 65–7.

We have been told, that foreign executors, administrators and guardians are not acknowledged. If this were so, it would prove nothing but that, for good reasons, these cases are excepted from the general operation of comity. But they are acknowledged; they cannot sue; this is the whole extent of the exception; a voluntary payment to them is good and valid. Besides, the executorship or administration of the domicil is regarded as the principal,

and any other is only ancillary to it. So that, for most, perhaps, for all purposes, except enforcing payment by suit, they are regarded.

But as to contracts, the ground of the matter is, that the extra-territorial effect is by comity, adopting voluntarily the law of *another state, as a rule of decision, where it is the proper and natural rule. This [*545 adoption is presumed, unless the contrary be made apparent. Such is the doctrine of the common law of the states of this Union. And what would be the consequences of a contrary doctrine?

1. The inconvenience, mischief and injustice that would result from establishing that a corporation can make no valid contract beyond the limits of the state creating it. Consider the immorality of urging and aiding the breach of contracts fairly made; especially, if, on one side, executed. Public policy may sometimes require from the tribunals to withhold their aid from parties; but they do it from necessity, and always under a sense of the individual injustice and wrong that are done. It is a casual advantage to dishonesty, which ought not to be often presented, nor unless there be a clear prohibition. What possible inducement is there here? Consider also the great injury to commerce and trade. Sales for incorporated manufacturing companies, to the amount of millions of dollars annually, are made by their agents. What possible reason can be given for declaring all such transactions illegal and void? Iusurances are made by incorporated companies against fire, and against marine risks. Are the policies to be declared void? To what good end? Again, it must embrace all contracts, implied as well as express; for if it be unlawful to make an express promise, surely the law will not imply one. No two corporations, in different states, can make any contract with each other. For one of them must unavoidably contract out of the state where it is chartered. Obligations and notes of corporations, even bank-notes, passed in another state, must become void, because there is a new contract with the holder. There would be no end to the enumeration of the mischiefs which would flow from such a decision.

2. The capacity of corporations to make contracts beyond their states, and the exertion of that capacity, are supported by uniform, universal and long-continued practice. How many of our corporations have made contracts in England, by their agents? How many have made contracts in other states? How many such contracts are now pending, where the consideration on one side has been fully paid? It surpasses all power to estimate them. What disorder and gross wrong would be caused by introducing a principle that would declare them illegal and void! And for what good purpose? To abolish a common law, found convenient and just, and adopted as it were by the whole people.

But of this adoption there is more authentic evidence than this; more tangible, more cognisable in a court of justice. There is every kind of evidence.

1. Judicial. Unless it be in a single case, to be adverted to presently, which really is not an exception, there is not an instance of such an objection ever being made. This silence is not without significance, for cases have been of daily occurrence. *There is affirmative evidence too. [*546 *Society for Propagating the Gospel* v. *Wheeler*, 8 Wheat. 464, is to the point. *Pindall* v. *Marietta Bank*, 2 Rand. 465, admits that what are

there termed "secondary contracts," may be made. If it seem to go further, and question the validity of primary contracts, it is proper to remark, that the action was sustained; and therefore, the saying would be merely *obiter*, and of little weight, notwithstanding the high authority of the court. But what is said has express reference to banking operations, and the restraints upon them by the laws of Virginia. Judge CABELL says, "It is our policy to restrain all banking operations by corporations not established by our laws. It would not, therefore, be permitted to a bank in Ohio, to establish an agency in this state, for discounting notes, or carrying on other banking operations; nor could they sustain an action upon notes thus acquired by them." The policy here referred to is apparent from the statutes of Virginia. (Tait's Dig. 41, &c.) Let the court of appeals, however, be its own expositor. In *Reese* v. *Conococheague Bank*, 5 Rand. 326, GREEN, Justice, says, "It was decided, 2 Rand. 465, that a foreign corporation may sue in our courts, upon a contract with them, valid according to the laws of the country in which it was made; unless it was contrary to the policy of our laws; and the making a note in Virginia to be discounted at a foreign bank, is not so." Thus explained, the case admits the power to make contracts by all corporations, excepting primary ones by banks, for carrying on banking operations, and by banks for all others. We might, therefore, lawfully buy a bill of exchange in Virginia; and so the case is really an authority in our favor.

2. Legislative. The Chesapeake and Ohio Canal Company, an incorporated company, sent an agent to Europe, to borrow a million of dollars, to be secured by mortgage upon the three local corporations within this district; and the United States, under an act of congress, guarantied the payment of the interest. Was this a void contract, being made abroad? The contracts made by the treasury with the state banks, about the deposit of the public moneys, were made, in law, as we have seen, and probably, in fact too, in the city of Washington. Were they void? The same question might be put as to the contracts the deposit banks were to make with each other; which, as to one of them, could not fail to be beyond the limits of its charter. Contracts of the post-office department with railroad companies, are they all void? These are all instances of contracts with or by corporations, beyond their territorial limits, and yet they are recognised by acts of congress as good.

The methods of proceeding by state legislatures are to the same effect. In New York, there is a law against banking, and a law against foreign insurance companies (companies out of the United States) and their agents. In Pennsylvania, there are similar laws. Purd. Dig. 68, 368; Tate's Dig. 41. In Alabama, there was a law in 1827, since repealed. And so of other states. *How far such prohibitory laws may be carried by state legislation, without violating the rights of other states and their citizens, under the constitution of the United States, in not now the question. They are adduced only as evidence of the concurrence of the state legislation with the legislation of the United States, that corporations could lawfully contract out of their territorial limits, unless they were prohibited. Else why should there be prohibition? The New York law prohibited foreign insurance companies, property so called, from insuring in New York. If there was any sense in the act, it must follow, that insurance companies of other

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states may still insure in New York. This is high and authentic evidence of the law, from the highest sources. Have the people, the legislatures, the judiciary and the executive, all been hitherto in error, from the time when the United States, in their need, made their loan in Holland, up to the present time? The answer is plain. What is not prohibited, is lawful, and is under the protection of the law. A corporation has a two-fold claim. It has a claim to respect for the law of its creation, and it has a claim to respect for the rights and privileges of the individuals who compose it. The former is sufficient for the present purpose. The latter need not be asserted, unless there should be a prohibition, which, under color of inhibiting the exercise of corporate powers, should really assail the constitutional rights of the citizen.

It remains only to consider, whether there is any law of the state of Alabama, which forbids the purchase of a bill of exchange, within her limits, by a corportion of another state. Mobile, it appears, is a market where bills are to be bought, and where it must be for the interest of sellers, that buyers should freely come. One does not easily perceive, what policy there can be to the contrary, unless it be to enable the State Bank of Alabama, in some measure, to command the market, by excluding competition as far as possible. But whatever was thus gained by the buyer, would be lost by the seller. The more buyers, the better for the seller; the better for Mobile; the better for Alabama. Nor is it objectionable, because the buyer is a bank. Such a purchase, though it be the operation of a bank, is not a banking operation. What is meant by banking, is well understood and defined. It consists of lending or discounting, receiving on deposit, and issuing paper. *Maine Bank* v. *Butts*, 9 Mass. 54; *People* v. *Utica Insurance Company*, 15 Johns. 390; *New York Firemen Insurance Company* v. *Ely*, 2 Cow. 678. Accordingly, the prohibitory laws of the state point their prohibitions and penalties against one or all of these. A banking charter would not, by giving banking privileges, authorize the dealing in bills of exchange. When such a power is deemed requisite, it is expressly given, as something superadded. A prohibition of banking would not prohibit the buying exchange by corportions or by individuals. The policy of such prohibitory statutes would not be contravened by buying bills of exchange. A company incorporated *for buying bills of exchange would not be a bank, either in a popular or in a legal sense. [*548

Such would have been the clear law, to be applied to the case, if there had been any legislative act against banking, in Alabama, at the time of this transaction. Neither the prohibition nor the policy of the act would have been encountered by the purchase of a bill of exchange. But there was none. The second section of the act of 1827 was a general law. 1 Stew. 301–2. In 1833, Aikin's Digest was established, and all laws of "a general and public nature," not included in it, were repealed, from and after the 1st of January then next. Dig. 301, § 5. This law is not included in the digest, and therefore, it is repealed. It was under this law, while it was in force, that Stebbins and others were indicted. 1 Stew. 300. The charge was for issuing bank-notes. The case is not unlike the case of the *Utica Insurance Company*, in 15 Johns., though the mode of proceeding was different. The defendants were indicted, as individuals, and attempted to justify themselves, under a very lose and extraordinary charter; which did

not define their powers, and was, therefore, contended, to be without restriction or limitation. Towards the close of the opinion, the learned judge speaks of the issuing of bank-notes, as being a franchise, under the constitution of Alabama. The charter is a franchise, but it is not perceived, that the acts which might be done by an individual, if not prohibited by law, can, with propriety, be so called, according to the legal import of the term. 10 Petersdoff 53 (77), note; 4 Com. Dig. 459. But be that as it may, as regards the issuing of bank-notes, it cannot be pretended, that the buying or holding a bill of exchange, is a franchise. If it be, it would follow, according to the decision in *Stebbins's Case*, that under the act of 1827, an individual might be indicted for buying a bill of exchange. This proves too much.

The constitution has no bearing upon the question. It provides in detail for the establishment of a state bank and branches, and limits the number of banks the legislature may establish. (Aik. Dig. 55–6.) The state bank is specially authorized to purchase bills of exchange, conceding that it would not otherwise possess the power; but there is nothing to prohibit individuals or other corporations from buying them, nor from which any such prohibition can be implied. It would, indeed, be derogatory to the character of the state of Alabama, to suppose, that she would be so wanting to her own true policy, and to the duties she owes to the citizens of her own state, and of other states, as to deprive them of the use of the ordinary means of transferring their funds, for the sake of conferring an odious and unjust, and probably, fruitless, monopoly, upon her own bank. The only effect would be, to impose upon her citizens the vexation and expense of going abroad in quest of purchasers, instead of having purchasers to come to them.

It is submitted, that the judgment below is erroneous; that it ought *to be reversed; and judgment on the case stated be entered for the plaintiffs.
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Webster, also of counsel, with *Sergeant*, for the United States Bank.—The United States Bank is a corporation created by a law of the state of Pennsylvania. By that act, the bank, among other functions, possesses that of dealing in bills of exchange. In the month of January 1837, having funds in Mobile, this bank, through the instrumentality of its agent, Mr. Poe, purchased a bill of exchange, to remit to New York. This bill, drawn at Mobile, upon New York, and indorsed by William D. Primrose, the defendant in this case, not having been paid, either at New York, or by the drawer, the Bank of the United States instituted this suit in the circuit court of Alabama, to recover the money due on the bill. In the court below, it was decided, that the contract by Poe in behalf of the bank was void, on two grounds. 1. Because it was a contract made by the United States Bank, in the state of Alabama; whereas, a bank incorporated by the state of Pennsylvania can do no act out of the limits of Pennsylvania. 2. Because Alabama has a bank of her own, the capital of which is owned by the state herself, which is authorized to buy and sell exchange, and from the profits of which she derives her revenue; and the purchase of bills of exchange, being a banking operation, the purchase of such bills by others, at least, by any corporation, although there is no express law forbidding it, is against the policy of the

state of Alabama, as it may be inferred from the provisions of the constitution of that state, and the law made in conformity thereto.

It is admitted, that the parties are rightfully in court. It is admitted also, that the defendant is a citizen of Alabama, and that all the citizens who compose the corporation of the United States Bank are citizens of the state of Pennsylvania, or of some other state besides Alabama. The question is, can they, as a corporation, do any act within the state of Alabama? In other words, is there anything in the constitution or laws of the state of Alabama which prohibits, or rightfully can prohibit, citizens of other states, or corporations created by other states, from buying and selling bills of exchange in the state of Alabama?

In his argument for the defendant in this case, my learned friend, Mr. Vande Gruff, asked certain questions, which I propose to answer. Can this bank, said he, transfer itself into the state of Alabama? Certainly not. Can it establish a branch in the state of Alabama, there to perform the same duties and transact the same business in all respects as in the state of Pennsylvania? Certainly not. Can it exercise in the state of Alabama, any of its corporate functions? Certainly it can. For my learned friend admits its right to sue in that state, which is a right that it possesses solely by the authority of the Pennsylvania law, by which the bank is incorporated. We thus clear the case of some difficulty, by arriving at this point, [*550 the admission on both sides that there are certain powers which the bank can exercise within the state of Alabama, and certain others which it cannot exercise.

The question is, then, whether the bank can exercise within the state of Alabama, this very power of buying a bill of exchange? Our proposition is, that she can buy a bill of exchange within the state of Alabama: because there are no corporate functions necessary to the act of buying of a bill of exchange; because buying and selling exchange is a thing open to all the world, in Alabama as well as everywhere else; because, although the power to buy and sell bills of exchange be conferred upon this bank, by its charter, and it could not buy or sell a bill of exchange, without that provision in its charter, yet this power was conferred upon it, as were other powers conferred by its charter, to place the bank upon the same footing as an individual; to give it, not a monopoly, not an exclusive privilege in this respect, but simply, the same power which the members of the corporation, as individuals, have an unquestionable right to exercise. The banker, the broker, the merchant, the manufacturer, all buy bills of exchange, as individuals. The individuals who compose a corporation may do it; and we say, that they may do it, though they do it in the name of, and for, the corporation. We say, undoubtedly, that they cannot acquire power, under the Pennsylvania charter, to do acts in Alabama which they cannot do as individuals; but we say, that the corporation may do, in their corporate character, in Alabama, all such acts, authorized by their charter, as the members thereof would have a right to perform as individuals.

The learned counsel on the other side was certainly not disposed to concede gratuitously anything in this case. Yet he did admit, that there might be a case in which the acts of a corporation, created by one state, if done in another state, would be valid. He supposed the case of a railroad company in one state, sending an agent into another state, to buy iron for the con-

struction of the road. Without conceding expressly the point of law in that case, he admitted, that it would be a case very different from the present; and he gave as a reason for this admission, that it would be a single special act, necessary to enable the corporation to execute its functions within the state to which it belonged; and in this respect, differing from the case now under consideration. In what circumstance, it may well be asked, do the cases differ? One act only of the corporation of the United States Bank is set forth in this record, and that act stands singly and by itself. There is no proof before the court, that the corporation ever bought another bill of exchange than that which is the subject of this suit. Transactions of this nature must necessarily come, one by one, before this court, when they come at all, and must stand or fall on their individual merits, and not upon
*551] *the supposition of any policy which would recognise the legality of a single act, and deny the validity of the dealings or transactions generally, of which that act is a part.

Then, as to the other reason stated by my learned friend in support of the idea, that such a purchase of iron might be supported, he says, it is, because that, in that case, the purchase being made abroad solely to enable the corporation to perform its functions at home, might be considered legal, under the law of comity from one state to another. Now, said Mr. Webster, that supposed case is precisely the case before the court. Here is the case of a corporation established in Philadelphia, one of whose lawful functions is to deal in exchange. A Philadelphia merchant, having complied with the order of his correspondent in Alabama, draws a bill upon him for the amount due in consequence, goes to the United States Bank, and sells the bill. The funds thus realized by the bank from the purchase of bills of exchange, accumulate in Alabama. How are those funds to be brought back by the Philadelphia corporation, within its control? The bank has unquestioned power to deal in bills of exchange. Can there be such a thing as dealing in exchange, with a power to act only on one end of the line? Certainly not. How then is the bank in Philadelphia to get its funds back from Alabama? Suppose, that it were to send an agent there, and buy specie. Can the bank ship the specie? Can it sign an agreement for the freight, insurance and charges of bringing it round? To do that, would be an act of commerce, of navigation, not of exchange. A power conferred upon a bank to deal in exchange would be perfectly nugatory, unless accompanied by a power also to direct its funds to be remitted. The practical result of a contrary construction would be, that this Pennsylvania bank may carry on exchange between Philadelphia and Reading, or Philadelphia and Lancaster, but not by possibility with Mobile, or any other city or place in the south, nor even with New York, Trenton or Baltimore. Out of Pennsylvania, it could only buy and remit. It could get no return. An exchange that runs but one way! What sort of an exchange is that?

Having cleared the case of some of these generalities, Mr. Webster proceeded to the exposition of what he considered a constitutional, American view of the question. The record of this case finds, that these plaintiffs, the members of the corporation of the United States Bank, are citizens of other states, and that the defendant is a citizen of Alabama. Now, in the first place, to begin with the beginning of this part of the question, what are the relations which the individual citizens of one state bear to the individual

citizens of any other state of this Union? How did the matter stand, before the revolution? When these states were colonies, what was the relation between the inhabitants of the different colonies? Certainly, it was not that of aliens. They were not, indeed, all citizens of the same colony; but certainly, they were fellow-subjects, and owed a common allegiance; and it was *not competent for the legislative power to say, that the citizens of any one of the colonies should be alien to the other. This was the [*552 state of the case, until the 4th of July 1776, when this common allegiance was thrown off. After a short interval of two years, after the renunciation of that allegiance, the articles of confederation were adopted; and now let us see what was the relation between the citizens of the different states, by the articles of confederation. The government had become a confederation. But it was something more—much more. It was not merely an alliance between distinct governments, for the common defence and general welfare, but it recognised and confirmed a community of interest, of character, and of privileges, between the citizens of the several states. "The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this Union," said the fourth of the articles of confederation, "the free inhabitants of each of these states shall be entitled to all the privileges and immunities of free citizens in the several states; and the people of each state shall have free ingress and egress to and from any other state, and shall enjoy therein all the privileges of trade and commerce," &c. This placed the inhabitants of each state on equal ground as to the rights and privileges which they might exercise in every other state.

So things stood at the adoption of the constitution of the United States. The article of the present constitution, in fewer words and more general and comprehensive terms, confirms this community of rights and privileges in the following form: "The citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." However obvious and general this provision may be, it will be found to have some particular application to the case now before the court; the article in the confederation serving as the expounder of this article in the constitution. That this article in the constitution does not confer on the citizens of each state political rights in every other state, is admitted. A citizen of Pennsylvania cannot go into Virginia, and vote at an election in that state; though, when he has acquired a residence in Virginia, and is otherwise qualified, as required by her constitution, he becomes, without formal adoption as a citizen of Virginia, a citizen of that state, politically. But for the purposes of trade, commerce, buying and selling, it is evidently not in the power of any state to impose any hinderance or embarrassment, or lay any excise, toll, duty or exclusion, upon citizens of other states, to place them, coming there, upon a different footing from her own citizens.

There is one provision then in the constitution, by which citizens of one state may trade in another without hinderance or embarrassment. There is another provision of the constitution, by which citizens of one state are entitled to sue citizens of any other state in the courts of the United States. This is a very plain and clear right under the constitution; but it is not more clear than the preceding.

*Here, then, are two distinct constitutional provisions, conferring [*553 power upon citizens of Pennsylvania and every other state, as to

what they may do in Alabama or any other state: citizens of other states may trade in Alabama, in whatsoever is lawful to citizens of Alabama; and if, in the course of their dealings, they have claims on citizens of Alabama, they may sue in Alabama, in the courts of the United States. This is American constitutional law, independent of all comity whatever.

By the decisions of this court, it has been settled, that this right to sue is a right which may be exercised in the name of a corporation. Here is one of their rights, then, which may be exercised in Alabama, by citizens of another state, in the name of a corporation. If citizens of Pennsylvania can exercise, in Alabama, the right to sue in the name of a corporation, what hinders them from exercising, in the same manner, this other constitutional right, the right to trade? If it be the established right of persons in Pennsylvania, to sue in Alabama, in the name of a corporation, why may they not do any other lawful act, in the name of a corporation? If no reason to the contrary can be given, then the law in the one case is the law also in the other case.

My learned friend says, indeed, that suing and making a contract are different things. True! but this argument, so far as it has any force, makes against his cause; for it is a much more distinct exercise of corporate power to bring a suit, than by an agent to make a purchase. What does the law take to be true, when it says that a corporation of one state may sue in another? Why, that the corporation is there, in court, ready to submit to the court's decree—a party on its record. But in the case of the purchase of the bill of exchange, such as is the subject of this suit, what is assumed? No more than that George Poe bought a bill of exchange, and paid the value for it, on account of his employers in Philadelphia. So far from its being a more natural right, for a corporation to be allowed to sue, it is a more natural right to be allowed to trade in a state in which the corporation does not exist. What is the distinction? Buying a bill of exchange is said to be an act, and therefore, the corporation could not do it in Alabama. Is not a suit an act? Is it not doing? Does it not, in truth, involve many acts? The truth is, that this argument against the power of a corporation to do acts beyond the territorial jurisdiction of the authority by which it is created, is refuted by all history as well as by plain reason.

What have all the great corporations in England been doing, for centuries back? The English East India company, as far back as the reign of Elizabeth, has been trading all over the eastern world. That company traded in Asia, before Great Britain had established any territorial government there, and in other parts of the world, where England never pretended to any territorial authority. The Bank of England, established in 1694, has been always trading and dealing in exchanges and bullion with Hamburg, Amsterdam and other marts of Europe. Numerous other corporations have
*554] been *created in England, for the purpose of exercising power over matters and things, in territories wherein the power of England has never been exerted. The whole commercial world is full of such corporations, exercising similar powers, beyond the territorial jurisdiction within which they have legal existence.

I say, then, that the right, secured to the people of Pennsylvania, to sue in any other state, in the name of a corporation, is no more clear, than this other right of such a corporation to trade in any other state; nor even so

clear; it is a farther-fetched legal presumption, or a much greater extent of national courtesy or comity, to suppose a foreign corporation actually in court, in its legal existence, with its legal attributes, and acting in its own name, than it is to allow an ordinary act of trade, done by its agent, on its own account, to be a valid transaction.

Mr. Webster here referred to an opinion of this court, directly bearing on this question. It was the case of the *Bank of the United States* v. *Deveaux*, decided in 1809. The bank here mentioned was the first Bank of the United States, which had not, like the last, express authority given in its charter, to sue in the courts of the United States. It sued, therefore, as this plaintiff sues, in its name as a corporation; but with an averment, as here, that its members were citizens of Pennsylvania, the action being brought against a citizen of Georgia. The only question was, whether the plaintiffs might not exercise their constitutional right to sue in the courts of the United States, although they appeared in the name of their Pennsylvania corporation; and the court decided that they might. "Substantially and essentially," said Chief Justice MARSHALL, "the parties in such a case, where the members of the corporation are aliens, or citizens of a different state from the opposite party, come within the spirit and terms of the jurisdiction conferred by the constitution on the national tribunals." "That corporations, composed of citizens, are considered by the legislature as citizens, under certain circumstances, is to be strongly inferred from the registering acts. It never could be intended, that an American registered vessel, abandoned to an insurance company, composed of citizens, should lose her character as an American vessel; and yet this would be the consequence of declaring that the members of the corporation were, to every intent and purpose, out of view, and merged in the corporation." The argument here is, that citizens may exercise their rights of suing, as such citizens, in the name of their corporation; because, in such a name, the law recognises them as competent to engage in transactions, hold property, and enjoy rights proper for them as citizens.

If the court agree in this language of its own opinion, as far back as the year 1809, it must be admitted, that the rights of the people of Pennsylvania, as citizens of the United States, are not merged in the act of incorporation by which they are associated, and under which they are parties to this suit. If there ever was a human *being that did not argue to the [*555
obscure, from the more obscure, it was certainly the late Chief Justice of the United States. And what was his argument to prove that the citizens of one state may sue in another, by a corporate name? It is, as I have said, that they may sue by a corporate name, because they can do acts out of court by a corporate name; whilst, directly reversing this conclusion, it has been held in this case, in the court below, that, whilst a corporation of one state may rightfully sue in another state, it cannot do any other act therein. In this view of the case, said Mr. Webster, I see no occasion to invoke the law of comity or international courtesy to our aid. Here our case stands, independently of that law, on American ground, as an American question.

Now, as to the reason of the case. What possible difference can it make, if these citizens of Pennsylvania can trade, or buy and sell bills, in Alabama, whether the trading, or buying and selling, be under one agency

or another? That Poe (the agent of the United States Bank, at Mobile) could, under a power of attorney from a citizen of Philadelphia, buy and sell bills of exchange in Alabama, will not be denied. If, without an act of incorporation, several citizens of Philadelphia should form an association to buy and sell bills of exchange, with five directors or managers of its concerns, those five directors may send as many agents as they please into other states, to buy bills of exchange, &c. Having thus formed themselves into this associated company, and appointed agents for the purpose of transacting their business, if they should go one step farther, and obtain a charter from Pennsylvania, that their meetings and proceedings may be more regular, and the acts of the association more methodical, what would be the difference, in the eye of reason, between the acts of the members of such a corporation, and the acts of the same individuals, associated for the same purposes, without incorporation, and acting by common agents, correspondents, or attorneys? The officers of a bank are but the agents of the proprietors; and their purchases and sales are founded upon their property, and directed by their will, in the same manner as the acts of agents of unincorporated associations or partnerships. The Girard Bank, we all know, was never incorporated, until after Mr. Girard's death; yet its proprietor, during a considerable part of his life, and until his death, acted as a banker. Could he not, during his life, send an agent into Alabama, and there purchase bills of exchange? And if his neighbors over the way chose to ask for an act of incorporation from the state of Pennsylvania, are they thereby less entitled to the privileges common to all other citizens, than Stephen Girard was?

I agree certainly, generally, that a state law cannot operate ex-territorially, as the phrase is. But it is a rule of law, that a state authority may create an artificial being, giving it legal existence; and that that being, thus created, may legally sue in other states than that by which it is created. It follows, of course, as a consequence *of the right of suit in another state, that it may obtain judgment there. If it obtain judgment, it may accept satisfaction of that judgment. If a judgment be obtained in Alabama, by the United States Bank, would not an acknowledgment of satisfaction by an agent of the bank be a satisfaction of the decree of the court? How is the fruit of a suit to be gathered, if the bank, by its agent, cannot do this act? What benefit can it be to this bank, to be allowed to sue in Alabama, if it cannot take the money sued for? But it is said by the court below, that it cannot recover money in Alabama, because it cannot do an act there! According to this argument, although the power to appeal to law, and the power to recover judgment exist, yet the *fructus legis* is all dust and ashes.

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On the commercial branch of this question, Mr. Webster continued, he would say but little. But this much he would say: The state of Alabama cannot make any commercial regulation for her own emolument or benefit, such as should create any difference between her own citizens and citizens of other states. He did not say, that the state of Alabama may not make corporations, and give to them privileges which she does not give to her citizens. But he did say, that she cannot create a monopoly to the prejudice of citizens of other states, or to the disparagement or prejudice of any common commercial right. Suppose, that a person having occasion to purchase

bills of exchange, should not like the credit of bills sold by the Bank of Alabama; or suppose (what is within the reach of possibility), that the Bank of Alabama should fail; may not a citizen buy bills elsewhere? Or is it supposed, that the state of Alabama can give such a preference to any institution of her own, in the buying and selling of exchange, that no exchange can be bought and sold within her limits, but by that institution? It would be, doubtless, doing the state great injustice, to suppose that she could entertain any such purpose.

In conclusion of the argument upon this point, said Mr. Webster, I maintain, that the plaintiffs in this case had a right to purchase this bill and to recover judgment upon it. For the same reason that they had a right to bring this suit, they had the right to do the act upon which the suit was brought.

But if the rights of the plaintiffs, under this constitutional view of the case, be doubted, then what has been called the comity of nations obliges the court, to sustain the plaintiffs in this cause. The term "comity" is taken from the civil law. Vattel has no distinct chapter upon that head. But the doctrine is laid down by other authorities, with sufficient distinctness, and in effect by him. It is, in general terms, that there are, between nations at peace with one another, rights, both natural and individual, resulting from the comity or courtesy due from one friendly nation to another. Among these, is the right to sue in their courts respectively; the right to travel in each other's dominions; the right to pursue one's vocation in trade; the right to do all things generally, which belong to the citizens proper of each country, and which they are not precluded *from [*557
doing by some positive law of the state. Among these rights, one of the clearest is the right of a citizen of one nation to take away his property from the territory of any other friendly nation, without molestation or objection. This is what we call the comity of nations. It is the usage of nations, and has become a positive obligation on all nations. I know, said Mr. Webster, that it is but a customary or voluntary law; that it is a law existing by the common understanding and consent of nations, and not established for the government of nations, by any common superior. For this reason, every nation, to a certain extent, judges for itself of the extent of the obligation of this law, and puts its own construction upon it. Every other nation, however, has a right to do the same; and if, therefore, any two nations differ irreconcilably in their construction of this law, there is no resort for settling that difference but the *ultima ratio regum*.

The right of a foreigner to sue in the courts of any country may be regulated by particular laws or ordinances of that country. He may be required to give security for the costs of suit, in any case, or not to leave the country until the end of the controversy. He may possibly be required to give security that he will not carry his property out of the country, till his debts are paid. But if, under pretence of such regulation, any nation shall impose unreasonable restrictions or penalties on the citizens of any other nation, the power of judging that matter for itself lies with that other nation. Suppose, that the government of the United States, for example, should say, that every foreigner should pay into the public treasury ten, twenty or fifty per cent. of any amount which he might recover by suit in our courts of law; would such a regulation be perfectly just and right?

Or would not the practice of such extortion upon the citizens of other nations be a just ground of complaint, and, if unredressed, a ground of war, much more sufficient than most of the causes which put nations in arms against one another? What is, in fact, now the question, which has assumed so serious an aspect, between the governments of France and Mexico? One of the leading causes of difference between the two countries, so far as I understand it, is not, that the courts of Mexico are not open to the citizens or subjects of France, but that the courts do not do justice between them and the citizens of Mexico; in other words, that French subjects are not treated in Mexico according to the comity of the law of nations. [Mr. Webster said, he did not speak of the merits of this quarrel; into that he did not enter; he spoke only of things alleged between the parties.] Look, said Mr. Webster, into Vattel, and you will find, that this very right to carry away property, the proceeds of trade, from a foreign friendly country, by exchange, is a well-understood and positive part of the law of nations. Suppose, that there existed no treaties between the United States and France or England, guarantying these rights to each other's citizens; those rights would yet exist by tacit consent and permission. Suppose, this govern-
*558] ment, in the absence of treaties, were to shut its courts *against the citizens of either nation (to do so would be only a violation of the comity of nations), and should grant them no redress upon complaint being made; it might unquestionably be ground of war against the United States by that nation.

There are in London several incorporated insurance companies. Suppose, a ship insured by one of these companies should be wrecked in the Chesapeake bay. Being abandoned, she becomes the property of the corporation by which she was insured. I demand, whether the insurers may not come and take this property, and bring an action for it, if necessary, in any court in this country, state or federal? They may recover by an action of tort against the wrongdoer. They may replevy their property, if necessary, or sell it; or refit it; or send it back. Unquestionably, if any country were to debar the citizens of another country of the enjoyment of these common rights, within its territorial jurisdiction, it would be cause of war. I do not mean, that a single act of that sort would or should bring on a war; but it would be an act of that nature, so plain and manifest a violation of our duty, under the law of nations, as to justify war. According to the judgment of the court below, in the present case, however, these insurance companies would be deprived of their rightful remedy. You let them sue, indeed; but that is all.

Mr. Webster here referred to a case tried some time ago in the circuit court of the Massachusetts district, in which he was counsel, in which a vessel insured in Boston was wrecked in Nova Scotia, and was abandoned to the insurers. The insurance office sent out an agent, who did that which the owner of the vessel said was an acceptance of the abandonment. On the question whether the agent of the Boston office accepted the abandonment (said Mr. Webster), the court decided the case. If we had said, that we sent him down, indeed, but that his agency ceased when he got to the boundary line of the state, and he could do no act, when he got beyond it, and the court had agreed with us, we might, perhaps, have gained our cause.

But it never occurred to me, nor probably to the court, that the agency of our agent terminated, the moment that he passed the limits of the state.

The law of comity is a part of the law of nations; and it does authorize a corporation of any state to make contracts beyond the limits of that state. How does a state contract? How many of the states of this Union have made contracts for loans in England? A state is sovereign, in a certain sense. But when a state sues, it sues as a corporation. When it enters into contracts with the citizens of foreign nations, it does so in its corporate character. I now say, that it is the adjudged and admitted law of the world, that corporations have the same right to contract and to sue in foreign countries, as individuals have. By the law of nations, individuals of other countries are allowed in this country to contract and sue; and we make no distinction, in the case of individuals, between the right to sue and *the right to contract. Nor can any such distinction be sustained in law, in the case of corporations. Where, in history, in the books, is [*559 any law or *dictum* to be found (except the disputed case from Virginia), in which a distinction is drawn between the rights of individuals and of corporations, to contract and sue in foreign countries, in regard to things, generally, free and open to everybody? In the whole civilized world, at home and abroad, in England, Holland and other countries of Europe, the equal rights of corporations and individuals, in this respect, have been undisputed until now, and in this case; and if a distinction is to be set up between them, at this day, it lies with the counsel on the other side to produce some semblance of authority or show of reason for it.

But it is argued, that though this law of comity exists as between independent nations, it does not exist between the states of this Union. That argument appears to have been the foundation of the judgment in the court below. In respect to this law of comity, it is said, states are not nations; they have no national soverignty; a sort of *residuum* of sovereignty is all that remains to them. The national sovereignty, it is said, is conferred on this government, and part of the municipal sovereignty. The rest of the municipal sovereignty belongs to the states. Notwithstanding the respect which I entertain for the learned judge who presided in that court, I cannot follow in the train of his argument. I can make no diagram, such as this, of the partition of national character between the state and the general governments. I cannot map it out, and say, so far is national, and so far municipal; and here is the exact line where the one begins and the other ends. We have no second Laplace, and we never shall have, with his Méchanique Politique, able to define and describe the orbit of each sphere in our political system with such exact mathematical precision. There is no such thing as arranging these governments of ours, by the laws of gravitation, so that they will be sure to go on for ever without impinging. These institutions are practical, admirable, glorious, blessed creations. Still they were, when created, experimental institutions; and if the convention which framed the constitution of the United States had set down in it certain general definitions of power, such as have been alleged in the argument of this case, and stopped there, I verily believe that in the course of the fifty years which have since elapsed, this government would have never gone into operation.

Suppose, that this constitution had said, in terms, after the language

of the court below—all national sovereignty shall belong to the United States all municipal sovereignty to the several states. I will say, that however clear, however distinct, such a definition may appear to those who use it, the employment of it in the constitution could only have led to utter confusion and uncertainty. I am not prepared to say, that the states have no national sovereignty. The laws of some of the states—Maryland and Virginia, for instance—provide punishment for treason. The power thus exercised *is certainly not municipal. Virginia has a law of alien-
*560] age; that is, a power exercised against a foreign nation. Does not the question necessarily arise, when a power is exercised concerning an alien enemy—enemy to whom? The law of escheat, which exists in all the states, is also the exercise of a great sovereign power.

The term "sovereignty" does not occur in the constitution at all. The constitution treats states as states, and the United States as the United States; and by a careful enumeration declares all the powers that are granted to the United States, and all the rest are reserved to the states. If we pursue, to the extreme point, the powers granted, and the powers reserved, the powers of the general and state governments will be found, it is to be feared, impinging, and in conflict. Our hope is, that the prudence and patriotism of the states, and the wisdom of this government, will prevent that catastrophe. For myself, I will pursue the advice of the court in *Deveaux's Case;* I will avoid nice metaphysical subtilties, and all useless theories; I will keep my feet out of the traps of general definition; I will keep my feet out of all traps; I will keep to things as they are, and go no farther to inquire what they might be, if they were not what they are. The states of this Union, as states, are subject to all the voluntary and customary law of nations. [Mr. Webster here referred to, and quoted a passage from Vattel, page 61, which, he said, clearly showed that states connected together as are the states of this Union, must be considered as much component parts of the law of nations as any others.]

If, for the decision of any question, the proper rule is to be found in the law of nations, that law adheres to the subject. It follows the subject through, no matter into what place, high or low. You cannot escape the law of nations, in a case where it is applicable. The air of every judicature is full of it. It pervades the courts of law of the highest character, and the court of *pie poudre;* aye, even the constable's court. It is part of the universal law. It may share the glorious eulogy pronounced by Hooker upon law itself: that there is nothing so high as to be beyond the reach of its power, nothing so low as to be beneath its care. If any question be within the influence of the law of nations, the law of nations is there. If the law of comity does not exist between the states of this Union, how can it exist between a state and the subjects of any foreign sovereignty? Upon all the consideration that I have given to the case, the conclusion seems to me inevitable, that if the law of comity do not exist between the states of this Union, it cannot exist between the states individually and foreign powers. It is true, a state cannot make a treaty; she cannot be a party to a new chapter on the law of nations: but the law which prevails among nations—the customary rule of judicature, recognised by all nations—binds her in all her courts.

I have heard no answer to another argument. If a contract be made

in New York, will the expectation that it is to be there executed, *and suit is brought upon it in Alabama, it is to be decided by the law of the state in which the contract was made. In a case now before this court, there has been a decision by the court of Alabama, in which that court has undertaken to learn the law of the state of New York, and administer it in Alabama. Why take notice in Alabama of the law of New York? Because, simply, there are cases in which the courts in Alabama feel it to be their duty to administer that law, and to enforce rights accordingly. That, said Mr. Webster, is the very point for which we contend, viz., the court in Alabama should have given effect to rights exercised in that state by the plaintiff in the present cause, under the authority of Pennsylvania, without prejudice to the state of Alabama.

After all that has been said in argument, about corporations, they are but forms of special partnership, in some of which the partners are severally liable. The whole end and aim of most of them, as with us, is to concentrate the means of small capitalists in a form in which they can be used to advantage. In the eastern states, manufactures, too extensive for individual capital, are carried on in this way. A large quantity of goods is manufactured and sold to the south, out of cotton bought in the south, to the amount of many millions in every year. Upon the principle of the decision in the court below, the manufacturers of the goods and the growers of the cotton would be equally precluded from recovering their dues. What will our fellow-citizens of the south say to this? If, after we have got their cotton, they cannot get their money for it, they will be in no great love, I think, with these new doctrines, about the comity of states and nations.

Again, look at the question as it regards the insurance offices. How are all marine insurances, fire insurances and life insurances effected in this country, but by the agency of companies incorporated by the several states? And the insurances made by these companies, beyond the limits of their particular states, are they all void? I suppose, that the insurances against fire, effected for companies at Hartford, in Connecticut, alone, by agents all over the northern states, may amount to an aggregate of some millions of dollars. I remember a case occurring in New Hampshire, of a suit against one of those companies, for the amount of an insurance, in which a recovery was had against the company; and nothing was said, nor probably thought, of such a contract of insurance being illegal, on the ground that a corporation of Connecticut could not do an act or make a contract in New Hampshire. Are those insurances all to be held void, upon the principle of the decision from Alabama?

And as to notes issued by banks: if one, in Alabama, hold the notes of a bank incorporated by Pennsylvania, are they void? If one be robbed there of such notes, is it no theft? If one counterfeits those notes there, is it no crime? Are all such notes mere nullities, when out of the state where issued?

Reference has been made to the statute-books, to show cases in *which the states have forbidden foreign insurance companies from [*562
making insurances within their limits. But no such prohibition has been shown against insurances by citizens of, or companies created in, the different states. Is not this an exact case for the application of the rule *exceptio probat regulam?* The fact of such prohibitory legislation shows that

citizens of other states have, and that citizens of foreign powers had, before they were excluded by law, the right to make insurances in any and every one of the states.

Mr. Webster next called the attention of the court to the deposit law passed by congress on the 23d of June 1836. It was, said he, one of the conditions upon which, under that act, any state bank should become a depository of the public money, that it should enter into obligations "to render to the government all the duties and services heretofore required by law to be performed by the late Bank of the United States, and its several branches or officers;" that is, to remit money to any part of the United States, transfer it from one state to another, &c. But that act required also, something more; and it shows how little versed we in congress were (and I take to myself my full share of the shame) in the legal obstacles to the doing of acts in one state, by corporations of other states. The first section of that act provides, that "in those states, territories or districts, in which there are no banks," &c., the secretary of the treasury "may make arrangement with a bank or banks in some other state, territory or district, to establish an agency or agencies in the states, territories, so destitute of banks, as banks of deposit," &c. Here is an express recognition by congress of the power of a state bank to create an agent, for the purpose of dealing as a bank in another state or territory.

It has been said, that as there is no law of comity, under the law of nations, between the states, it remains for the legislatures of the several states to adopt, in their conduct towards each other, as much of the principle of comity as they please. Here, then, there is to be negotiation between the states, to determine how far they will observe this law of comity; they are thus required to do precisely what they cannot do. States cannot make treaties nor compacts; a state cannot negotiate; it cannot even hold an Indian talk! And now, I would ask, how it happens, at this time of the day, that this court shall be called upon to make a decision contrary to the spirit of the constitution, and against the whole course of decisions in this contry and in Europe, and the undisputed practice under this government, for fifty years, overturning the law of comity, and leaving it to the states, each to establish a comity for itself?

Mr. Webster here took leave of the question of the power of a corporation created by one of the states to make contracts in another.

I now proceed, said Mr. Webster, to consider whether there be anything in the law or constitution of the state of Alabama, which prevents the agent of the United States Bank, in that state, from making such a contract as that which is the foundation of this suit. *It is said, that the buying *563] of a bill of exchange by such agent, is contrary to the policy of the state of Alabama; and this is inferred from the law establishing the Bank of Alabama; that bank being authorized to deal in bills of exchange, and the constitution of the state authorizing the establishment of no other than one bank in the state.

This, said Mr. Webster, is a violent inference. How does the buying or selling bills of exchange in Alabama, by another purchaser than the Bank of Alabama, infringe her policy? Because, it is said, it diminishes the profits which she derives from the dealings of the bank. Profits is her policy, it is argued; gain, her end. Is it against her policy, for Mr. Biddle

to buy bills, because his bank is incorporated; and not against her policy for Mr. Girard to buy bills, because his is not incorporated? Or, how far does she carry this policy imputed to her? Is no one to be allowed to buy or sell bills of exchange in Alabama, but a bank of her own, which may or may not be in credit, and may or may not be solvent? It would be strange, indeed, were any state in this Union to adopt such a policy as this. But, if the argument founded on this inferred policy of Alabama amounts to anything, it proves, not that incorporated citizens of other states cannot buy or sell bills there, but that it is the policy of Alabama to prevent other citizens from buying bills at all in Alabama.

I think, said Mr. Webster, that there is no just foundation for the inference of any such policy on the part of the state of Alabama. By referring to Aikins' Digest of the laws of that state, it will be found, that she has carried her policy a little further than merely the establishing of a bank. Her public officers are authorized to receive the notes of banks of other states in payment of dues to her; and she has enacted laws to punish the forgery of notes of other banks. Now, taking their acts together, considering them as a whole, the inference which has been drawn from her establishment of a state bank, under her constitution, is certainly not sustained.

To consider this argument, however, more closely: it is assumed by it, first, that the state meant, by her legislation, to take to herself all the profits of banking within her territorial limits; and secondly, that the act of buying and selling a bill of exchange belongs to banking. The profits of banking are derived more from circulation than from exchange. If the state meant, through her bank policy, to take all the profits of banking, why has she not taken all the profits of circulation? Not only has she done no such thing, but she protects the circulation of notes of banks of other states.

Mr. Webster begged now to ask the particular attention of the court to this question—What is banking? Alabama, in reference to banking, has done nothing but established a bank, and given it the usual banking powers. And when the learned counsel on the other side speak of banking, what do they mean by it? A bank deals in exchange; and it buys or builds *houses also; so do individuals. If there be anything peculiar in these acts by a bank, it must be, not in the nature of the acts individually, but in the aggregate of the whole. What constitutes banking must be something peculiar. There are various acts of legislation, by different states in this country, for granting or preventing the exercise of banking privileges. But has any law ever been passed, to authorize or to prevent the buying by an individual of a bill of exchange? No one has ever heard of such a thing. The laws to restrain banking have all been directed to one end; that is, to repress the unauthorized circulation of paper money. There are various other functions performed by banks; but, in discharging all these, they only do what unincorporated individuals do. [*564

What is that, then, without which, any institution is not a bank, and with which it is a bank? It is a power to issue promissory notes with a view to their circulation as money. Our ideas of banking have been derived principally from the act constituting the first Bank of the United States, and the idea of that bank was borrowed from the Bank of England. To ascertain the character and peculiar functions of the Bank of England, Mr. Webster had referred, and referred the court, to various authorities: to

McCulloch's Commercial Dictionary ; to Smollett's continuation of Hume's England ; to Godfrey's History of the Bank of England, in Lord Somers' Tracts, 11th volume, 1st article ; to Anderson's History of Commerce, &c. The project of the Bank of England was conceived, Mr. Webster said, by Mr. Paterson, a Scotch gentleman, who had travelled much abroad, and had seen somewhere (he believed in Lombardy) a small bank which issued tickets or promises of payment of money. From this he took the idea of a bank of circulation. That was in 1694. At that time, neither inland bills nor promissory notes were negotiable or transferrible, so as to enable the holder to bring suit thereon in his own name. There was no negotiable paper, except foreign bills of exchange. Mr. Paterson's conception was, that the notes of the Bank of England should be negotiable *toties quoties*, or transferrible from hand to hand, payable at the bank in specie, either on demand or at very short sight. This conception had complete success, because there was then no other inland paper, either bills or notes, which were negotiable. The whole field was occupied by Bank of England notes. In 1698, inland bills were made negotiable by act of parliament ; and in the fourth year of Queen Anne's reign, promissory notes were made negotiable. Of course, after this, everybody might issue promissory notes, and where they had credit enough, they might circulate as money. There is not much of novelty in the inventions of mankind. Under this state of things, that took place in England which we have seen so often take place among us, and which we have put to the account of modern contrivance. Large companies were formed, with heavy amounts of capital, for purposes not professedly banking ; one, especially, to carry on the mining business on a large scale. These companies *issued promissory notes, payable on demand ; and these notes readily got in circulation as cash, to the prejudice of the circulation of the Bank of England. But parliament being at this time in great want of ready money for the expenditures of the war on the continent, the bank proposed to double its capital, and to lend this new half of it to government, if government would secure to the bank an exclusive circulation of its notes. The statute of 6 Anne, c. 22, was accordingly passed ; which recites, that other persons and divers corporations have presumed to borrow money, and to deal as a bank, contrary to former acts ; and thereupon, it is enacted, that "no corporation, or more than six persons in partnership, shall borrow, owe or take up any money on their bills and notes, payable at demand, or at less than six months from the borrowing." This provision has been often re-enacted, and constitutes the banking privilege of the Bank of England. Competition was not feared from the circulation of individual notes. Hence, individuals or partnerships of not more than six persons have been at liberty to issue small notes, payable on demand ; in other words, notes for circulation. And we know, that in the country such notes have extensively circulated ; but private bankers, in London, in the neighborhood of the bank, though it was lawful, have not found it useful to issue their own notes. So that the banking privilege of the Bank of England consisted simply in the privilege of issuing notes for circulation, while that privilege is forbidden, by law, to all other corporations, and all large partnerships and associations. This privilege was restrained, in 1826, so as not to prohibit banking companies, except within the distance of sixty-five miles of London ; and at the same time, notes of

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the bank were made a tender in payment of all debts, except by the bank itself. This provision may be considered as a new privilege ; but it does not belong to the original and essential idea of banking. Mr. McCulloch remarks, and truly, that all that government has properly to do with banks is only so far as they are banks of issue. Upon the same principle, the banks of other countries of Europe are incorporated, with the privilege to issue and circluate notes as their distinctive character. Here Mr. Webster explained the character of the banks of France, Belgium, &c.

Now, how is it in our own country? When our state legislatures have undertaken to restrain banking, the great end in view has been to prevent the circulation of notes. Mr. Webster here referred to the statute books of Massachusetts, Maine, Rhode Island and New Hampshire, for restraining unauthorized companies from issuing notes of circulation. He then turned to the statute of Ohio, imposing a punishment for unauthorized banking. Her law defines, in the first place, what constitutes a bank, viz., the issuing of notes which pass by delivery, and intended for circulation as cash. That, said Mr. Webster, is the true definition of a bank, as we understand it, in this country. Mr. Webster referred also to the laws of other *states, Maryland, New Jersey, Missouri, Pennsylvania, Delaware, North Carolina, South Carolina, Virginia, Georgia, all to the [*566 same effect. The law of the state of Alabama herself, said he, is much more important, in this view of the case, than that of any other state. The constitution of the state of Alabama was established in 1819 ; the law creating the bank of Alabama was passed in 1823. The constitution and this law are all the authorities from which the inference has been drawn of the policy of the state of Alabama. Did she suppose, that by this law, she was establishing such a monopoly of the purchase of bills of exchange as has been contended for in this case? Certainly not. For, by a law passed afterwards, she restrained the circulation of unauthorized bank-notes ; that is, notes not issued by some authorized banks. But did she also restrain dealings in exchange? She did no such thing. Nor is there anything, either in the constitution or the laws of the state of Alabama, which shows that, by banking, she ever meant more than the circulation of bills as currency. There is nothing, therefore, in any law or any policy of Alabama, against the purchase of bills of exchange by others as well as by the Bank of Alabama. She has prohibited by law other transactions which are clearly banking transactions ; but she has not touched this. If even her banking policy includes as well buying exchange, as circulation, and she guards against competition in the one, and leaves the other open, who can say, in the face of such evidence, that it is her policy to guard against what she leaves free and unrestrained? Is there anything in the constitution, or any ground in the legislation of Alabama, to sustain the allegation which has been made of her policy? If not, is the existence of such a policy to be established here by construction, and that construction far-fetched ?

Mr. Webster here rested his argument on this case, which, he said, had been discussed by others so ably as not to justify his occupying the time of the court by going further into it.

The learned counsel on the other side had, in the course of his argument of yesterday, alluded to the newspapers, which, he said, had treated the

decision of the court below scornfully. Mr. Webster said, he was sorry to hear it; for the learned judge had acted, in his decision, he had no doubt, under a high sense of duty. I have been told, said Mr. Webster, but I have not seen it, that a press in this city, since this case has been under consideration in this court, has undertaken to speak, in a tone something approaching to that of command, of the decision upon it to be expected from this court. Such conduct is certainly greatly discreditable to the character of the country, as well as disrespectful and injurious to the court.

A learned gentleman on the other side said, the other day, that he thought he might regard himself, in this cause, as having the country for his client. He only meant, doubtless, to express a strong opinion, that the interest of the country required the case to be decided in his favor. I agree with the learned gentleman, and I go, indeed, far beyond him, in my estimate of
*567] the importance of this case *to the country. He did not take pains to show the extent of the evil which would result from undoing the vast number of contracts which would be affected by the affirmation here of the judgment rendered in the court below, because his object did not require that: his object was to diminish the prospect of mischief, not to enlarge it. For myself, I see neither limit nor end to the calamitous consequences of such a decision. I do not know where it would not reach, what interests it would not disturb, nor how any part of the commercial system of the country would be free from its influences, direct or remote. And for what end is all this to be done? What practical evil calls for so harsh, not to say, so rash a remedy? And why, now, when existing systems and established opinions, when both the law and public sentiment have concurred in what has been found practically so safe and so useful; why now, and why here, seek to introduce new and portentous doctrines? If I were called upon to say, what has struck me as most remarkable and wonderful in this whole case, I would, instead of indulging in expletives, exaggerations or exclamations, put it down as the most extraordinary circumstance, that now, within a short month of the expiration of the first half century of our existence under this constitution, such a question should have been made; that now, for the first time, and here, for the last place on earth, such doctrines as have been heard in its support should be brought forward. With all the respect which I really entertain for the court below, and for the arguments which have been delivered here on the same side, I must say that, in my judgment, the decision now under revision by this court is, in its principle, anti-commercial and anti-social, new and unheard of in our system, and calculated to break up the harmony which has so long prevailed among the states and people of this Union.

It is not, however, for the learned gentleman, nor for myself, to say here that we speak for the country. We advance our sentiments and our arguments, but they are without authority. But it is for you, Mr. Chief Justice and judges, on this, as on other occasions of high importance, to speak and to decide for the country. The guardianship of her commercial interests; the preservation of the harmonious intercourse of all her citizens; the fulfilling, in this respect, of the great object of the constitution, are in your hands; and I am not to doubt, that the trust will be so performed as to sustain at once high national objects and the character of this tribunal.

Ingersoll, for the defendant, said, that although distinct considerations of universal, of international, and of municipal law are involved in this case, he should not attempt to discriminate, but submit them altogether. The judgment of the circuit court is against the plaintiff's right of action; for that judgment, two distinct reasons are given, viz: 1. That the law of Alabama excludes banking in that state, except as prescribed by its peculiar provisions. 2. That besides that local law, the universal law excludes corporations not authorized by the legislative power of such states as *did not charter them. The first reason is enough to support the [*568 judgment, without regard to the second, with which this court is not bound to concern itself. The corporation question, therefore, is not necessarily in issue. It matters not, what the rule of general jurisprudence may be, as to corporations attempting extra-territorial transactions, if the law of Alabama be, that banking is prohibited in that state, whether by corporations or individuals. The banking question rules the case, by the banking interdict, without reference to the corporation question, on which the opposite argument has spent itself in political denunciation. Alabama has a sovereign right to make banking an affair of state; and an unbroken series of the uniform judgments of the supreme court of the United States affirms not only that state right, but the obligation of this court to conform to it. Mr. Ingersoll then read the articles of the constitution of Alabama concerning banks, and an act of the assembly of that state in 1836, by which the profits of banks are declared to be the resource substituted for all other taxation of the state revenue; and several passages of the case of the *State of Alabama* v. *Stebbins*, 1 Stew. 299; which he urged as conclusive of the controversy. The constitution, legislation and adjudication of a sovereign state all unite in declaring that even its own citizens shall not deal in banking, but agreeable to its peculiar laws. The plaintiff bank had not, in any respect, conformed to those laws. Consequently, it cannot bank in Alabama, nor recover there on a banking transaction there. The second reason of the circuit court that corporations have no extra-territorial power may be erroneous, and yet the plaintiff bank must fail for the first reason; not because it is a corporation, but because it is a bank, no matter where or whether incorporated, or partnership, or individual, or even inhabitant and citizen of Alabama. It is enough, that it attempting banking, contrary to the local and peculiar law of Alabama. That settles the question, without involving it with corporation law. The *Bank of the United States* v. *Deveaux*, 5 Cranch 61, falls under this principle too, because no citizens, including those of Alabama, can bank there, contrary to its laws.

No comity interferes with this unquestionable principle. It is the indisputable basis of universal law, that laws have no force beyond the territories of those who make them. This is one of the few principles of universal jurisprudence universally acknowledged. *United States* v. *Bevans*, 3 Wheat. 386; 3 Dall. 370 note, Huberus; Laussat's Fonblanque, book 4, ch. 1, § 6, p. 658 (444); 2 Kent's Com., 3d edit., part 5, lect. 39, p. 457; Story's Conflict of Laws, § 23, p. 24; Henry on Foreign Law, § 1; *United States* v. *Owens*, 2 Pet. 540; *Bank* v. *Donnally*, 8 Ibid. 372; *Rhode Island* v. *Massachusetts*, 12 Ibid. 736.

It would be superfluous to multiply authorities for this indubitable position. In the case last cited, from 12 Peters 740, this court carries it so far

as to declare, and with perfect propriety, that an act of parliament during
*569] the colonial condition of this country *was not binding here. The only force allowed to laws, extra-territorially, is derived from international comity, which never intervenes to set aside either the written law or the common law, or even the state policy or state interest of another country. Henry 2 ; Story's Conflict of Laws, p. 33, § 32–3 ; p. 37, § 38 ; Huberus, art. 3, 3 Dall. 370, in note ; *Bank of Marietta*, 2 Rand. 465 ; *Pennington* v. *Townsend*, 7 Wend. 276. The word in Huberus is "*potestas*," which Dallas translates rights, meaning, as it does mean, any species of right, by written, common, or even usage law ; for no such power or right of one state can, by comity, be supplanted by the law of another state. *Comitas inter communitates* is at most a frail and evanescent substitute for law ; Dallas translates it courtesy, and it is really nothing more. It is a law of reciprocal necessity, of indispensable reciprocity, of absolute charity, to do as you would be done by ; without which the harmony of nations would be incessantly disturbed ; but which, nevertheless, is no more than the highest obligation of charity, to love our neighbours as we do ourselves, but not better than ourselves. Its philosophy is well explained by Judge Story, by a classical quotation, in his learned judgment in the case of *Harvey* v. *Richards*, 1 Mason 413 ; *sub mutuæ vicissitudinis obtentu, damus petimusque vicissim.* Unless, therefore, the state of Georgia needs such concession by comity from the state of Alabama, she is not bound to make it. One of the cases involving this question is brought here by the Carrollton Bank of Louisiana, the law of which state requires its judges to refer in their judgments to the written law of the state on which the judgments are founded, and prohibits the judges from ever leaving the state whose boundaries are established by the constitution. How could the courts of Alabama or any other state reciprocate with Louisiana such regulations as these ? In another of the cases, the United States Bank of Pennsylvania is the plaintiff, which bank, by the law of that state conferring its charter, is closely connected with the canals, railroads, schools and other improvements of Pennsylvania. Could any stretch of comity give such provisions force in Alabama? It is not judicial comity, but the comity of a state which its courts of judicature award. Story's Conflict of Laws, p. 37, § 38. No court, therefore, can allow it, but as the comity of the state, and not the court. Comity, moreover, is international courtesy ; never allowed between provinces, districts, counties, cities, or other parts of the same empire. The connection between these United States is closer and more intimate than that of comity. Their union by federal compact expressly settles the relation of the states to each other, and leaves no room for tacit or constructive comity to operate. A national constitution declares, that no state shall enter into any treaty, alliance or confederation, or, without the consent of congress, into any agreement or compact with another state or foreign power. Such union, with much providence and some jealousy, has settled the powers and relations of the respective states. An article of the consti-
*570] tution provides for the force and *proof of public acts of state, for the privileges and immunities of the citizens of each state in all the rest, for fugitives from justice and fugitives from labor ; leaving little or nothing on this important subject to judicial construction.

For certain purposes, these United States are one and the same nation ; for

others, a *quasi* nation or close confederation; and a mere confederation, but still a national confederation, for all powers not delegated to them by the people and the states. According to the language of this court, in 12 Pet. 720, the states are sovereign within themselves, as to all the powers not granted to the United States, and foreign to each other as to all others. The argument of the judge determining this case in the circuit court, denies the existence of any comity whatever between these several states whose union constitutes a nation. Whether that argument be unquestionable or not, it is certain, that their union makes them a nation. In the opinion of Chancellor KENT, lately published, on this subject, a doubt is intimated, whether, as the citizens of each state are entitled to all the privileges and immunities of citizens in the several states, it is competent to the state of Alabama to prevent citizens of Georgia or Pennsylvania from banking in the former state. But this court adjudged, in the *Bank of the United States* v. *Deveaux*, 5 Cranch 61, that no corporation is a citizens; and it cannot be doubted, that citizens of Georgia and Pennsylvania are not entitled to more privileges and immunities in Alabama, than that state vouchsafes to its own citizens. That full faith and credit shall be given to the acts and public proceedings of the states in each other, seems to be as yet confined to judicial acts. 3 Story's Com. 174; *Pennington* v. *Townsend*, 7 Wend. 279. The laws of the different states are proved as foreign laws in courts of justice; and that it would lead to intolerable confusion, to make by comity the laws of any state, the laws of every other state, is demonstrated in Judge MCKINLEY'S argument, with a force which Chancellor KENT'S opinion attempts in vain to overthrow.

This is, perhaps, a question rather of politics than jurisprudence. It may be granted, that states can re-enact each other's laws, and so adopt them, but it is submitted as clear, that by no agreement whatever, can this be constitutionally effected. If, then, no agreement of states can do it, it cannot be done by comity of courts; otherwise, construction would have more power than legislation. The question is not, whether even one state, or the judicature of one state, can, by comity, adopt the law of another state; but it is, whether this great addition to the law of a state can be made by the judiciary of the United States; not for the United States; but whether the federal judiciary can by comity incorporate the law of one of these United States with that of another. It may be questioned, whether the judiciary of the United States can reciprocate comity with that of any foreign nation. All our federative law, political, civil, penal, fiscal, martial and whatever else there is, is specific and written. There is no common law of the United States *but for principles and definitions. The admiralty law, though of large scope, is by constitutional grant, and the [*571
revenue law is settled by legislation. Could a court of the United States reciprocate admiralty or revenue law with England, France or Mexico?

Chancellor KENT alleges international law of merchants; but if merchants may make laws for nations, so may mariners, travellers or borderers. If merchants by sea, why not traders ashore? Those of New York and Liverpool have no better right to supersede the treaty-making authority, by their own tacit understanding, than the traders who fetch peltries from the north or metals from the south. The borderers of the St. Lawrence, the Sabine, and the Arkansas may arrange rude international codes with Canada

Mexico and Texas, for the government of these United States, usurping the powers of constituted authorities, as *ex parte* professional opinions may usurp those of appointed judicature. There is no occasion for any such irregularities. Every state of the United States has its all-sufficient common law and frequent legislation; while the law-making power and the law-judging department of the Union are in constant being, rendering it wholly unnecessary for illegitimate usage, action or habit, partial, personal and selfish substitutes, to take the place of deliberate law-making. It is, at least, doubtful, whether either the federal or even the state judiciary of these United States has the power to make laws by comity. At all events, it is a perilous faculty, by comity, to make common law for one state from the written law of another; and granting that state courts may exercise such jurisdiction, by no means infers, that the federal judiciary may do it for the states. For this court to introduce a Georgia or Pennsylvania bank into Alabama, would be more than the legislature of that state can do for its own citizens, except as its peculiar constitutions allow.

Introducing or changing law, is often a serious measure. It is the direct exercise of conquest, and the most difficult. Diversities of laws, language and local sympathies, are the ways of God to man, without which all nations would strive to have but one local habitation and one name. *Droit d'aubaine*, British allegiance, the land exclusive law of the common law, all such seemingly severe and harsh provisions are pregnant with the philosophy of providence. A learned foreign lawyer, M. de Tocqueville, vol. 1, p. 99, considers these United States so many foreign nations, whose whole form the Union, of which, originally, even every township was a sort of independent sovereignty. Nothing like law can be more foreign than that of Massachusetts and Louisiana to each other. It may be politic, it may be wise, to try to abolish or mitigate these estrangements of locality; but it is no more practicable to extirpate them, than the barbarisms of war. This court has strenuously adjudged that at any rate such is not the judicial function. It does not and will not anticipate or fabricate legislation.

Furthermore, the objection to courts extending comity for states to banks, is corroborated by the consideration that banking is a sovereign privi-
*572] lege. Making money, or a substitute for it, is of sovereign *faculty. *Wilson* v. *Spencer*, 1 Rand. 100; *Pennington* v. *Townsend*, 7 Wend. 276. Mr. Ogden cites the *People* v. *Utica Ins. Co.*, 15 Johns. 390, for Chief Justice THOMPSON's allegation, that banking was not a franchise at common law. But of what banking is that allegation made? Banking by deposit, by discount, or by circulation? If the latter, it is expressly contradicted by Judge ROANE and the Virginia court, as it is believed to be by all the authors on political economy, In the case of *Drew* v. *Swift*, in the Pennsylvania circuit, it was adjudged by Mr. Justice BALDWIN, that banking by circulation is money-making, and part of the public authority. Be this as it may, as a general principle, Alabama has settled it by her organic law. So adjudged in the *State* v. *Stebbins*, 1 Stew. 299. If it were *res integra*, it might well be questioned, whether any state can devolve on individuals this sovereign authority. It was so questioned, on demurrer, in Tennessee. Peck 269. Without now attempting that perhaps foreclosed position, it is submitted, that no state court, much less a court of the United States, can inflict on one state the banking sovereignty of another state. No comity can do that. It

would be servitude. Otherwise, the taxation, hostilities and all other exigencies of one state or nation may be adjudicated upon another. Even if there were no law of Alabama to forbid it, the flagrant impolicy is patent. Story's Conflict 33. The banks of Europe and Asia, the laws of Mexico and Texas, the abolition acts of Pennsylvania, the English common law, which in Massachusetts, *ipso facto* emancipates a slave, the church laws, laws of royal prerogative and of noblemen's privileges, might all be enforced in Alabama. There must be some stop to such endless and insufferable confusion—such chaos of government. The only question is, what branch of government shall interpose; and Judge STORY's valuable work on the conflict of Laws is explicit, that in France, England and this country, the judiciary is that branch, without awaiting written laws of direction. Story's Conflict 24–5. This court has always asserted the necessity and duty of courts to refuse their aid to acts contrary to the policy of law. *Armstrong* v. *Toler*, 11 Wheat. 270; *United States* v. *Owen*, 2 Pet. 527. Nor is there any inconsistency in courts enforcing the exclusion, and yet not the comity, because the one is compliance with law, whereas, the other is to make it. Finally, to doubt whether comity is due, is to resolve that it is not, under such a government as ours, where the judicial power is so specific and defined.

Mr. Ogden finally denies the right of Alabama to meddle with bills of exchange, which are the means of commerce; and commerce, with all its regulations, has been surrendered by the states to the Union. But no bill of exchange is here in question, as a commercial mean, more than a ferry-boat, a horse, an ass, a slave, a man or woman, or any other commercial convenience; and it will not be pretended, that these are not under state regulation. New York has regulated money by a small-bill law, and money, more than bills of exchange, is the medium of commerce. All the states *have by law regulated the damages on bills of exchange. The [*573
argument proves too much, and therefore nothing. As to the ruinous consequences denounced, Mr. Ingersoll said, that such had always been augured, and always would be, of measures offensive to certain political prejudices. They were abundantly disproved, by the improvement and prosperity of the country. The court, instead of being alarmed from its duty by such appeals, should feel encouraged to support the laws of state sovereignty; which, well understood, were the broad foundations of the general welfare. Neither man nor state can stand erect, without the self-preserving rights; against which the pleas of comity and cries of politics are equally futile and unavailing in this court, as now constituted.

As it is impossible to foresee, what may be the views of the court, it is an advocate's duty to consider all the reasons given for the judgment below; and therefore, the corporation question must next be examined. The court will remark, that it is not a question of action, but of transaction. The record presents the case of an incorporated bank, by its stationary agent, resident in Alabama, with the funds of the bank, discounting there a bill of exchange; upon which transaction, this action was instituted. It is thus no secondary contract; but a primary, actual dealing by the corporation, in banking business, out of the state which chartered the banking corporation. The right of suit is not to be confounded with the right of contract. They are obviously distinguishable. Perhaps, American state courts have sanctioned the right of action, which it is not intended either to concede or

to draw in question. The cases of the *Portsmouth Company*, 10 Mass. 91; *The Silver Lake Bank*, 4 Johns. Ch. 370; of the *New York Firemen Insurance Company*, 5 Cow. 678; *The Bank of Marietta*, 2 Rand. 465; *The Gospel Society*, 2 Gallis. 105, and 8 Wheat. 454; *Green* v. *Minnis*, 1 McCord 80, and the various foreign authorities cited in the opposite argument, may perhaps establish the law, that a corporation or sovereignty enjoys the right of suit in other courts than those of its own state. It is, nevertheless, worthy of remark, that no case is to be found in the English books, of a corporation suing in England upon a contract there. All the volumes of English law may be challenged for such a case. The case of the *Dutch West India Company*, in Raymond and Strange, was suit upon a lawful contract, that is, a contract in the country where the company had a right to contract, so that the *lex loci* never came in question during the suit in England, and when an attempt was made to plead it into the suit, that attempt was frustrated by estoppel. The English chancery cases of suits by foreign sovereigns, are distinguishable from suits by foreign corporations; because the sovereign sued in them, as an individual, divested of the privileges of intangibility.

If suits have been brought by the Bank of England in this country, for the recovery of American debts, they must have been of rare occurrence, passing *sub silentio*. The case of *Perkins* *v. *Washington Insurance* *574] *Company*, from 6 Johnson's reports, cited to show that this question was not raised on that occasion, abounds with demonstration that it was against the interest of both parties to make it; and in the cases of the Silver Lake and Marietta Banks, the most eminent lawyers in New York and Virginia denied the right of action, which, *à multo fortiori*, argues contradiction of the right of transaction. Mr. Ogden's notion of the venue, at any rate, a very little technicality upon which to build so important a position, is annulled by a law of Alabama, which prohibits all special demurrers, so that no averment of venue is necessary in their declarations, and rarely occurs.

The question, thus freed from mere fiction, and the right of action, is, broadly, whether corporations can contract and enforce their contracts by by suit in foreign countries. To discriminate between right and remedy, is always matter of some difficulty, as this court experienced in *Ogden* v. *Saunders*, 12 Wheat. 213. Yet the distinction is well known and universally recognised; the right of remedy being regulated by the law of the *forum*, whereas the legality of the contract is determined by the law of the place. In most of the courts of civilized countries, there is little restriction upon the right of action. In Great Britain and this country, all courts are open to all persons, upon principles of wise jurispudence, well explained in the 82d number of the Federalist; that foreigners as well as citizens, the poor and the rich, the incorporated and the individual, have all an equal and unquestionable right to judicial redress for alleged wrong. The courts of France will not take jurisdiction of a suit between two foreigners, but *renvoy* them to their own courts at home. But it is the privilege of every complainant to bring suit in any English or American court, upon all lawful contracts. The contract must be lawful, however, that is to say, must conform to the law of the place of contract. Place, therefore, settles the right, while courts regulate the remedy.

Our question is, whether the incorporation of one state or country is such in all others? which is denied. What is a corporation? Mr. Ogden's definition is perfectly acceptable for the defendant's argument; he defines it an artificial person created by the law of an independent state. The definition or description, accurately made, tends much to explain the reason of the thing, and to elucidate the subject. It is an artificial body: Ayliff calls it a mystical body, a mere creation of the law, with none but express powers *ad hoc*, or such implied powers as are strictly indispensable. Judge McKinley treats the matter with exemplary accuracy, when he says, that unless the act of incorporation by Georgia, Louisiana or Pennsylvania, can operate as strict law in Alabama, it is of no force there whatever. Such is the true starting point of the whole discussion. All the authorities of all countries and ages occur in this fundamental doctrine of corporations. Brooke, Comyn, Bacon, Ayliff, Taylor, Brown, Coke, Blackstone, Kyd, Willcock, and it may be affirmed, all American treaties and adjudications agree in this. *2 Kent's Com. 3d edit. 298; Ang. and Ames, 17, 59; *Head* v. *Providence Insurance Company*, 2 Cranch 167; *Darthmouth College*, 4 Wheat. 636; *United States Bank* v. *Dandridge*, 12 Ibid. 64; *Beaty* v. *Knowler*, 4 Pet. 167–8.

It is beyond question, that corporation authority is a license to be strictly construed. Chancellor Kent, in his Commentaries, says, this is modern doctrine. Yet, on the same page, he mentions Trajan's letter to Pliny, which strongly asserts it; and the fact is, that from Solon and Numa, whose laws on the subject he also refers to, down to Marshall, the late much honored chief justice of this court; who was a uniform and inflexible supporter of the strict construction of corporation powers; it has always been the same, and necessarily must be so, because charters take franchises from all, to confer upon a few, which franchises or privileges must needs be restricted to their very capitulation. An individual power of attorney or substitution is never expanded by construction. All letters of license are taken strictly, though their interpretation is but matter of intention; whereas, that of a charter presents a question of state power which courts have no authority to enlarge constructively.

It may, indeed, be asked, what is meant by modern corporation law? What is the American law of charters? Who made it? When? Where? Is it English common law, or common civil law, from which code all the law of charters proceeds? Is the American law on this subject ante-revolution or post-revolution? Do we get it from Massachusetts or Louisiana, where the common English law and the common civil law respectively prevail? or is the modern law of Massachusetts, enforced in Virginia as common law there, as was adjudged in *Dandridge's Case?* Chancellor Kent says (2 Com. 281), that corporations have multiplied with a flexibility and variety unknown to the common law. But what is the American common law of corporations? The United States having no common common law, what is their standard? In all the states formed out of Louisiana, with the civil law as their birthright, corporators are personally answerable for corporate acts. In states inheriting the English common law, they are, perhaps, personally intangible; not by the terms of a charter or by any written law, but because it is understood, that the English common law annexes such privilege of exemption. A state grants a charter,

to which the common law tacitly annexes an inestimable privilege. Has this English common law been adopted in the American states? Is it consonant with their policy, or conformable to their constitutions? At the period of their independence, there were few, if any, corporations, and no banking corporations, in America. Has that universal public sentiment, which gradually frames common law, since then, engrafted this privilege upon the corporation stock, which, till long after the American revolution, had not begun to germinate, and only within a very few years last past, has attained a growth which overshadows all our institutions? The source of this immense power it is hard to find; but, at all events, the stream has been uniform in the channel of the supreme court of the United States, coincident with those *principles of law; which, whether ancient or modern, are equally unquestionable in their authority and their reason. In some of the latter cases of this court, *The Columbia Bank*, 7 Cranch 299; *The Bank of the United States*, 8 Wheat. 338, and the same bank, 12 Ibid. 68, in the absence of some of the judges, and Chief Justice MARSHALL earnestly dissentient in the last-mentioned case, whose principles rule the whole doctrine, it was declared by the eminent judge who delivered the court's opinion, that the common law of corporations has been broken in upon by modern adjudications, as it has been declared by another distinguished commentator, that the common law was found impolitic in this respect, and essentially discarded.

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It is true, that in order to keep pace with the modern flood of these associations, the common law, with its characteristic adaptations to exigencies, has counteracted their intolerable privilege, by holding them to personal liability. But no other change than this, it is apprehended, will be found in the modern common law of either this country or England. Power to pronounce it impolitic, to break in upon or discard it, if it exists in any court, should be very sparingly exercised. All the English cases are in 2 Kent 289, 292, and Angell & Ames 128; and their uniform tendency is to keep down corporation privilege, not to exaggerate it. And the same is the result of any thorough examination of all the American cases. Corporations have not been allowed to escape suit, by undue privilege; which is the substance of all that salutary change in the law, that is supposed to discard it as impolitic, or break in upon it as antiquated. It is adaptation, not alteration, of the common law. No principle of corporation law is invoked for this defence, but such as the late chief justice of this court always abided by. His anxious dissent in 12 Wheaton sets forth those principles with a review of the accredited authorities from Brooke to Blackstone; while the learned judge who delivered the opinion of the majority of the court, appeals to a recent *dictum* of Justice BAYLEY, and the still later doctrines of Chief Justice PARKER, for a common law of corporations in Virginia, transported from Massachusetts.

Gradual and cautious conformity to circumstances, is the merit of the common law, following the universal sense of propriety; for substantial law is eternal and identical, and what is frequently denounced as disorganization, is, in truth, restoration of first principles. The great duty of courts is to maintain them, and it was, no doubt, the solemn determination of Chief Justice MARSHALL to uphold even those seeming formalities of corporation law, which experience had sanctioned as wise. His forecast in this

is proved on this occasion. The seal, the regular vote, the record, the duly constituted agent, and other philosophical guards of this formidable *imperium in imperio*, cannot be dispensed with, without enabling a vast engine of factitious wealth to crush communities. And all the law is contrary to it. Formalities have been discarded, not to break in upon, but to strengthen law, while the whole substance stands unimpared in all its original *and indispensable propriety. Legislation and adjudication have never gainsaid it. Judge McKinley cites Chief Justice Parsons, for a solemn warning against constructive encroachment. Even granting the policy, where is the judicial power? No corporation is created, in contemplation of law, but for the public good. Charters are intended to benefit the unincorporated, more than the incorporated. Legislatures and states organize them on no other principle; and courts carry it into practice, by restricting the grant to its letter, and, if indispensable, moulding common law to countervail privilege. Hence Coke's Institute, and the case in Cowper, declare corporations to be inhabitants, that they may not evade taxation; while this court denies that they are citizens, in order to prevent undue privilege of suit. 5 Cranch 61. Hence numerous adjudications, individuating corporations for suit, not one of which designs to extend intangibility. *United States* v. *Amedy*, 11 Wheat. 392; *Beaston* v. *Farmers' Bank of Delaware*, 12 Pet. 135. [*577

Any judicial extension of charter-exemption by construction, would not be in harmony with common law, which is general assent; while every sound judicial limitation of such exemption effectuates the common will. A few may contend otherwise; but it is impossible that they can make law. All its established principles limit corporation power, and facilitate common right. Even the formalities of law are often its necessary solemnities. It might be sometimes convenient to suitors and judges, for the latter to adjudicate at their meals, or in bed; but open courts and formal proceedings are obviously essential. The great attempt of those who deny and would discard the settled laws of corporations is, first to assimilate them to persons, and secondly, to partners or other associations of persons not incorporated. But they are neither, for aggravation of exemption; they may resemble either, for personal liability. This court has adjudged that they are not persons. 12 Pet. 99–100. And the very reverse is the reason of the law. Whenever impersonated, it is to restrain, not to license them. A corporation cannot, like a person insolvent, make an assignment of its affairs. 12 Pet. 138. Even if so authorized by charter, it cannot assign them to foreign trustees. *Williams* v. *Maus*, 6 Watts 278. Can a corporation do any act of humanity? Certainly not, though the munificence of such acts daily stifles the sense of their illegality. It is as much a *devastavit*, for the trustees or directors of a corporation to spend its means generously, as it would be for an executor or administrator. It is not the law, that a corporation is a person capable, like an individual, of action and transaction. 2 Kent 267, 299, 279; 1 Kyd 225. Persons go anywhere; corporations are localized and stationary. They cannot go abroad, but by agents; and how they are to be constituted, or whether they can be at all, is the very question. 16 Johns. 6. Personal rights are original and unlimited; corporate franchises are derivative and specific. A person, like a state, may do whatever is not prohibited; a corporation, like this confederation, can do only

what is expressly allowed by charter. *An American person is a sovereign, restrained by no fetters but of his own making. A corporation is his creature, bound by strict obligation. Persons may traffic everywhere: but why? Because they become subjects, wherever they are; but corporations are amenable only to the state creating them. The European, Asiatic or African, is an American, in America: whereas, the reverse argument of corporation license is to be a citizen, without being a subject; while all natural persons are subjects, even though not citizens. Personal identity, corporeal being, and powers of motion, are the attributes of persons, but not of corporations. They are personal for legal responsibility, but plural for the enjoyment of privilege.

Still less is the attempted resemblance of corporations to partners. In the Law Reporter 59, this resemblance is strongly asserted. But the want of it is so palpable, that a single reference to the distinction is enough. Ang. & Am. 23. Corporations are neither persons nor partners, but artificial bodies politic, created by act of state, always *ad hoc*, and their franchises are granted for public good, of which they are the supposed instruments. Charter elements are artificial creations, with none but express or severely indispensable power, indispensable to existence, without existence till allowed by the state, mostly assigned to a place, always confined to defined purposes. Whether, and how, agencies for corporations can be constituted, is questionable. 2 Kent 291–2, in note. But an inflexible and fundamental doctrine prevents their extra-territorial transactions, by requiring the permission of the state, wherever such transaction is; in which doctrine the question of agency is merged and disappears.

In this plain principle, all authorities agree. 2 Kent 268–9, 276; Ang. & Am. 27, 37–8. The civil law, the common law, American law, all law coincides in it. Not a case or sentence can be cited against it. A corporation must be authorized by the sovereignty where it acts as such, otherwise, it is what is called an adulterine corporation. Ang. & Am. 38. Mr. Ogden's definition acknowledges this; and he conceded, that it cannot perform corporate acts, beyond the state creating it. This is the explanation of Chief Baron MANWOOD'S quaint notion, that corporations have no souls, because they are created by the king. They are creations of law, and do not share in government or any political power: *per* MARSHALL, Chief Justice, 4 Wheat. 636. No corporation is such, it has no creation or legal being, till authorized by the government of the state where it is to act as a corporate body. *Greystock College Case*, Jenk. 205; Dyer 3, 60; 6 Vin. Abr. 287; Ang. & Am. 38, note 5. This ancient judgment contains the germ of the whole self-protecting principle of sovereignties against corporations. The Pope founded Greystock College, and it existed for a long time; but the English courts, as soon as it appeared before them, annulled it, for want of lawful beginning. Such is the universal law applicable to these bodies politic. *Sutton's Hospital*, Jenk. 270. Courts may have suffered them to sue abroad, on contracts at home which are lawful; but never to contract
*579] and sue abroad, without authority of state *there. Whenever this position against them is taken in a court, it is insuperable. A charter, if required, must be proved, before any corporate act can be even given in evidence. *United States* v. *Johns*, 4 Dall. 415; Bull. N. P. 107; 10 Mass. 91; 8 Johns. 295; 1 Halst. 211; 1 Kyd 292–3; 10 Wend. 269; 3 Conn. 199;

Ang. & Am. 377. The universal common law of all sovereign states requires, and uniformly asserts, this self-protecting principle. It is a state right of indispensable recognition. None but the state can legitimate a corporation. In Pennsylvania, the legislature have authorized the supreme court to create charitable, religious and literary corporate bodies, on certain terms, as in England the king deputes persons to grant charters. Ang. & Am. 44. But state agency, sovereignty permission, is *sine qua non.*

But it is said, that sovereigns may sue abroad. True, they do, but not as sovereigns. When the King of Spain sued in the circuit court of Pennsylvania, he was liable to costs, or to nonsuit; and when his minister, Don Onis, waived his privilege as a foreign ambassador, to become a witness on the trial, he might have been prosecuted for perjury, or committed for contempt. When a sovereign sues abroad, he becomes subject to the foreign jurisdiction, which corporations never do; and when sovereigns sue in equity, especially, the fullest reaction and reciprocity of responsibility necessarily ensue. It will not be pretended, that a monarch of England brings his privilege of irresponsibility, or the Sultan of Turkey, his despotic power, when condescending to sue in this country. As monarchs, they have no power here whatever; and they sue, like all others subject to our courts.

It has been made a question, too, whether, upon the principles contended for, the American states, being, as was alleged, corporations, can, as they constantly do, borrow money, sell stocks, and otherwise transact business in foreign countries; to which the obvious answer is, that on all such occasions they deal as sovereign states, and not mere corporstions. Chancellor KENT, in his published opinion, relies on the United States Bank having been permitted to sue in state courts. But this right was denied in Virginia, and this court has determined, that that bank had no right to the federal *forum*, but by express act of congress. 5 Cranch 61. Right of suit, at any rate, is not right of contract.

It being thus shown, indisputably, that no corporation can exist but by express permission of that state in which it acts as such, it follows, as a matter of course, that it is no corporation at all, until allowed by the state in which it acts. Chancellor KENT perverts this principle, by asserting, that a corporation may contract abroad, until forbidden there; the true principle being, as asserted by Chief Justice MARSHALL, in the case of the *Providence Bank*, that the act creating a corporation is an enabling act, by which alone it is enabled to contract. 2 Cranch 167–9. This simple and incontestable position covers the whole ground. It is part of universal jurisprudence, and parcel of all politics. Corporations *are creations of municipal law, having no existence or power to contract whatever, until enabled so [*580 to do by a law, or other legitimate permission of the sovereignty, wherever acting. Especially is this conservative principle indispensable, as an undelegated right of these United States. Otherwise, the smallest member of this Union may legislate for, and govern, all the rest. In the case of the *Marietta Bank*, 2 Rand. 465, the court explained this principle with great force of argument; much more, it is apprehended, than is displayed by the contrary view, in Chancellor KENT'S opinion, or has been urged in this court.

These United States, as such, can have no private corporations; and if, upon false notions of commercial intimacy, they are to be consolidated by traders, corporations, and professional dogmas, contrary to the true spirit of

our political institutions, not only the rights of all the states, but the federal constitution itself, will be at an end. Upon the plea of international commercial law, a Bank of the United States might branch, not only in every state, but every county of every state in the Union; and, indeed, so may every state bank. It is confidently submitted to this court, that it will best fulfil its duties, by holding the states united by sovereign ties, by the states remaining sovereign, and corporations remaining subject; not by sovereign corporations and subject states.

The state of Alabama cannot apply the common law of Georgia or of Pennsylvania to determine controversies such as this. It cannot ascertain, by any accredited rules of interpretation, what may have been the intention of another state, in creating a corporation, which is responsible for misconduct only to the state creating it, and cannot be reached in the foreign state where it contracts. Every charter involves questions of political advantage, regarding which no state looks beyond itself, but simply to its own good, of which no foreign courts can judge. All a court can do is to ascertain the will of its own government; and if it finds that that government has not sanctioned the corporation, by express authority for that state, then such corporation cannot be acknowledged by the court. It is no corporation before that court. Its charter may be proved there, as it must be, before it is in evidence there. But, when proved, even though it may have a right of action there, it has no right of contract in that state, till authorized by it to contract there. If courts are bound, by common law, to restrict corporations to the specific purposes of their creation, they are bound, by the same common law, to prevent their wandering out of place, as much as out of purpose. 2 Kent 299, note *e*.

Charters are special and untransferrible trusts, to be executed as when and where prescribed, which trusts have no extra-territorial existence. If they act by agent, beyond the chartering state, the trust is defrauded and annulled, without responsibility of the agent to the chartering state, or of the corporation to the foreign state. No state can, even by act of assembly, raise an executor, administrator or other trustee in another state. The states of Georgia, Louisiana and Pennsylvania could not intend by these bank *581] charters to make laws *for the state of Alabama. It is impossible, in legal contemplation, so to consider it. Can then the interposition of a questionable agency supply a power, which not only never was intended to be given, but which could not be given, even if intended? Otherwise, all corporations may, by agencies, act everywhere. The colleges of New England may make masters of arts, in the southern states, and the southern states may introduce societies for establishing slavery in the north. Not only so, but Europe, Asia, Africa, even Australasia, Mexico or Texas, may regulate the United States of America.

In *Dandridge's Case*, 12 Wheat. 64, Chief Justice MARSHALL, after explaining the supposed changes of the common law respecting corporations, denies that what he calls the talisman of construction has yet quite dissolved the whole fabric of deep-rooted and venerable jurisprudence. The old rule, for which on that occasion he fell into a minority of this court, if preserved, as he insisted, would prevent all extra-territorial corporation power; and the confusion which, if suffered, it will be sure to inflict on the nationality of the country. The legal analogies are abundant and unquestionable.

Executors, administrators and guardians have no authority beyond the states creating them. 1 Cranch 92 ; 1 Dall. 456 ; 2 Mass. 384 ; 3 Ibid. 514 ; 11 Ibid. 313 ; 3 Cranch 319–23 ; 5 Mass. 7 ; 11 Ibid. 256 ; 9 Cranch 151 ; 1 Johns. Ch. 153 ; 7 Ibid. 45 ; 6 Ibid. 353 ; 1 Hayw. 354 ; 3 Day 74, 305 ; 2 Root 462 ; 7 Cow. 68 ; 9 Wend. 426 ; 1 Pick. 81 ; 2 Ibid. 18 ; 8 Wheat. 671 ; 9 Ibid. 565–9 ; 12 Ibid. 169 ; 3 Mason 469 ; Coxe's Dig. p. 16, pl. 53 ; 5 T. B. Monr. 49 ; 6 Ibid. 59 ; 4 Litt. 277 ; 1 Cam. & Norw. 68 ; 1 A. K. Marsh. 88 ; *Stephens* v. *Swartz*, 1 Carolina Law Repos. 471. It is in vain to say, that executors, administrators and guardians have charge of property, and are, therefore, obliged to give security for its safe management, in each state where it may happen to be. So have corporations charge of property. Their franchises are property. Insolvent and bankrupt assignees have no power extra-territorially. *Harrison* v. *Sterry*, 5 Cranch 289 ; *Dixon* v. *Ramsay*, 3 Cranch 319.

When merchants draw bills of exchange over the boundaries of states, across the rivers Delaware, Ohio, Hudson, Connecticut, Potomac and Savannah, or even the insignificant creeks, and sometimes mere ideal confines, which separate the various conterminous states of this Union, they are foreign bills of exchange. It is the law of this court, that the states are foreign to each other for all but federal purposes. 12 Pet. 720. Even a state judgment, notwithstanding its constitutional protection, requires legal provision for its full faith and credit. And foreign judgments, even *in rem*, on questions of international law, are tested, so far at least as to ascertain that they were pronounced with jurisdiction over both thing and person. *Rose* v. *Himely*, 4 Cranch 274. Persons, whether aliens or citizens, are not allowed right of suit in the federal courts, without some preliminary proof of it ; and corporations, *though inhabitants, are not citizens, with right of suit. 5 Cranch 61. It has been adjudged, [*582 that foreign property of non-residents is not attachable under state attachment laws, notwithstanding a practice of more than a hundred years in some of the states. *Toland* v. *Sprague*, 12 Pet. 300.

Corporations are municipal creations of states, and creatures of common law. But as has already been questioned, what is that law ? If English, it is adopted only as adapted here ; and what is that in Alabama—a state not yet twenty years old ? This is, probably, the first occasion when the elements of corporation law in that state have come to be ascertained. Is it Roman, English or American ? No instance has occurred, probably, before, of a foreign corporation attempting, by resident agency, to deal in Alabama. We are brought, then, at last, to the question, whether an incorporated bank can enjoy there privileges and immunities denied to the citizens of that state. The only adjudications in point are, *Beaty* v. *Knowler*, 4 Pet. 167–8 ; and *The Marietta Bank*, 2 Rand. 465 ; the argument of the Virginia court in the latter ; the judgment, as well as the argument of this court in the former. The act of the state of Ohio is likewise full to the point, as a practical recognition of the law. The cases sustaining suits on contracts in the states creating the corporations, are no contradictions of these two cases. The only pertinent English case, in Lord Raym. and Strange, has been explained. The case of the *Propagation Society* v. *Wheeler*, in 8 Wheat. 464, was no more than a question of suit. The *Greystock College Case*, that of *The Bank of Marietta*, and

Beaty v. *Knowler*, are coincident acknowledgments of the great principle, that a corporation has no corporate power beyond the state to which it owes being. In the earnest and sincere advocacy of that principle of universal, international and municipal law, Mr. Ingersoll said, he felt cheered by the assurance, that his country is his client.

Vande Gruff, for J. B. Earle, one of the defendants in error, stated, that the act of the legislature of Alabama, which declared the statutes of the state in force as they are contained in Aikin's Digest, provides, that all statutes, laws and parts of laws, not included in the Digest, are repealed. This repealed the act of 1827 relative to banking ; and other laws on the same subject. This act was passed in 1832. (Aikin's Digest 301.) There is another act of the legislature of Alabama, which makes bills of exchange and promissory notes negotiable, and declares them to be *primâ facie* evidence of consideration. Ibid. 327.

Two questions have been agitated in these causes. One may not be necessary to their decision. The question of comity may be one which, on general principles, may embarrass. It is believed, that comity between nations is as necessary to their intercourse, as our breath is to our existence ; but it is not understood how it is to be limited. Is a law of Pennsylvania to be applied over the whole world ? The rule that corporations have not
*583] an extra-territorial *existence is established : but the principles which are claimed on the part of the plaintiffs in error, would give a universal existence and unlimited privileges to such institutions. The general rule is, that the laws of a particular state have authority only within the territory of the state ; and the exception to the rule prevails only when the laws have been adopted in a foreign, or another state or country. If this principle is correct, it will be the duty of the counsel for the plaintiff in error, to show, that the law of Pennsylvania, incorporating the United States Bank, is a law which has been adopted in the state of Alabama.

A railroad company may buy iron abroad, for the purpose of constructing their railroad at home. This appears to be a contract which will be sustained by the comity of nations. It presents a different question from this ; which is, whether the United States Bank of Pennsylvania can go abroad, to do acts which are only authorized in the state. It would be disastrous, to say, a corporation cannot go out of Alabama, to buy paper to be used in its operations at home. But this is a different case from authorizing a corporation to carry on the business for which it was incorporated in Pennsylvania, out of that state. Could a bank of the state of Pennsylvania go to Mobile, and carry on the business of banking there, to the injury of the domestic banks ? The rule of comity has never been applied so as to allow it to interfere with all the laws of a state ; its application has ever and only been to particular cases.

If a court has declared, that the rule of comity does not apply in a particular case, there is a final adjustment of the question as to the force of the foreign law in that case ; and the question is settled by the decision of the court. No cases which have been cited for the plaintiffs in error, show that by the laws or the decisions of the courts of Alabama, corporations have extra-territorial powers or privileges. The case of the *Marietta Bank*, decided in Virginia, and reported in 2 Rand., shows that comity in favor of

corporations does not exist. This is evidence that there is no general law which allows the existence of corporations, out of the state in which they are chartered.

All the questions of the rights of corporations to go abroad to borrow money, do not apply to the case before the court. Those corporations borrow money to enable them to transact and carry on the business for which they were incorporated at home. The inquiry is, whether the United States Bank of the state of Pennsylvania could go into Alabama, and there carry on the business of banking. The legislature of Alabama would, in positive terms, have refused this privilege, if it had been applied for. A judge in Alabama, knowing this, should have felt himself bound, by his judicial duties, to apply a principle which would have been applied by the legislature. Is it reasonable, that if large profits are to be made in Alabama, that a part of these profits should not be paid to the state of Alabama, for the privilege of carrying on banking? This is just, and it has *been the course of legislation in all the states to receive a *bonus* from [*584 banking corporations, or to claim a portion of the profits of their operations, on granting charters of incorporation. In England, corporations can only exist by prescription, or be established by grants from the king, or legislative enactment. Could a foreign corporation go to England, and carry on its business there, until it should be expressly excluded by the decision of a court, or by an act of parliament?

Another point in this case is to be regarded. The act of the legislature of Pennsylvania establishes the United States Bank at Philadelphia, and authorizes branches in the state. The law gives it no powers to be exercised out of the state. This is a sufficient evidence of the restriction of its existence to the state of Pennsylvania.

As to that feature in the case before the court, which depends on the existing constitution and laws of Alabama, prohibiting banking, the court will be obliged to decide what banking is. The agreed case shows that a part of the capital of the bank was transferred to Alabama to buy bills of exchange; and the question is, whether buying bills of exchange is banking?

Discounting bills and notes, and receiving money on deposit, are not exclusively banking. Every bank, at the time of the incorporation of the State Bank of Alabama, dealt in bills of exchange. The object of the charter of the bank was, to include the discounting and purchase of bills of exchange, as a part of the operations of the bank. The bank was to have every opportunity of making profits which any other bank possessed. It is not necessary to go into the question of the rights of individuals to purchase bills of exchange. The question before the court is, whether foreign corporations have such rights. Speculations on the rights of individuals only embarrass the case. To show that the dealing in bills of exchange is banking, Mr. Vande Gruff cited Postlethwait's Universal Dictionary of Trade and Commerce, titles Discount, Banking; 15 Johns. 390; Tomlin's Law Dictionary, title Bank.

How can the plaintiff say the purchase of bills of exchange is not banking, when the law of their existence gives them no other powers but those of a bank. They are here found remitting the funds of their bank, to Alabama, to buy bills. Can they say, this is not a banking operation? It was the object of the act incorporating the bank to give it the advantages of

buying bills of exchange, which composes a large part of the profits of banking operations; and this is precisely what they have done in the case before the court. The constitution of Alabama on this subject should receive a liberal construction, as the whole support of the government of Alabama is derived from the banking operations of the state banks.

Taney, Ch. J., delivered the opinion of the court.—These three cases *585] involve the same principles, and have been *brought before us by writs of error directed to the circuit court for the southern district of Alabama. The first two have been fully argued by counsel; and the last submitted to the court upon the arguments offered in the other two. There are some shades of difference in the facts, as stated in the different records, but none that can affect the decision. We proceed, therefore, to express our opinion on the first case argued, which was the *Bank of Augusta* v. *Joseph B. Earle.* The judgment in this case must decide the others.

The questions presented to the court arise upon a case stated in the circuit court in the following words :—"The defendant defends this action upon the following facts, that are admitted by the plaintiffs : that plaintiffs are a corporation, incorporated by an act of the legislature of the state of Georgia, and have powers usually conferred upon banking institutions, such as to purchase bills of exchange, &c. That the bill sued on was made and indorsed, for the purpose of being discounted by Thomas McGran, the agent of said bank, who had funds of the plaintiffs in his hands, for the purpose of purchasing bills, which funds were derived from bills and notes discounted in Georgia by said plaintiffs, and payable in Mobile ; and the said McGran, agent as aforesaid, did so discount and purchase the said bill sued on, in the city of Mobile, state aforesaid, for the benefit of said bank, and with their funds, and to remit said funds to the said plaintiffs. If the court shall say, that the facts constitute a defence to this action, judgment will be given for the defendant, otherwise for plaintiffs, for the amount of the bill, damages, interest and costs ; either party to have the right of appeal or writ of error to the supreme court, upon this statement of facts, and the judgment thereon."

Upon this statement of facts, the court gave judgment for the defendant ; being of opinion, that a bank incorporated by the laws of Georgia, with a power, among other things, to purchase bills of exchange, could not lawfully exercise that power in the state of Alabama ; and that the contract for this bill was, therefore, void, and did not bind the parties to the payment of the money.

It will at once be seen, that the questions brought here for decision are of a very grave character, and they have received from the court an attentive examination. A multitude of corporations, for various purposes, have been chartered by the several states ; a large portion of certain branches of business has been transacted by incorporated companies, or through their agency ; and contracts to a very great amount have, undoubtedly, been made by different corporations, out of the jurisdiction of the particular state by which they were created. In deciding the case before us, we, in effect, determine whether these numerous contracts are valid, or not. And if, as has been argued at the bar, a corporation, from its nature and character, is incapable of making such contracts ; or if they are inconsistent with the

rights and sovereignty of the states in which they are made, they cannot be enforced in courts of justice.

*Much of the argument has turned on the nature and extent of the powers which belong to the artificial being called a corporation ; [*586 and the rules of law by which they are to be measured. On the part of the plaintiff in error, it has been contended, that a corporation, composed of citizens of other states, is entitled to the benefit of that provision in the constitution of the United States which declares that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states;" that the court should look behind the act of incorporation, and see who are the members of it ; and if, in this case, it should appear, that the corporation of the Bank of Augusta consists altogether of citizens of the state of Georgia, that such citizens are entitled to the privileges and immunities of citizens, in the state of Alabama ; and as the citizens of Alabama may, unquestionably, purchase bills of exchange in that state, it is insisted, that the members of this corporation are entitled to the same privilege, and cannot be deprived of it, even by express provisions in the constitution or laws of the state. The case of the *Bank of the United States* v. *Deveaux*, 5 Cranch 61, is relied on to support this position.

It is true, that in the case referred to, this court decided, that in a question of jurisdiction, they might look to the character of the persons composing a corporation ; and if it appeared, that they were citizens of another state, and the fact was set forth, by proper averments, the corporation might sue in its corporate name, in the courts of the United States. But in that case, the court confined its decision, in express terms, to a question of jurisdiction—to a right to sue—and evidently went even so far, with some hesitation. We fully assent to the propriety of that decision ; and it has ever since been recognised as authority in this court. But the principle has never been extended any further than it was carried in that case ; and has never been supposed to extend to contracts made by a corporation ; especially, in another sovereignty. If it were held to embrace contracts, and that the members of a corporation were to be regarded as individuals carrying on business in their corporate name, and therefore, entitled to the privileges of citizens, in matters of contract, it is very clear, that they must, at the same time, take upon themselves the liabilities of citizens, and be bound by their contracts in like manner. The result of this would be, to make a corporation a mere partnership in business, in which each stockholder would be liable, to the whole extent of his property, for the debts of the corporation ; and he might be sued for them, in any state in which he might happen to be found. The clause of the constitution referred to, certainly never intended to give to the citizens of each state the privileges of citizens in the several states, and at the same time to exempt them from the liabilities which the exercise of such privileges would bring upon individuals who were citizens of the state. This would be to give the citizens of other states far higher and greater privileges than are enjoyed by the citizens of the state itself. Besides, it would deprive every state of all control over the extent *of corporate franchises proper to be granted in the state ; and corporations would be chartered in one, to carry on their [*587 operations in another. It is impossible, upon any sound principle, to give such a construction to the article in question. Whenever a corporation

makes a contract, it is the contract of the legal entity—of the artificial being created by the charter—and not the contract of the individual members. The only rights it can claim are the rights which are given to it in that character, and not the rights which belong to its members as citizens of a state: and we now proceed to inquire, what rights the plaintiffs in error, a corporation created by Georgia, could lawfully exercise in another state; and whether the purchase of the bill of exchange on which this suit is brought, was a valid contract, and obligatory on the parties.

The nature and character of a corporation created by a statute, and the extent of the powers which it may lawfully exercise, have upon several occasions been under consideration in this court. In the case of *Head* v. *Providence Insurance Company*, 2 Cranch 127, Chief Justice MARSHALL, in delivering the opinion of the court, said, "without ascribing to this body, which in its corporate capacity is the mere creature of the act to which it owes its existence, all the qualities and disabilities annexed by the common law to ancient institutions of this sort, it may correctly be said, to be precisely what the incorporating act has made it; to derive all its powers from that act, and to be capable of exerting its faculties only in the manner which that act authorizes. To this source of its being, then, we must recur to ascertain its powers; and to determine whether it can complete a contract by such communications as are in this record." In the case of *Dartmouth College* v. *Woodward*, 4 Wheat. 636, the same principle was again decided by the court. "A corporation," said the court, "is an artificial being, invisible, intangible, and existing only in contemplation of law. Being a mere creature of the law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence." And in the case of the *Bank of the United States* v. *Dandridge*, 12 Wheat. 64, where the question in relation to the powers of corporations and their mode of action, were very carefully considered, the court said; "But whatever may be the implied powers of aggregate corporations, by the common law, and the modes by which those powers are to be carried into operation; corporations created by statute, must depend, both for their powers and the mode of exercising them, upon the true construction of the statute itself."

It cannot be necessary to add to these authorities. And it may be safely assumed, that a corporation can make no contracts, and do no acts, either within or without the state which creates it, except such as are authorized by its charter; and those acts must also be done, by such officers or agents, and in such manner as the charter authorizes. And if the law creating a
*588] corporation, does not, by *the true construction of the words used in the charter, give it the right to exercise its powers beyond the limits of the state, all contracts made by it in other states would be void.

The charter of the Bank of Augusta authorizes it, in general terms, to deal in bills of exchange; and consequently, gives it the power to purchase foreign bills as well as inland; in other words, to purchase bills payable in another state. The power thus given, clothed the corporation with the right to make contracts out of the state, in so far as Georgia could confer it. For whenever it purchased a foreign bill, and forwarded it to an agent to present for acceptance, if it was honored by the drawee, the contract of acceptance was necessarily made in another state; and the general power to pur-

chase bills, without any restriction as to place, by its fair and natural import authorized the bank to make such purchases, wherever it was found most convenient and profitable to the institution; and also to employ suitable agents for that purpose. The purchase of the bill in question was, therefore, the exercise of one of the powers which the bank possessed under its charter; and was sanctioned by the law of Georgia creating the corporation, so far as that state could authorize a corporation to exercise its powers beyond the limits of its own jurisdiction.

But it has been urged in the argument, that notwithstanding the powers thus conferred by the terms of the charter, a corporation, from the very nature of its being, can have no authority to contract out of the limits of the state; that the laws of a state can have no extra-territorial operation; and that as a corporation is the mere creature of a law of the state, it can have no existence beyond the limits in which that law operates; and that it must necessarily be incapable of making a contract in another place. It is very true, that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the coporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty. But although it must live and have its being in that state only, yet it does not by any means follow, that its existence there will not be recognised in other places; and its residence in one state creates no insuperable objection to its power of contracting in another. It is, indeed, a mere artificial being, invisible and intangible; yet it is a person, for certain purposes, in contemplation of law, and has been recognised as such by the decisions of this court. It was so held, in the case of the *United States* v. *Amedy*, 11 Wheat. 412, and in *Beaston* v. *Farmers' Bank of Delaware*, 12 Pet. 125. Now, natural persons, through the intervention of agents, are continually making contracts in countries in which they do not reside; and where they are not personally present when the contract is made; and nobody has ever doubted the validity of these agreements. And what greater objection can there be to the capacity of an artificial person, *by its agents, to make a contract, within the scope of its limited powers, in a sovereignty in which it does not reside; provided such contracts are permitted to be made by them by the laws of the place? [*589

The corporation must, no doubt, show, that the law of its creation gave it authority to make such contracts, through such agents. Yet, as in the case of a natural person, it is not necessary that it should actually exist in the sovereignty in which the contract is made. It is sufficient, that its existence as an artificial person, in the state of its creation, is acknowledged and recognised by the law of the nation where the dealing takes place; and that it is permitted, by the laws of that place, to exercise there the powers with which it is endowed.

Every power, however, of the description of which we are speaking, which a corporation exercises in another state, depends for its validity upon the laws of the sovereignty in which it is exercised; and a corporation can make no valid contract, without their sanction, express or implied. And this brings us to the question which has been so elaborately discussed; whether, by the comity of nations, and between these states, the corpora-

tions of one state are permitted to make contracts in another. It is needless to enumerate here the instances in which, by the general practice of civilized countries, the laws of the one, will, by the comity of nations, be recognised and executed in another, where the right of individuals are concerned. The cases of contracts made in a foreign country are familiar examples; and courts of justice have always expounded and executed them, according to the laws of the place in which they were made; provided that law was not repugnant to the laws or policy of their own country. The comity thus extended to other nations, is no impeachment of sovereignty. It is the voluntary act of the nation by which it is offered; and is inadmissible, when contrary to its policy, or prejudicial to its interests. But it contributes so largely to promote justice between individuals, and to produce a friendly intercourse between the sovereignties to which they belong, that courts of justice have continually acted upon it, as a part of the voluntary law of nations. It is truly said, in Story's Conflict of Laws 37, that "In the silence of any positive rule, affirming or denying, or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their own government, unless they are repugnant to its policy, or prejudicial to its interests. It is not the comity of the courts, but the comity of the nation, which is administered, and ascertained in the same way, and guided by the same reasoning by which all other principles of municipal law are ascertained and guided."

Adopting, as we do, the principle here stated, we proceed to inquire, whether, by the comity of nations, foreign corporations are permitted to make contracts within their jurisdiction; and we can perceive no sufficient reason for excluding them, when they are not contrary to the known policy
*590] of the state, or injurious to its interests. *It is nothing more than the admission of the existence of an artificial person, created by the law of another state, and clothed with the power of making certain contracts; it is but the usual comity of recognising the law of another state. In England, from which we have received our general principles of jurisprudence, no doubt appears to have been entertained, of the right of a foreign corporation to sue in its courts, since the case *Henriquez* v. *Dutch West India Company*, decided in 1729, 2 Ld. Raym. 1532. And it is a matter of history, which this court are bound to notice, that corporations, created in this country, have been in the open practice, for many years past, of making contracts in England, of various kinds, and to very large amounts; and we have never seen a doubt suggested there, of the validity of these contracts, by any court or any jurist. It is impossible to imagine, that any court in the United States would refuse to execute a contract, by which an American corporation had borrowed money in England; yet if the contracts of corporations made out of the state by which they were created, are void, even contracts of that description could not be enforced.

It has, however, been supposed, that the rules of comity between foreign nations do not apply to the states of this Union; that they extend to one another no other rights than those which are given by the constitution of the United States; and that the courts of the general government are not at liberty to presume, in the absence of all legislation on the subject, that a state has adopted the comity of nations towards the other states, as a part of its jurisprudence; or that it acknowledges any rights but those which

are secured by the constitution of the United States. The court think otherwise. The intimate union of these states, as members of the same great political family; the deep and vital interests which bind them so closely together; should lead us, in the absence of proof to the contrary, to presume a greater degree of comity, and friendship, and kindness towards one another, than we should be authorized to presume between foreign nations. And when (as without doubt must occasionally happen) the interest or policy of any state requires it to restrict the rule, it has but to declare its will, and the legal presumption is at once at an end. But until this is done, upon what grounds could this court refuse to administer the law of international comity between these states? They are sovereign states; and the history of the past, and the events which are daily occurring, furnish the strongest evidence that they have adopted towards each other the laws of comity, in their fullest extent. Money is frequently borrowed in one state, by a corporation created in another. The numerous banks established by different states are in the constant habit of contracting and dealing with one another. Agencies for corporations engaged in the business of insurance and of banking have been established in other states, and suffered to make contracts, without any objection on the part of the state authorities. These usages of commerce and trade have been so general and public, and have been practised for so long a period of time, and so generally acquiesced *in by the states, that the court cannot overlook them, when a [*591
question like the one before us is under consideration. The silence of the state authorities, while these events are passing before them, show their assent to the ordinary laws of comity which permit a corporation to make contracts in another state. But we are not left to infer it merely from the general usages of trade, and the silent acquiescence of the states. It appears from the cases cited in the argument, which it is unnecessary to recapitulate in this opinion, that it has been decided in many of the state courts, we believe in all of them where the question has arisen, that a corporation of one state may sue in the courts of another. If it may sue, why may it not make a contract? The right to sue is one of the powers which it derives from its charter. If the courts of another country take notice of its existence as a corporation, so far as to allow it to maintain a suit, and permit it to exercise that power; why should not its existence be recognised for other purposes, and the corporation permitted to exercise another power, which is given to it by the same law and the same sovereignty—where the last-mentioned power does not come in conflict with the interest or policy of the state? There is certainly nothing in the nature and character of a corporation which could justly lead to such a distinction; and which should extend to it the comity of suit, and refuse to it the comity of contract. If it is allowed to sue, it would, of course, be permitted to compromise, if it thought proper, with its debtor; to give him time; to accept something else in satisfaction; to give him a release; and to employ an attorney for itself to conduct its suit. These are all matters of contract, and yet are so intimately connected with the right to sue, that the latter could not be effectually exercised, if the former were denied.

We turn, in the next place, to the legislation of the states. So far as any of them have acted on this subject, it is evident, that they have regarded the comity of contract, as well as the comity of suit, to be a part of the law

of the state, unless restricted by statute. Thus, a law was passed by the state of Pennsylvania, March 10th, 1810, which prohibited foreigners and foreign corporations from making contracts of insurance against fire, and other losses mentioned in the law. In New York, also, a law was passed, March 18th, 1814, which prohibited foreigners and foreign corporations from making in that state insurances against fire; and by another law, passed April 21th, 1818, corporations chartered by other states are prohibited from keeping ony office of deposit for the purpose of discounting promissory notes, or carrying on any kind of business which incorporated banks are authorized by law to carry on. The prohibition of certain specified contracts by corporations, in these laws, is, by necessary implication, an admission that other contracts may be made by foreign corporations in Pennsylvania and New York; and that no legislative permission is necessary to give them validity. And the language of these prohibitory acts
*592] most *clearly indicates, that the contracts forbidden by them might lawfully have been made, before these laws were passed. Maryland has gone still further in recognising this right. By a law passed in 1834, that state has prescribed the manner in which corporations, not chartered by the state, "which shall transact or shall have transacted business" in the state, may be sued in its courts, upon contracts made in the state. The law assumes, in the clearest manner, that such contracts were valid, and provides a remedy by which to enforce them.

In the legislation of congress also, where the states and the people of the several states are all represented, we shall find proof of the general understanding in the United States, that by the law of comity among the states, the corporations chartered by one were permitted to make contracts in the others. By the act of congress of June 23d, 1836 (5 U. S. Stat. 52), regulating the deposites of public money, the secretary of the treasury was authorized to make arrangements with some bank or banks, to establish an agency in the states and territories where there was no bank, or none that could be employed as a public dispository, to receive and disburse the public money which might be directed to be there deposited. Now, if the proposition be true, that a corporation created by one state cannot make a valid contract in another, the contracts made through this agency, in behalf of the bank, out of the state where the bank itself was chartered, would all be void, both as respected the contracts with the government and the individuals who dealt with it. How could such an agency, upon the principles now contended for, have conformed any of the duties for which it was established?

But it cannot be necessary to pursue the argument further. We think it is well settled, that by the law of comity among nations, a corporation created by one sovereignty is permitted to make contracts in another, and to sue in its courts; and that the same law of comity prevails among the several sovereignties of this Union. The public, and well-known, and long-continued usages of trade; the general acquiesence of the states; the particular legislation of some of them, as well as the legislation of congress; all concur in proving the truth of this proposition.

But we have already said, that this comity is presumed from the silent acquiescence of the state. Whenever a state sufficiently indicates that contracts which derive their validity from its comity are repugnant to its

policy, or are considered as injurious to its interests; the presumption in favor of its adoption can no longer be made. And it remains to inquire, whether there is anything in the constitution or laws of Alabama, from which this court would be justified in concluding that the purchase of the bill in question was contrary to its policy.

The constitution of Alabama contains the following provisions in relation to banks. "One state bank may be established, with such number of *branches as the general assembly may, from time to time, deem expedient, provided that no branch bank shall be established, nor [*593 bank charter renewed, under the authority of this state, without the concurrence of two-thirds of both houses of the general assembly; and provided also, that not more than one bank or branch bank shall be established, nor bank charter renewed, but in conformity to the following rules: 1. At least two-fifths of the capital stock shall be reserved for the state. 2. A proportion of power, in the direction of the bank, shall be reserved to the state, equal at least to its proportion of stock therein. 3. The state and individual stockholders shall be liable respectively for the debts of the bank, in proportion to their stock holden therein. 4. The remedy for collecting debts shall be reciprocal, for and against the bank. 5. No bank shall commence operations, until half of the capital stock subscribed for be actually paid in gold and silver; which amount shall, in no case, be less than $100,000.

Now, from these provisions in the constitution, it is evidently the policy of Alabama, to restrict the power of the legislature in relation to bank charters, and to secure to the state a large portion of the profits of banking, in order to provide a public revenue; and also to make safe the debts which should be contracted by the banks. The meaning, too, in which that state used the word bank, in her constitution, is sufficiently plain, from its subsequent legislation. All of the banks chartered by it, are authorized to receive deposits of money, to discount notes, to purchase bills of exchange, and to issue their own notes, payable on demand, to bearer. These are the usual powers conferred on the banking corporations in the different states of the Union; and when we are dealing with the business of banking in Alabama, we must undoubtedly attach to it the meaning in which it is used in the constitution and laws of the state. Upon so much of the policy of Alabama, therefore, in relation to banks as is disclosed by its constitution, and upon the meaning which that state attaches to the world bank, we can have no reasonable doubt. But before this court can undertake to say, that the discount of the bill in question was illegal, many other inquiries must be made, and many other difficulties must be solved. Was it the policy of Alabama, to exclude all competition with its own banks, by the corporations of other states? Did the state intend, by these provisions in its constitution, and these charters to its banks, to inhibit the circulation of the notes of other banks, the discount of notes, the loan of money, and the purchase of bills of exchange? Or did it design to go still further, and forbid the banking corporations of other states from making a contract of any kind within its territory? Did it mean to prohibit its own banks from keeping mutual accounts with the banks of other states, and from entering into any contract with *them, express or implied? Or did she mean to give [*594 to her banks the power of contracting, within the limits of the state

with foreign corporations, and deny it to individual citizens? She may believe it to be the interest of her citizens, to permit the competition of other banks in the circulation of notes, in the purchase and sale of bills of exchange, and in the loan of money. Or she may think it to be her interest, to prevent the circulation of the notes of other banks; and to prohibit them from sending money there to be employed in the purchase of exchange, or making contracts of any other description.

The state has not made known its policy upon any of these points. And how can this court, with no other lights before it, undertake to mark out, by a definite and distinct line, the policy which Alabama has adopted in relation to this complex and intricate question of political economy? It is true, that the state is the principal stockholder in her own banks. She has created seven; and in five of them, the state owns the whole stock; and in the others, two-fifths. This proves that the state is deeply interested in the successful operation of her banks, and it may be her policy to shut out all interference with them. In another view of the subject, however, she may believe it to be her policy to extend the utmost liberality to the banks of other states; in the expectation that it would produce a corresponding comity in other states towards the banks in which she is so much interested. In this respect, it is a question chiefly of revenue, and of fiscal policy. How can this court, with no other aid than the general principles asserted in her constitution, and her investments in the stocks of her own banks, undertake to carry out the policy of the state upon such a subject, in all of its details, and decide how far it extends, and what qualifications and limitations are imposed upon it? These questions must be determined by the state itself, and not by the courts of the United States. Every sovereignty would, without doubt, choose to designate its own line of policy; and would never consent to leave it as a problem to be worked out by the courts of the United States, from a few general principles, which might very naturally be misunderstood or misapplied by the court. It would hardly be respectful to a state, for this court to forestall its decision, and to say, in advance of her legislation, what her interest or policy demands. Such a course would savor more of legislation than of judicial interpretation.

If we proceed from the constitution and bank charters to other acts of legislation by the state, we find nothing that should lead us to a contrary conclusion. By an act of assembly of the state, passed January 12th, 1827, it was declared unlawful for any person, body corporate, company or association, to issue any note for circulation as a bank-note, without the authority of law; and a fine was imposed upon any one offending against this statute. Now, this act protected the privileges of her own banks, in relation to bank-notes only; and contains no prohibition against the purchase of bills of exchange, nor against any other business by foreign banks, which
*595] *might interfere with her own banking corporations. And if we were to form our opinion of the policy of Alabama from the provisions of this law, we should be bound to say, that the legislature deemed it to be the interest and policy of the state, not to protect its own banks from competition in the purchase of exchange, nor in anything but the issuing of notes for circulation. But this law was repealed by a subsequent law, passed in 1833, repealing all acts of assembly not comprised in a digest then prepared and adopted by the legislature. The law of 1827 above men-

tioned was not contained in this digest, and was consequently repealed. It has been said at the bar, in the argument, that it was omitted from the digest by mistake, and was not intended to be repealed. But this court cannot act judicially upon such an assumption. We must take their laws and policy to be such as we find them in their statutes. And the only inference that we can draw from these two laws, is, that after having prohibited, under a penalty, any competition with their banks, by the issue of notes for circulation, they changed their policy, and determined to leave the whole business of banking open to the rivalry of others. The other laws of the state, therefore, in addition to the constitution and charters, certainly would not authorize this court to say, that the purchase of bills by the corporations of another state was a violation of its policy.

The decisions of its judicial tribunals lead to the same result. It is true, that in the case of the *State* v. *Stebbins*, 1 Stew. 312, the court said, that since the adoption of their constitution, banking in that state was to be regarded as a franchise. And this case has been much relied on by the defendant in error. Now, we are satisfied, from a careful examination of the case, that the word franchise was not used, and could not have been used, by the court, in the broad sense imputed to it in the argument. For if banking includes the purchase of bills of exchange, and all banking is to be regarded as the exercise of a franchise, the decision of the court would amount to this—that no individual citizen of Alabama could purchase such a bill. For franchises are special privileges conferred by government upon individuals, and which do not belong to the citizens of the country, generally, of common right. It is essential to the character of a franchise, that it should be a grant from the sovereign authority, and in this country, no franchise can be held, which is not derived from a law of the state. But it cannot be supposed, that the constitution of Alabama intended to prohibit its merchants and traders from purchasing or selling bills of exchange ; and to make it a monopoly in the hands of their banks. And it is evident, that the court of Alabama, in the case of the *State* v. *Stebbins*, did not mean to assert such a principle. In the passage relied on, they are speaking of a paper circulating currency, and asserting the right of the state to regulate and to limit it.

The institutions of Alabama, like those of the other states, are founded upon the great principles of the common law ; and it is *very clear, [*596
that at common law, the right of banking, in all of its ramifications, belonged to individual citizens ; and might be exercised by them at their pleasure. And the correctness of this principle is not questioned in the case of the *State* v. *Stebbins*. Undoubtedly, the sovereign authority may regulate and restrain this right ; but the constitution of Alabama purports to be nothing more than a restriction upon the power of the legislature, in relation to banking corporations ; and does not appear to have been intended as a restriction upon the rights of individuals. That part of the subject appears to have been left, as is usually done, for the action of the legislature, to be modified according to circumstances ; and the prosecution against Stebbins was not founded on the provisions contained in the constitution, but was under the law of 1827 above mentioned, prohibiting the issuing of bank-notes. We are fully satisfied, that the state never intended, by its constitution, to interfere with the right of purchasing or selling bills of

exchange ; and that the opinion of the court does not refer tc transactions of that description, when it speaks of banking as a franchise.

The question then recurs—Does the policy of Alabama deny to the corporations of other states the ordinary comity between nations? or does it permit such a corporation to make those contracts which from their nature and subject-matter, are consistent with its policy, and are allowed to individuals? In making such contracts, a corporation, no doubt, exercises its corporate franchise. But it must do this, whenever it acts as a corporation, for its existence is a franchise. Now, it has been held in the court of Alabama itself, in 2 Stew. 147, that the corporation of another state may sue in its courts ; and the decision is put directly on the ground of national comity. The state, therefore, has not merely acquiesced by silence, but her judicial tribunals have declared the adoption of the law of international comity, in the case of a suit. We have already shown, that the comity of suit brings with it the comity of contract ; and where the one is expressly adopted by its courts, the other must also be presumed, according to the usages of nations, unless the contrary can be shown.

The cases cited from 7 Wend. 276, and from 2 Rand. 465, cannot influence the decision in the case before us. The decisions of these two state courts were founded upon the legislation of their respective states, which was sufficiently explicit to enable their judicial tribunals to pronounce judgment on their line of policy. But because two states have adopted a particular policy, in relation to the banking corporation of other states, we cannot infer, that the same rule prevails in all of the other states. Each state must decide for itself. And it will be remembered, that it is not the state of Alabama which appears here to complain of an infraction of its policy. Neither the state, nor any of its constituted authorities, have interfered in this controversy. The objection is taken by persons who were parties to
*597] those contracts ; and *who participated in the transactions which are now alleged to have been in violation of the laws of the state.

It is but justice to all the parties concerned, to suppose that these contracts were made in good faith, and that no suspicion was entertained by either of them, that these engagements could not be enforced. Money was paid on them by one party, and received by the other. And when we see men dealing with one another openly in this manner, and making contracts to a large amount, we can hardly doubt, as to what was the generally-received opinion in Alabama, at that time, in relation to the right of the plaintiffs to make such contracts. Everything now urged as proof of her policy, was equally public and well known, when these bills were negotiated. And when a court is called on to declare contracts thus made to be void, upon the ground that they conflict with the policy of the state ; the line of that policy should be very clear and distinct, to justify the court in sustaining the defence. Nothing can be more vague and indefinite than that now insisted on as the policy of Alabama. It rests altogether on speculative reasoning as to her supposed interests ; and is not supported by any positive legislation. There is no law of the state which attempts to define the rights of foreign corporations.

We, however, do not mean to say, that there are not many subjects upon which the policy of the several states is abundantly evident, from the nature of their institutions, and the general scope of their legislation ; and which

do not need the aid of a positive and special law to guide the decisions of the courts. When the policy of a state is thus manifest, the courts of the United States would be bound to notice it, as a part of its code of laws; and to declare all contracts in the state, repugnant to it, to be illegal and void. Nor do we mean to say, whether there may not be some rights under the constitution of the United States, which a corporation might claim, under peculiar circumstances, in a state other than that in which it was chartered. The reasoning, as well as the judgment of the court, is applied to the matter before us; and we think the contracts in question were valid, and that the defence relied on by the defendants cannot be sustained. The judgment of the circuit court in these cases must, therefore, be reversed, with costs.

BALDWIN, Justice, delivered an opinion concurring in the judgment of the court, on principles which were stated by him at large. This opinion was not delivered to the reporter.

MCKINLEY, Justice. (*Dissenting.*)—I dissent from so much of the opinion of the majority of the court as decides that the law of nations furnishes a rule by which validity can be given to the contracts in these cases; and from so much as *decides that the contracts, which were the subjects of the suits, were not against the policy of the laws of Alabama. [*598

This is the first time since the adoption of the constitution of the United States, that any federal court has, directly or indirectly, imputed national power to any of the states of the Union; and it is the first time that validity has been given to such contracts, which, it is acknowledged, would otherwise have been void, by the application of a principle of the necessary law of nations. This principle has been adopted and administered by the court as part of the municipal law of the state of Alabama, although no such principle has been adopted or admitted by that state. And whether the law of nations still prevails among the states, notwithstanding the constitution of the United States? or the right and authority to administer it in these cases are derived from that instrument? are questions not distinctly decided by the majority of the court. But whether attempted to be derived from one source or the other, I deny the existence of it anywhere, for any such purpose.

Because the municipal laws of nations cannot operate beyond their respective territorial limits, and because one nation has no right to legislate for another; certain rules, founded in the law of nature and the immutable principles of justice have, for the promotion of harmony and commercial intercourse, been adopted by the consent of civilized nations. But no necessity exists for such a law among the several states. In their character of states, they are governed by written constitutions and municipal laws. It has been admitted by the counsel, and decided by the majority of the court, that without the authority of the statutes of the states, chartering these banks, they would have no power whatever to purchase a bill of exchange, even in the state where they are established. If it requires the exertion of the legislative power of Pennsylvania, for instance, to enable the United States Bank to purchase a bill of exchange in that state; why should it not require the same legislative authority, to enable it to do the same act in Alabama? It has been contended in argument, that the power granted to the bank to purchase a bill of exchange at Philadelphia, in Pennsylvania,

payable at Mobile, in Alabama, would be nugatory, unless the power existed also to make contracts at both ends of the line of exchange. The authority to deal in exchange may very well be exercised, by having command of one end of the line of exchange only. To buy and sell the same bill at the bank, is dealing in exchange, and may be exercised with profit to the bank ; but not perhaps as conveniently as if it could make contracts in Alabama as well as at the bank.

But if it has obtained authority to command but one end of the line of exchange, it certainly has no right to complain that it cannot control the other, when that other is within the jurisdiction of another state, whose authority or consent it has not even asked for. The bill of exchange which is the subject of controvery between the Bank of Augusta and Earle, and that which is the subject of controversy between the United States Bank and Primrose, *were both drawn at Mobile, and made payable at New York. Neither of the banks had authority from any state, to make a contract at either end of the line of exchange here established. Here, then, they claim, and have exercised, all the rights and privileges of natural persons, independent of their charters ; and claim the right, by the comity of nations, to make original contracts everywhere, because they have a right, by their charters, to make like contracts in the states where they were created, and have "a local habitation and a name."

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It is difficult to conceive of the exercise of national comity, by a state having no national power. Whatever national power the old thirteen states possessed, previous to the adoption of the constitution of the United States, they conferred, by that instrument, upon the federal government. And to remove all doubt upon the question, whether the power thus conferred was exclusive or concurrent, the states are, by the tenth section of the first article of the constitution, expressly prohibited from entering into any treaty, alliance or confederation ; and without the consent of congress, from entering into any agreement or compact with another state, or with a foreign power. By these provisions, the states have, by their own voluntary act, and for wise purposes, deprived themselves of all national power, and of all the means of international communication ; and cannot even enter into an agreement or compact with a sister state, for any purpose whatever, without the consent of congress. The comity of nations is defined by Judge Story, in his Conflict of Laws, to be the obligations of the laws of one nation in the territories of another, derived altogether from the voluntary consent of the latter. And in the absence of any positive rule, affirming, or denying, or restraining, the operation of foreign laws, courts of justice presume the tacit adoption of them by their own government, unless they are repugnant to its policy or prejudicial to its interests. Conflict of Laws 37.

Now, I ask again, what is the necessity for such a rule of law as this? Have not the states full power to adopt or reject what laws of their sister states they please? And why should the courts interfere in this case, when the states have full power to legislate for themselves, and to adopt or reject such laws of their sister states as they think proper? If Alabama had adopted these laws, no difficulty could have arisen in deciding between these parties. This court would not then have been under the necessity of resorting to a doubtful presumption for a rule to guide its decision. But when the court have determined that they have the power to presume that

Alabama has adopted the laws of the states chartering these banks, other difficult questions arise. How much of the charter of each bank has been adopted? This is a question of legislative discretion, which, if submitted to the legislature of the state, would be decided upon reasons of policy and public convenience. And the question of power, to pass such a law, under the constitution of Alabama, would have to be considered and decided. These are *very inconvenient questions for a judicial tribunal to determine. As the majority of the court have not expressly stated whether Alabama has adopted the whole charters of the banks, or what parts they have adopted, there is now no certainty what the law of Alabama is on the subject of these charters. [*600

But these are not all the difficulties that arise in the exercise of this power by the judiciary. Many questions very naturally present themselves in the investigation of this subject, and the first is—to what government does this power belong? Secondly, has it been conferred upon the United States? or has it been reserved to the states by the tenth amendment of the constitution? If it be determiued, that the power belongs to the United States, in what provision of the constitution is it to be found? And how is it to be exercised? By the judiciary or by congress? The counsel for the banks contended, that the power of congress to regulate commerce among the several states, deprives Alabama of the power to pass any law restraining the sale and purchase of a bill of exchange; and by consequence, the whole power belongs to congress. The court, by the opinion of the majority, does not recognise this doctrine, in terms. But if the power which the court exercised, is not derived from that provision of the constitution, in my opinion, it does not exist.

If ever congress shall exercise this power, to the broad extent contended for, the power of the states over commerce, and contracts relating to commerce, will be reduced to very narrow limits. The creation of banks, the making and indorsing of bills of exchange and promissory notes, and the damages on bills of exchange, all relate, more or less, to the commerce among the several states. Whether the exercise of these powers amounts to regulating the commerce among the several states, is not a question for my determination on this occasion. The majority of the court have decided that the comity of nations gives validity to these contracts.

And what are the reasons upon which this doctrine is now established? Why, the counsel for the banks say—we are obliged to concede, that these banks had no authority to make these contracts in the state of Alabama, in virtue of the laws of the states creating them, or by the laws of Alabama; therefore, unless this court will extend to them the benefit of the comity of nations, they must lose all the money now in controversy, they will be deprived hereafter of the benefit of a very profitable branch of their business as bankers, and great public inconvenience will result to the commerce of the country. And besides all this, there are many corporations in the north, which were created for the purpose of carrying on various branches of manufactures, and particularly that of cotton. Those engaged in the manufacture of cotton will be unable to send their agents to the south, to sell their manufactured articles, and to purchase cotton to carry on their business; and may lose debts already created. This is the whole amount of the argument, upon which the benefit of this doctrine is claimed.

Because banks cannot make money in places and by means not authorized by their charters; *because they may lose by contracts made in unauthorized places; because the commerce of the country may be subjected to temporary inconvenience; and because corporations in the north, created for manufacturing purposes only, cannot, by the authority of their charters, engage in commerce also; this doctrine, which has not heretofore found a place in our civil code, is to be established. Notwithstanding, it is conceded, that the states hold ample legislative power over the same subject, it is deemed necessary, on this occasion, to settle this doctrine by the supreme tribunal. The majority of the court having, in their opinion, conceded, that Alabama might make laws to prohibit foreign banks to make contracts, thereby admitted, by implication, that she could make laws to permit such contracts. I think it would have been proper to have left the power there, to be exercised or not, as Alabama, in her own sovereign discretion, might judge best for her interest or her comity. The majority of the court thought and decided otherwise. And here arises the radical and essential difference between them and me.

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They maintain a power in the federal government, and in the judicial department of it, to do that which, in my judgment, belongs, exclusively, to the state governments; and to be exercised by the legislative and not the judicial departments thereof. A difference so radical and important, growing out of the fundamental law of the land, has imposed on me the unpleasant necessity of maintaining, single-handed, my opinion, against the opinion of all the other members of the court. However unequal the conflict, duty impels me to maintain it firmly; and, although I stand alone here, I have the good fortune to be sustained, to the whole extent of my opinion, by the very able opinion of the court of appeals of Virginia, in the case of the *Marietta Bank* v. *Pindall*, 2 Rand. 465. If congress have the power to pass laws on this subject, it is an exclusive power; and the states would then have no power to prohibit contracts of any kind, within their jurisdictions. If the government of the United States have power to restrain the states, under the power to regulate commerce, whether it be exerted by the legislative or the judicial department of the government, is not material; it being the paramount law, it paralyzes all state power on the same subject. And this brings me to the consideration of the second ground on which I dissent.

It was contended by the counsel for the banks, that all the restraints imposed by the constitution of Alabama, in relation to banking, were designed to operate upon the legislature of the state, and not upon the citizens of that or any other state. To comprehend the whole scope and intention of that instrument, it will be necessary to ascertain, from the language used, what was within the contemplation and design of the convention. The provision in the constitution on the subject of banking is this: "One state bank may be established, with such number of branches as the general assembly may, from time to time, deem expedient; provided, that no branch bank shall be established, nor bank charter renewed, under the authority of this state, without the concurrence of two-thirds of both houses of the general assembly; and provided also, that not more than one bank nor branch bank shall be established, nor bank charter renewed, at any one session of the general assembly, nor shall any bank or

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branch bank be established, or bank charter renewed, but in conformity with the following rules: 1. At least two-fifths of the capital stock shall be reserved for the state. 2. A proportion of power in the direction of the bank shall be reserved to the state, equal at least to its proportion of stock therein. 3. The state, and the individual stockholders, shall be liable respectively, for the debts of the bank, in proportion to their stock holden therein. 4. The remedy for collecting debts shall be reciprocal for and against the bank. 5. No bank shall commence operations until half of the capital stock subscribed for shall be actually paid in gold or silver, which amount shall in no case be less than $100,000."

There are a few other unimportant rules laid down, but they are not material to the present inquiry. The inquiry naturally suggests itself to the mind—Why did Alabama introduce into her constitution these very unusual and specific rules? If they had not been deemed of great importance, they would not have been found there. Can any one say, therefore, that this regularly organized system, to which all banks within the state of Alabama were to conform, did not establish for the state, her legislature, or other authorities, a clear and unequivocal policy on the subject of banking? It has been conceded in the argument, and by the opinion of the majority of the court, that these constitutional provisions do restrict and limit the power of the legislature of the state. Then, the legislature cannot establish a bank in Alabama, but in conformity with the rules here laid down. They have established seven banks; five of them belonging exclusively to the state, and two-fifths of the stock of the other two, with a proportionate power in the direction, reserved to the state. Each of these banks is authorized to deal in exchange.

It is proper to stop here, and inquire whether the subject of exchange is proper to enter into the policy of the legislation of a state; and whether it is a part of the customary and legitimate business of banking. All the authorities on the subject show that, in modern times, it is a part of the business of banking. See Postlethwaite's Commercial Dictionary, tit. Bank; Tomlin's Law Dictionary, tit. Bank; Rees' Cyclopædia, tit. Bank; Vattel 105. This last author quoted, after showing that it is the duty of the sovereign of a nation to furnish for his subjects a sufficiency of money, for the purposes of commerce, to preserve it from adulteration, and to punish those who counterfeit it, proceeds to say, "There is another custom more modern, and of no less use to commerce, than the establishment of money, namely, exchange, for the business of the bankers; by means of whom a merchant remits immense sums from *one end of the world to the other, with very little expense, and, if he pleases, [*603 without danger. For the same reasons that sovereigns are obliged to protect commerce, they are obliged to protect this custom by good laws, in which every merchant, foreigner or citizen may find security." From these authorities, it appears, that exchange is a part of modern banking, or at least so intimately connected with it, that all modern banks have authority to deal in it. And it also appears, that it is as much the duty of a state to provide for exchange, as for money or a circulating medium, for its subjects or citizens.

When the state of Alabama reserved to herself, by her fundamental law, at least two-fifths of the capital and control of all banks to be created in the

state, and, by her laws, has actually appropriated to herself the whole of the capital, management and profits of five out of seven banks, and two-fifths of the other two ; had she not the same right to appropriate the banking right, to deal in exchange, to herself, to the same extent? While performing her duty, under the constitution, by providing a circulating medium for the citizens, she was not unmindful of her duty in relation to exchange, and that is also provided for. Has she not provided increased security and safety to the merchant, by making herself liable for the payment of every bill of exchange sold by the five banks belonging to her, and for two-fifths of all sold by the other two? And has she not also provided by law, that all the profits derived from thus dealing in bills of exchange shall go into the public treasury, for the common benefit of the people of the state? And has she not, by the profits arising from her banking, including the profits on exchange, been enabled to pay the whole expenses of the government, and thereby to abolish all direct or other taxation? See Aikin's Digest 651.

It was not the intention of the legislature, by conferring the power upon these banks to purchase and sell bills of exchange, to deprive the citizens of the state, or any other natural person, of the right to do the same thing. But it was the intention to exclude all accumulated bank capital which did not belong to the state, in whole or in part, according to the constitution, from dealing in exchange ; and such is the inevitable and legal effect of those laws. Let us test this principle. It is admitted by the majority of the court, in their opinion, that these constitutional provisions were intended as a restraint upon the legislature of the state. If so intended, the legislature can pass no law contrary to the spirit and intention of the constitution ; nor contrary to the spirit and intention of the charters of the banks, created in pursuance of its provisions. Now, were the laws chartering the banks which are parties to this suit, contrary to the spirit and intention of the constitution and laws of Alabama? That is the precise question.

It must be borne in mind, that these were banks, and nothing but banks, that made the contracts in Alabama ; and in that character, and that only, have they been considered in the opinion of the majority of the court. Were those banks chartered by the legislature of Alabama, two-thirds of both houses concurring? Was, at least, two-fifths of the capital stock, and of the management of these *banks reserved to the state? Did the profits arising from the purchase of these bills of exchange go into the treasury of Alabama? All these questions must be answered in the negative. Then, these are not constitutional banks in Alabama, and cannot contract there. The majority of the court have decided these causes upon the presumption, that Alabama had adopted the laws of Georgia, Louisiana and Pennsylvania chartering these banks. And this presumption rests for its support upon the fact, that there is nothing in the laws or the policy of the laws of Alabama to resist this presumption. I suppose, it will not be contended, that the power of this court, to presume that Alabama had adopted these laws, is greater than the power of Alabama to adopt the laws for herself? Suppose, these banks had made a direct application to the legislature of Alabama, to pass a law to authorize them to deal in bills of exchange in that state, could the legislature have passed such a law, without violating the constitution of the state?

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An incorporated bank, in Alabama, is not only the mere creature of the law creating it, as banks are in other states; but it is the creature of a peculiar fundamental law; and if its charter is not in conformity to the provisions of the fundamental law, it is void. It must be recollected, that the banks, which are the plaintiffs in these suits, when they present themselves to the legislature, asking permission to use their corporate privileges there, are not demanding a right, but asking a favor, which the legislature may grant or refuse as it pleases. If it should refuse, it would violate no duty, incur no responsibility. If, however, the court exercise the power, it is upon the positive obligation of Alabama, that the presumption must arise, or the right does not exist. A positive rule of law cannot arise out of an imperfect obligation, by presumption or implication. But to put it on the foot of bare repugnance of the law, presumed to be adopted, to the laws of the country adopting, if there be any repugnance, the court ought not to presume the adoption. Story's Conflict of Laws 37. The charter of every bank, not created in conformity with the constitution of Alabama, must, at least, be repugnant to it. The presumption is, that the charters of all these banks were repugnant, there being no reason or inducement to make them conform, in the states where they were created. The power of the court to adopt the laws creating these banks, as they actually existed, and the power of the legislature of Alabama to adopt them in a modified form, or to grant the banks a mere permission to do a specified act, present very different questions, and involve very different powers. If, therefore, the legislature could not adopt the charters, in the least objectionable form, nor authorize the banks to deal in exchange, without violating the constitution of Alabama, how can it be said, that the contracts in controversy are not against the policy of the laws of Alabama? And by what authority does the majority of this court presume, that Alabama has adopted those laws? The general rule is, that slight evidence and circumstances shall defeat a mere legal presumption of law. This case will be a signal exception to that rule.

*In the case of *Pennington* v. *Townsend*, 7 Wend. 278, the Protection and Lombard Bank, chartered by New Jersey, by agents, [*605 undertook to do banking business in New York, and there discounted the check which was the subject of the suit, in violation of the restraining acts of 1813 and 1818; the first of which enacts, that no person, unauthorized by law, shall become a member of any association for the purpose of issuing notes or transacting any other business which incorporated banks may or do transact. The act of 1818 enacts, that it shall not be lawful for any person, association or body corporate to keep any office of deposit for discounting, or for carrying on any kind of banking business, and affixes a penalty of $1000, to be recovered, &c. Under these laws, the contract between the parties was held to be void; and the court says, "The protection against the evil intended to be remedied, to wit, preventing banking without the authority of the legislature of the state, is universal in its application within the state and without exception; unless qualified by the same power which enacted it, or by some other paramount law. Such is not the law incorporating this bank."

Is there anything in these laws which more positively prohibits banking in New York, without the authority of the legislature of that state, than there is in the constitution of Alabama, prohibiting all banking, except in

the manner prescribed by the constitution? Can it be believed, that she intended to protect herself against the encroachments of her own legislature only, and to leave herself exposed to the encroachments of all her sister states? Does the language employed in these provisions of the constitution jnstify any such construction? It is general, comprehensive, and not only restrictive, but expressly prohibitory. Whatever is forbidden by the constitution of Alabama, can be done by no one, within her jurisdiction; and it was sufficient for her to know, that no bank could do any valid banking act there, without violating her constitution. It was contended, by the counsel for the banks, that no law could be regarded as declaring the policy of the state, unless it was penal; and inflicted some punishment for its violation. This doctrine is as novel as it is unfounded in principle. I know of no such exclusive rule by which to reach the mind and intention of the legislature. If the language used shows clearly that particular acts were intended to be prohibited, and the act is afterwards done, it is against the policy of the law and void. Suppose, the legislature of Alabama were to establish a bank disregarding all the conditions and restrictions imposed by the constitution; would it not violate that instrument, and therefore, the act be void? And can Georgia, Louisiana or Pennsylvania, by their respective legislatures, do in Alabama, what her own legislature cannot do? The relations which these states hold towards each other, in their individual capacity of states, under the constitution of the United States, is that of perfect independence. In the case of *Buckner* v. *Finley*, 2 Pet. 590, Chief Justice MARSHALL said, "For all national purposes embraced by the federal constitution, the states *606] and the citizens thereof are one, *united under the same sovereign authority, and governed by the same laws. In all other respects, the states are necessarily foreign to, and independent of each other." It is in this foreign and independent relation, that these four states stand before this court in these cases. The condition of Alabama, taken with a view to this relation, cannot be worse than that of an independent nation, in like circumstanstances. What that would be, we will see from authority.

"Nations being free and independent of each other in the same manner as men are naturally free and independent, the second general law of their society is, that each nation ought to be left in the peaceable enjoyment of that liberty it has derived from nature. The natural society of nations cannot subsist, if the rights which each has received from nature are not respected. None would willingly renounce its liberty; it would rather break of all commerce with those that should attempt to violate it. From this liberty and independence, it follows, that every nation is to judge of what its conscience demands, of what it can or cannot do, of what is proper or improper to be done; and consequently, to examine and determine whether it can perform any office for another, without being wanting in what it owes to itself. In all cases, then, where a nation has the liberty of judging what its duty requires, another cannot oblige it to act in such or such a manner. For the attempting this would be doing an injury to the liberty of nations. A right to offer constraint to a free person can only be invested in us in such cases, where that person is bound to perform some particular thing for us, or from a particular reason that does not depend on his judgment; or, in a word, where we have a complete authority over him." Vattel 53–4.

Now, apply these just and reasonable principles to Alabama, in her relation of a foreign and independent state, reposing upon the rights reserved to her by the tenth amendment of the constitution of the United States; and then show the power that can compel her to pass penal laws to guard and protect those perfect, ascertained, constitutional rights from the illegal invasion of a bank created by any other state. If this power exists at all, it can be shown, and the authority by which it acts. But not even a reasonable pretence for any such power or authority has been shown. The conclusion must, therefore, be, that Alabama, as an independent foreign state, owing no duty, nor being under any obligation to either of the states, by whose corporations she was invaded, was the sole and exclusive judge of what was proper or improper to be done; and consequently, had a right to examine and determine whether she could grant a favor to either of those states, without injury to herself; unless, indeed, there be a controlling power, in this court, derived from some provision of the constitution of the United States. As none such has been set up, or relied upon, in the opinion of the majority of the court, for the present, I have a right to conclude, that none such exists. And without considering any of the minor points discussed in the argument, or noticed in the opinion, I dismiss the subject.

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