*The President and Directors of the Bank of the Metropolis, Plaintiff in error, *v.* Erastus Guttschlick, Defendant in error.

Jeofails.—Pleading.—Deed of trust.—Contract of corporation. Evidence.

Action on an agreement in writing, by which Guttschlick had purchased a lot of ground in the city of Washington, from the Bank of the Metropolis, for which he had paid a part of the purchase-money, and given a note for the residue; by the contract, the Bank of the Metropolis, through its president and cashier, was pledged to convey the lot in fee-simple to Guttschlick, when the whole purchase-money was paid. The declaration, in each count, averred the payment of the note, and the failure of the bank to convey; to the three special counts in the declaration, there was no conclusion; to the fourth count, for money had and received, there was a general conclusion. It was held by the court, that whatever might have been the effect of the want of a conclusion to the three counts, upon a special demurrer, the 32d section of the judiciary act of 1789, would cure the defect, if admitted to be one.

A corporation may be bound by contracts, not executed under their common seal, and by the acts of its officers, in the course of their official duties; when, in a declaration, it is averred, that a bank, by its officers, agreed to a certain contract, this averment imports everything to make the contract binding.

An allegation that a party made, accepted, indorsed or delivered a bill of exchange, is sufficient, although the defendant did not do either of those acts himself; provided, he authorized the doing of them.

The averments in a declaration set forth, that the plaintiff had been turned out of possession of a lot of ground, but did not state that the eviction was by due course of law; the breach alleged in the count was, that the defendant had refused, on demand, to convey the lot. The court held the averment of eviction to be mere surplusage.

The Bank of the Metropolis contracted to deliver a title in fee-simple to Guttschlick, of a lot of ground, and at the term of the contract, they held the lot, by virtue of a sale made under a deed of trust, at which sale they became the purchasers of the property; the same lot had, by a deed of trust executed by the same person, been previously conveyed to another person, to indemnify an indorser of his notes, and it was, by the trustee, afterwards, and after the contract with Guttschlick, sold and purchased by another: *Held*, that at the time of the contract of the bank, they had not a fee-simple in the lot, which could be conveyed to Guttschlick.

In case of a deed of trust, executed to secure a debt, unless in case of some extrinsic matter of equity, a court of equity never inferferes to delay or prevent a sale, according to the terms of the trust; the only right of the grantor in the deed, is the right to any surplus which may remain of the money for which the property sold.

The action, in this case, was *assumpsit* against the bank, on a contract under the seals of the president and cashier: *Held*, that the action was well brought; it makes no difference, in an action of *assumpsit* against a corporation, whether the agent was appointed under the seal or not; nor whether he puts his own seal to a contract which he makes in behalf of the corporation.

It is admissible, for the party who sues on a contract, to make a title to a lot of ground in fee-simple which he had purchased, to give in evidence, an examination of the records of the office for the recording of deeds, by a witness who was searching into the title of the lot, and also a letter, giving to the party who made the contract, a notice that the lot was about to be sold, under a title superior to that under which he held. A deed from the vendor, informally executed, and which did not convey the title the vendor agreed to give, was also admissible in evidence, in an action against the vendor, on the contract.

A paper executed by the president and cashier of a bank, purporting to convey a lot of ground held by the bank, is not the deed of the corporation.

The proceedings in an action against the indorser of a note, by the holder, which gave to a trustee, by the terms of the deed of trust, a right to sell property held for the indemnity of the indorser, were proper evidence, in an action on a contract for the sale of the lot, from which

*20] the party, who had purchased under another title, had been evicted by a title *obtained under the deed of trust. No exceptions to the regularity of the proceedings offered

in evidence can be taken, which should have been properly made in the original action, by the party sued on the same.

Whether evidence be admissible or not, is a question for the court to decide; but whether it be sufficient or not to support the issue, is a question for the jury. The only case in which the court can make inferences from evidence, and pass upon its sufficiency, is on a demurrer to evidence.

When a trust is created for the benefit of a third party, though without his knowledge at the time, he may affirm the trust, and enforce its execution.

Where a deed of trust was executed to secure the payment of certain notes, and a judgment obtained on the notes, the judgment did not operate as an extinguishment of the right of the holders of the note, to call for the execution of the trust; although the act of limitations might apply to the judgment.[1]

Guttschlick *v.* Bank of the Metropolis, 5 Cr. C. C. 435, affirmed.

ERROR to the Circuit Court of the District of Columbia and county of Washington. This action was instituted by the defendant in error, against the plaintiff in error, on the 31st day of March 1836. The declaration contained four counts:

1. That on the 9th of November 1827, the plaintiff bought of defendant, a certain lot of ground in the city of Washington, being lot No. 5, square No. 489, for the sum of $1191.25, and paid the sum of $591.25, and gave his promissory note for the balance of the purchase-money; that the defendant, in consideration thereof, agreed, through the president and cashier, that it was pledged, when the note should be paid, to convey said lot to plaintiff, his heirs and assigns; that said note was paid at maturity, with the interest: yet the defendant had not conveyed said lot, but to do so had hitherto wholly refused, &c.

2. That whereas, the defendant, by John P. Van Ness, the president of said bank, and Alexander Kerr, the cashier, agents for that purpose, duly authorized by, and acting for, defendant, did, on the 9th November 1827, bargain and sell to the plaintiff, the said lot of ground, on the terms mentioned in the first count, and did thereupon put plaintiff in possession of said lot; and the plaintiff averred the authority of Van Ness and Kerr to make said agreement; that plaintiff paid the note, and received and continued in possession of the lot, and was obliged to pay, and did pay, taxes thereon, from the 9th November 1827, to 30th December 1835, when he was turned out of possession by the Patriotic Bank: yet defendant, although often requested, had not conveyed the said lot in fee-simple to the plaintiff, but had hitherto wholly neglected and refused.

3. That whereas, defendant, on the 9th November 1827, by an agreement of that date, acknowledged to have received from the plaintiff the sum of $591.25, and the promissory note of the plaintiff, payable six months after date, with interest, and in consideration thereof, put the plaintiff in possession of said lot, and undertook and faithfully *promised the plaintiff, upon the payment of said note, with interest, to convey to plaintiff said lot in fee-simple; that the plaintiff did pay said note, with interest, whereby defendant became liable and bound to convey said lot in fee-simple, by a good and indefeasible title, free from incumbrances; and being so liable, undertook and promised, &c.: yet plaintiff said, that the [*21

[1] When a promissory note contains a warrant of attorney to confess judgment, the lapse of six years is not a bar to the entry of judgment thereon. Morris *v.* Hannick, 10 Phila. 571; Person *v.* Weston, 1 Kulp (Pa.) 387; Peirce *v.* McClurg, 1 Chester Co. Rep. 241.

defendant was not, at the time when, &c., nor at any other time after, seised or possessed of said lot in fee-simple, nor did then, or at any other time, although often requested to, convey, &c. And the plaintiff further averred, that being in possession of said lot as aforesaid, he was compelled to pay and did pay the taxes and public dues, amounting to $300, whereby, &c.

4. The fourth count was for money had and received, and concluded as follows: "Yet the said defendants, the said sums of money have not paid to the said plaintiff, nor have they paid any part thereof, but the same, or any part thereof, to pay to the said plaintiff, have hitherto wholly neglected and refused: to the damage of the said plaintiff $3000, and thereof," &c. There was no conclusion to the three preceding counts in the declaration.

The jury, under the charge of the court, found a general verdict for the plaintiff for $1191.25, with interest from November 9th, 1827.

The counsel for the defendant took four exceptions to the charge of the court. The plaintiff in the circuit court having given in evidence an account made out by the Bank of the Metropolis, against him, stating that he had bought a certain lot of ground described in the same, from the bank, for the sum of $1191.25, gives a credit for the sum of $595.25 as "cash received;" and the balance, $600 to be due on the bond of the plaintiff, in the following terms:

"Be it known, that on this 9th day of November 1827, Ernest Guttschlick has purchased of the Bank of the Metropolis, lot No. 5, in square No. 489, as above described, and as laid down on the plat of the city of Washington, for the sum of $1191.25, and that he hath paid on account of the same, the sum of $595.25, leaving due the sum of $600, for which he hath given his note to the said bank, payable in six months after date, with interest from date, which sum of $600 when paid, will be in full for the purchase-money of said lot. The Bank of the Metropolis, through president and cashier, is hereby pledged, when the above sum shall be paid, to convey the said lot, viz., lot 5, in square 489, in fee-simple, to the said Ernest Guttschlick, his heirs or assigns, for ever. In testimony whereof, the said
*22] president and cashier, by order of *the board of directors, have hereto set their hands and seals, this ninth day of November 1829.

JOHN P. VAN NESS, [SEAL.]
President of the Bank of Metropolis.
ALEXANDER KERR, Cashier." [SEAL.]

"In presence of—GEO. THOMAS."

With evidence that he, the plaintiff, had paid the sum of $600 to the bank; the defendants excepted to the admissibility and competency of the same, until some evidence should be given, showing the authority of the parties who executed the same to sign said paper. The court overruled the objection.

The defendant's second bill of exceptions stated, that the plaintiff proved, that in December 1835, witness, at the instance of the plaintiff, examined the records of deeds in Washington county, for the purpose of tracing the plaintiff's title to the lot in question, and after such examination, wrote for the plaintiff, his letter to the bank, dated 17th December 1835; that when he wrote that letter, a deed, purporting to be executed by John P. Van Ness, president, etc., to the plaintiff, was before him, and was the deed referred to in said letter as having been handed to him by plaintiff. The

said deed was duly recorded on the 13th of May 1828, and appeared to have been delivered in August 1828. Statements were made by counsel, and the plaintiff offered to read said deed in evidence; which being objected to, the court overruled the objection, and defendant excepted.

The third bill of exceptions stated, that the plaintiff, in order to maintain the issue on his part, offered in evidence, the proceedings of the circuit court of the district of Columbia, for the county of Washington, in a certain suit brought by the Patriotic Bank against Samuel Lane, for the purpose of showing, that Samuel Lane had been in fact sued upon a note for $3000, one of the notes mentioned in the deed from B. G. Orr, to Joseph Elgar, dated 21st of August 1818; to the competency and admissibility of the same to prove the said fact, the defendant objected; but the court overruled the objection, and permitted the same to go to the jury. To the admission of which testimony the defendant, by his counsel excepted. The deed from B. G. Orr referred to in the exception, was a deed of trust, executed on the 21st day of August 1818, and duly recorded, to Joseph Elgar, by which Orr conveyed to Elgar, certain lots of ground in the city of Washington, in trust, that if Samuel Lane should be sued, or put to any cost, trouble, damage or expense, by reason of his having indorsed certain notes made by B. G. Orr, negotiable at the Patriotic Bank, the trustee should sell and dispose of the property conveyed by the same, and out of the proceeds, discharge the notes, or such as might have been substituted for them, and to indemnify the said Samuel Lane, etc.

The fourth bill of exceptions stated, that the plaintiff, to sustain the issue on his part, gave in evidence the articles of agreement, *signed by John P. Van Ness, president of the bank of the Metropolis, [*23 and Alexander Kerr, cashier of the bank, with the plaintiff, for the sale of the lot; and then, having proved that B. G. Orr was seised in fee of the premises mentioned in the agreement, gave in evidence the deed from Orr to Elgar, referred to in the third exception; and then gave in evidence a deed from B. G. Orr to Kerr, authorizing the sale of the lot, for the purpose of discharging certain notes made by Orr, and discounted at the Bank of the Metropolis, and a deed made by Kerr to the Bank of the Metropolis, in pursuance of the trust, dated July 1st, 1825, under which deed, the bank entered into possession of the lot; and then gave in evidence the proceedings in the circuit court, in the case of the Patriotic Bank against Samuel Lane, as stated in the third bill of exceptions, and proved by competent testimony, that B. G. Orr had died in 1823, and Samuel Lane, in the year 1822, both insolvent; and that in the year 1835, said Elgar, at the instance and request of said Patriotic Bank, advertised the property mentioned in said deed to him for sale, in manner following, and that pursuant to said advertisement, he did, on the 21st day of December 1835, enter on the premises and expose to sale, and did sell, said lot No. 5, in square No. 489; and the said Patriotic Bank, by its cashier, became the purchaser; and said Elgar executed to said bank a deed for the same, and that the net proceeds of said sale of said lot, was carried on the books of the said Patriotic Bank to the credit of said B. G. Orr's note for $3000, mentioned in said deed from said Orr to Elgar, still leaving, as appears by the said books, a balance due on the said note; and then gave in evidence a letter addressed by said plaintiff to said defendant, and proved by com-

petent testimony, that the said lot was vacant, and uninclosed and unimproved; and that after said sale and conveyance to said Patriotic Bank, the cashier of said bank went on to said premises, in company with the attorney of said bank, and then and there declared, that he took possession of the same; and that in the year 1824, the said lot was assessed on the books of the corporation of Washington, as the property of said Orr; and that from the year 1825 to the year 1828, both inclusive, the same was assessed to said defendant, who paid the taxes thereon; and that from the year 1829 to the year 1835, the same was assessed to said plaintiff, who paid the taxes thereon, and continued in possession, till the year 1835, and from that time, the same had been assessed to said Patriotic Bank; and further proved, that said plaintiff was duly notified by the cashier of said Patriotic Bank, of his intention to take possession of said lot, in the manner and at the time of his said entry as aforesaid, that that said lot still remained and has constantly remained open, vacant, unimproved and uninclosed; and further proved, that said plaintiff had paid to said defendant the whole consideration-money for which said lot was sold to him, and taken up, at maturity, as part of said purchase-money, the note mentioned en the agreement aforesaid, signed by said Van Ness and Kerr; and that
*24] the said Orr and Kerr, during their lives, and *the said Elgar, the Bank of the Metropolis, and Patriotic Bank, were all in the city of Washington, from 1818 till after 1835. The defendant moved the court to instruct the jury, that upon this evidence, the plaintiff was not entitled to recover upon the first, or second, or third or fourth counts in the declaration; which instructions the court refused to give; to which refusal the defendants excepted. The defendants prosecuted this writ of error.

The case was argued by *Coxe*, for the plaintiffs in error; and by *Semmes* and *Bradley*, for the defendant.

Coxe contended, that the circuit court had erred in each and all the instructions given to the jury. He argued, that the proceedings under the deed from Orr to Elgar, under which the Patriotic Bank claimed title to the lot sold to the defendant in error, were irregular and void. Eighteen years had elapsed between the execution of the deed of trust by Orr to Elgar; and if the Patriotic Bank could come forward in 1835, to claim under a note given in 1819, they should have gone into a court of equity before they could call on the trustee to sell. The deed of trust gave only a naked power; and after the lapse of so many years, no sale could be made under it. He had exceeded his authority. Deeds of trust have the same effect as common-law mortgages. In 1835, when Elgar undertook to execute the trust, there was no debt due to the Patriotic Bank. A court of equity, as well as a court of common law, would have presumed its payment.

There is no evidence that Samuel Lane had been sued upon the notes, or had ever suffered damage, or been put to expense. The judgment of the Patriotic Bank on the notes, was obtained in 1823, against the administrator of Lane. By the law of Maryland, a judgment becomes inoperative, after twelve years; and this judgment was therefore invalid in 1835. The statute of limitations had created a complete bar to all claims on the notes of Orr, or on the judgment. The Patriotic Bank had no rights under either

the judgments or the notes. The Bank of the Metropolis had, therefore, become entitled, completely and exclusively, under the deed to Alexander Kerr, to the lot; for if no proceedings could be had against Lane, how could the deed of trust from Orr to Elgar be put in force? No evidence could be introduced, to show the right of Elgar; it was at an end from time.

The defendant in error did not show, on the trial, a right to recover against the Bank of the Metropolis. He had no right of action. He should have shown that he had tendered a proper deed to the bank, to be executed; but this was not shown, or averred. He should have proved that a power to sell the lot had been given by the bank to the president and cashier; but the circuit court did not require this. The defendant in error was barred from suing, by his holding the *deed for the lot, although it may have been defective; and by his holding possession under the deed, until he had demanded a better one from the Bank of the Metropolis. [*25

All the counts in the declaration are defective, except the fourth and last, as they have no conclusion; and the conclusion to the last count is inapplicable to the preceding three.

Semmes and *Bradley*, for the defendant in error.—It is extraordinary, that after the pleadings were made up in this case, a trial had, and the plaintiffs in error had taken four bills of exception, objections to the declaration should be first made in this court. The party thus objecting is too late; he has waived all right to take such exceptions. All defects in the declaration are cured by the verdict and by the statute of jeofails. So, if the defendant in the circuit court had an objection to the form of the action, he should have taken it by a plea.

The contract is set out in the declaration. It is a contract for the sale of the lot, by the officers of the bank; and it has been held, that the accredited agents of the bank have a right to bind it by their contracts. *Hatch* v. *Barr*, 1 Ohio 390. It is certain, that the Bank of the Metropolis made the contract set out in the record, and did not keep it with the defendant in error. At the time they assumed the right to sell the lot, the bank could not legally convey it; nor has a legal title to it been made, at any time, by the bank. There was an existing incumbrance on the lot, which the bank did not remove, and which has, subsequently to the sale to the defendant in error, been enforced; and he is entirely divested of the property. He has paid the full consideration stated in the contract, and he now seeks to recover the same back from the bank. This is resisted, and this is the question in the case. On the part of the defendant in error, every principle of equity and justice is in full force. The bank would exempt itself from its obligations, upon legal and technical grounds. But no objections, on such grounds, to the recovery of the defendant in error, will be found to exist. 20 Johns. 15, 20; Sugd. on Vend. 6. Incumbrances on property are objections to a valid title. 11 Johns. 525; 2 Ibid. 613; 12 Ibid. 190; 8 Wheat. 338; 12 Ibid. 64.

The authority of the agents of the bank to sell may be inferred from the acts of the parties. The money of the defendant, and his note, were given to the bank for the property, and this property was acquired by the

bank from one of its debtors, for the payment of a debt. This is authorized by the charter.

This was a contract on the part of the bank to sell the lot, free from all incumbrances. Cited, on this point, 1 H. Bl. 270, 280 ; 3 Bos. & Pul. 162 ; 4 Esp. 221 ; 2 Esp. N. P. 639–40. Was there an outstanding legal incumbrance on the lot, superior *to the title of the Bank of the Metropolis, at the time they made the sale to the defendant in error? *26]

It must be admitted, that any one interested in the trust given to Elgar might call on him to execute it ; and if he was willing to do his duty, there was no necessity to call in the aid of a court of chancery. The Patriotic Bank was the holder of the notes indorsed by Lane ; it was the *cestui que trust.* The bank was not barred by time. Their judgment was interlocutory, and was not affected by the statute of limitations of Maryland. The object of the deed of trust was to pay the notes, and thus to indemnify the indorser. The bank had a right to avail itself of the trust, whenever it became known to them. 3 Johns. Ch. 261. The purchase of the lot by the Bank of the Metropolis was made subject to the deed of trust to Elgar. That deed was on record, and was notice, from its date, to all the world. Nothing but actual fraud can divest a mortgage, properly on record, and that fraud must be proved. Cited, the Recording Act of Maryland 1815 ; 1 Johns. Ch. 298, 394.

Another objection has been made. It is said, that although the length of time which had elapsed before the sale by Elgar, would not bar a mortgage, but it would bar a judgment. But to make a judgment a bar, the statute of limitations must be pleaded. It is not void, but may be made so by pleading the statute. There was no plea of the statute in this case.

Barbour, Justice, delivered the opinion of the court.—This was an action of *assumpsit* brought by the defendant in error against the plaintiff in error, in the circuit court of the United States, in the county of Washington, and district of Columbia. The declaration contains three special counts, and a count for money had and received. The three special counts are all founded upon an agreement in writing, which, after reciting that the plaintiff in the court below had bought of the defendant in the court below, lot No. 5, in square No. 489, in the city of Washington, for which he had paid a part of the purchase-money, and executed his note for the residue, contains the following stipulation : "The Bank of the Metropolis, through the president and cashier, is hereby pledged, when the above sum (that is, the amount of the note) is paid, to convey the said lot, viz., lot No. 5, in square 489, in fee-simple, to the said Ernest Guttschlick, his heirs or assigns for ever." Each of these counts avers the payment, at the time agreed, of the amount of the note, and the failure of the bank, on demand, to convey the lot. At the trial, several bills of exception were taken, and a verdict was found, and judgment rendered, in favor of the plaintiff. To reverse that judgment, this writ of error is brought.

In the argument at the bar, various objections have been urged to the sufficiency of the declaration, which we will briefly notice, in the order in which they were made. The first objection is that the special counts have no conclusion. *There is certainly no formal conclusion to either of these counts. Each of them, after alleging the breach, terminating *27]

with the words, "whereby, &c." Whether counts, thus concluding, would have been sufficient upon a special demurrer in the court below, it is not necessary to decide; because, we are clearly of opinion, that the 32d section of the judiciary act, would cure the defect, if it were admitted to have been one.

The second objection which was taken, applies to the first count, viz., that the agreement sued on, is averred to have been made by the bank, "through the president and cashier," without averring their authorization by the bank to make it. We consider this objection as wholly untenable. The averment in this count is, that the bank, through these officers, agreed to convey the lot. Now, even assuming, for the sake of giving the objection its full force, that the making of this agreement was not within the competency of these officers, as such, yet it was, unquestionably, in the power of the bank, to give authority to his own officers to do so. When, then, it is averred, that the bank, by them, agreed, this averment, in effect, imports the very thing, the supposed want of which constitutes the objection; because, upon the assumption stated, the bank could have made no agreement, but by agents having lawful authority. Nay, it would have been sufficient, in our opinion, that the bank agreed, without the words, "through the president and cashier;" for it is a rule in pleading, that facts may be stated according to their legal effect. Now, the legal effect of an agreement made by an agent for his principal, whilst the agent is acting within the scope of his authority, is, that it is the agreement of the principal. Accordingly, it is settled, that the allegation that a party made, accepted, indorsed or delivered a bill of exchange, is sufficient, although the defendant did not, in fact, do either of these acts himself, provided he authorized the doing of them. Chitty on Bills 356, and the authorities there cited. This principle has been applied, too, in actions *ex delicto*, as well as *ex contractû*. In 6 T. R. 659, it was held, that an allegation that the defendant had negligently driven his cart against plaintiff's horse, was supported by evidence, that defendant's servant drove the cart. In this aspect of the question, it was one, not of pleading, but of evidence. If, on the contrary, the act were one in their regular line of duty, then, of course, the averment was unnecessary. In the case of *Fleckner* v. *United States Bank*, 8 Wheat. 358, the court declare the point to be settled, "that a corporation may be bound by contracts, not authorized or executed under its corporate seal, and by contracts made in the ordinary discharge of the official duty of its agents and officers."[1]

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[1] In the case of the City of Tallahassee *v.* Newby, in the court of appeals of Florida in 1845, the following opinion, upon this question, was delivered by—

JORDAN, Justice.—In the case the Bank of Columbia *v.* Patterson's Administrators, 7 Cranch 299, the action was *indebitatus assumpsit* for work and labor done under a contract made with the duly authorized agents of a corporation, under their *private* seals: and it was held, that the action was well brought, the contract being made for the exclusive benefit of the corporation, which had, from time to time, paid money to the intestate on the faith of it In the case of Randall *v.* Van Vechten, 19 Johns. 60, a case similar in its facts to that in Cranch above cited, on its being proved that the covenantee had recognised the contract as that of the corporation, the court held the committee not liable, on the ground, that the corporation was liable in *assumpsit*. The case at bar assimilates in almost every feature to those cases. The agent or intendant, Eppes, was duly authorized to make the contract in behalf of the city of Tallahassee, and credit was given by the plaintiff to the city. But the contract

The next objection which was raised to the declaration applied to the second count, viz., that the averment that the plaintiff was turned out of possession, was insufficient, in this, that it is not averred to have been by process of law, or by the entry of one having lawful title. If entry and eviction were the ground of the action, or constituted the gravamen of the
*28] count, as in covenant on a warranty, *or for quiet enjoyment, then, indeed, a declaration or count would be defective, which omitted to aver, that the plaintiff was evicted by due process of law, or by the entry and eviction of one, who, at the time of the covenant, had lawful title to the land; and having such title, entered and evicted the plaintiff; or which did not contain some averment of equivalent import. But upon examining the count in question, it will be found, that although this averment is contained in that count, it is mere surplusage; because the breach alleged is, that the defendant refused, on demand, to convey the land. There is nothing, therefore, in the objection, as applied to this count; because it would be good, without averring any eviction whatsoever.

The next objection to the declaration applies to the third count, and it is this: that the plaintiff, in that count, treats the agreement as importing an undertaking on the part of the bank, to convey the lot in fee-simple, by a good and indefeasible title, free from incumbrances. In the view which we have taken of this subject, it is unnecessary for us to decide, whether the agreement does, or does not, import such an undertaking, on the part

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executed by the intendant was not under the *corporate* seal, but under his *private* seal, and therefore, not binding on the *corporation* as a deed. It was not binding on *him*, because it was made in the name of the *corporation* who received the consideration, and the plaintiff took it as the contract of the *corporation*. In the case of the Bank of the Metropolis *v.* Guttschlick, 14 Pet. 19, which was an action of *assumpsit* against the bank, upon an agreement in writing, signed by the president and cashier, under their private seals, the declaration contained three special counts, all founded on the agreement, and a count for money had and received, it was held, that the action was well brought, and that it makes no difference in an action of *assumpsit* against a corporation, whether the agent was appointed under the corporate seal or not, or if he puts his private seal to a contract which he makes in behalf of the corporation. In the case of Fleckner *v.* United States Bank, 8 Wheat. 358, the court declared the point to be settled, that a corporation may be bound by contracts not authorized or executed under its corporate seal, and by contracts made in the ordinary dicharge of the official duties of its agents and officers.

The only question presented by the exception taken in the court below, in the present case, is whether the court below erred in permitting the plaintiff to read the agreement under the private seal of Eppes, the intendant, in evidence under the declaration. But the record presents another question which it is proper the court should determine. It is, whether the plaintiff as assignee or holder of this agreement, declared on in the first count, can maintain this action against the defendant. We are of opinion, that he can, under the act of 1828, entitled "an act regulating judicial proceedings" (Compilation 96). For, by the 33d and 34th sections of the act, "the assignment or indorsement of any bond, note, covenant, deed, bill of exchange, or other writing, whereby money is promised or secured to be paid, shall vest the assignee or indorsee thereof with the same rights, powers and capacities as might have been possessed by the indorser." We think that the assignment or indorsement of the instrument declared on, under this statute, substitutes the assignee or indorsee in place of the payee, and invests him with the rights and remedies which originally attached to the assignor or indorser, under the contract. Under the decisions in 7 Cranch 299; 19 Johns. 60; 14 Pet. 19; 8 Wheat. 358, and under our statute of 1828, §§ 33, 34, we think the agreement was competent testimony against the corporation, and being payable to bearer, it was evidence of money due the plaintiff and that the court committed no error in permitting it to be read in evidence, under this declaration. We therefore affirm the judgment rendered in the court below, with costs.

of the bank, as is ascribed to it in this count of the declaration. This count contains an averment, that the bank was not, at the time of the agreement, or at any time after, seised or possessed of the lot in fee-simple. We have seen, that the language of the agreement is, that the bank was to convey the lot in fee-simple, to the defendant in error, his heirs or assigns for ever. Now, it appears from the record, that the bank claimed under a deed from Alexander Kerr, who sold the lot as trustee, under a deed of trust from Orr, the former owner, made to secure certain debts therein stated, which deed of trust was executed on the 8th of September 1819. But Orr had, previously, to wit, on the 6th of August 1818, conveyed the same lot, in fee-simple, to Joseph Elgar, as trustee, for the purpose of securing certain debts therein stated, and with power to sell, in certain events therein mentioned; one of which was, that Samuel Lane, who was indorser of a note of $3000, secured by this last deed, should be sued, which event occurred as early as the year 1820. Now, from this state of facts, it is apparent, that at the date of the agreement, the bank was not seised of the fee-simple which it contracted to convey. If the deed of trust to Elgar be considered as a mortgage, then the moment it was executed, the legal estate in fee-simple was in Elgar, subject to be defeated, upon the performance of the condition, and so continued in him, from that time, down to the year 1835, when, under the trust deed, he sold and conveyed the lot to the Patriotic Bank, which purchased at the sale. The interest of the mortgagor, according to the common law, is not liable to execution as real estate. 8 East 467; 5 Bos. & Pul. 461. It is treated as equitable assets. 1 Ves. 436; 4 Kent 154. In conformity with this doctrine, this court decided (12 Pet. 201), that the wife of a mortgagor was not dowable; and in 13 Ibid. 294, that the equity of redemption could not be taken in execution under *a *fieri facias*. If this be so, in the case of a mortgage, the principle applies [*29 more strongly, in case of a deed of trust, because the interest of the mortgagor, such as it is, is so far protected by a court of equity, that the mortgagee cannot foreclose, without a decree in equity; and even in that decree, a short time is allowed to the mortgagor, within which to redeem, by paying the debt; whereas, in the case of the trust, unless in case of some extrinsic matter of equity, a court of equity never interferes; and the only right of the grantor in the deed is the right to whatever surplus may remain after sale, of the money for which the property sold. There was, then, a good cause of action, on the ground, that the bank had not the fee-simple which it contracted to convey. We think, then, that the declaration is not liable to any of the objections which have been urged against it.

Nor have we any doubt, but that the action well lies against the bank. For although the agreement is under seal, it is not the seal of the corporation, but that of the president and cashier. It was decided in the case of *Randall* v. *Van Vechten*, 19 Johns. 60, that covenant would not lie against a corporation, on a contract not under their corporate seal; but that an action of *assumpsit* would lie; and that it makes no difference, in regard to a corporation, whether the agent is appointed under seal or not, or whether he puts his own seal to a contract which he makes in their behalf, the doctrine of merger not applying to such a case. This doctrine we approve, and it is decisive of the objection.

We come now in order to the exceptions taken at the trial. The first

was, to the court's admitting the agreement declared upon to be given in evidence, until some evidence was previously given, showing the authority of the parties who executed it, to sign it. Assuming *argumenti gratiâ*, as we have before done as to this point, that the transaction was such that an authority was necessary to be proven, the objection resolves itself simply in a question of the order in which evidence was to be given. We think that there is nothing in it. It was as competent for the party to prove the authority after, as it was before, giving the agreement in evidence.

The second exception was taken to to court's admitting in evidence a letter from defendant in error to plaintiff in error, and the testimony of a witness, that he had examined the records, for the purpose of tracing the title of the defendant in error to the lot in question; and also a deed purporting to be executed by John P. Van Ness, president of the Bank of the Metropolis, to the defendant in error. The letter was merely to inform the plaintiff in error of the sale then advertised to be made of the lot in question, under the deed of trust from Orrto Elgar. The examination of the records, made by the witness, was for the purpose of enabling the defendant in error to decide what course to pursue in relation to the property. We
*30] see nothing objectionable in the admission either of *the letter or the testimony of the witness. The plaintiff in error certainly was not injured by its admission. The property which the defendant in error had bought, being about to be sold, he causes an examination to be made, that he might know what ground he stood on; then, out of abundant caution, he wrote the letter giving notice of the sale, so that the other party might pursue whatever course they thought best for their safety. The most that can be said of it is, that he hereby proved, that he had done more than he was bound to do. For, if he had chosen, he might have rested upon his contract, without troubling himself, either in examining records or giving the other party notice. Nor have we any doubt as to the admissibility of the deed; some of the counts in the declaration charged, as a breach of the agreement, the failure of the other party to make a deed; a paper having been executed, having the form of a deed, it was altogether proper, then, to give it in evidence, to show that, being sealed, not with the corporate seal, but with that of the president of the bank, it was no deed; and thus sustain the allegation, that no deed had been made. It is clear, beyond doubt, that a paper such as this, not under the corporate seal, is not the deed of the bank, in contemplation of law.

The third exception was taken to the court's receiving in evidence the record of a suit by the Patriotic Bank against Lane, for the purpose of showing that Lane had been sued upon a note for $3000, mentioned in the deed from B. G. Orr to Elgar, dated August 20th, 1818. We think, that this record was properly admitted. For one important question in the cause was, whether the occasion had occurred, which justified Elgar, the trustee in the deed of trust from Orr, to sell the lot in question. Now, one of the provisions of that deed authorized him to sell, whensoever Lane should be sued on the note for $3000, given by Orr to the Patriotic Bank and indorsed by Lane, and to pay off that note to the bank. Now, this record proved that Lane had been sued, that, therefore, the *casus fœderis* had occurred; that the land was rightfully sold; and therefore, we think was admissible for the purpose for which it was offered. But it was argued, that the note stated

in the deed of trust as the one indorsed by Lane, purported to be negotiable at the Patriotic Bank, and that the note declared upon in the record did not purport to be negotiable at that bank, and that there was, therefore, a variance. If the question had been raised in the suit brought upon the note, it might have been considered a misdescription ; but in this case, it was offered in evidence to the jury, to prove the fact that Lane had been sued ; it was a question for the jury to consider, whether this evidence was sufficient to satisfy them, that it was the same debt as the one described in the deed from Orr to Elgar ; and therefore, the principle of law, that the allegations, in the parties' pleadings, and their proofs, shall correspond, has no application.

The last exception, after setting out certain evidence given by the plaintiff, without even stating that it was all the evidence, states, *that the defendant prayed an instruction, that upon that evidence, the plaintiff was not entitled to recover, either upon the first, or second, or third, or fourth counts in the declaration, which instruction the court refused to give ; and we think, very properly. Whether evidence in admissible or not, is a question for the court to decide ; but whether it is sufficient or not, to support the issue, is a question for the jury. This court said, in the *United States* v. *Laub*, 12 Pet. 5, "It is a point too well settled to be now drawn in question, that the effect and sufficiency of the evidence, are for the consideration and determination of the jury." And this proceeds upon this obvious principle : It is the province of the jury to decide what facts are proved ; it is competent to them, to draw from the evidence before them, all such inferences and conclusions as that evidence conduces to prove ; if the court were to tell them, that upon a given state of evidence, the plaintiff could, or could not, recover, then they must, in the assumption of what facts were proved, either discard from their consideration such inferences as the jury might draw, or they must themselves deduce them. The first course would injure the party offering the evidence ; the second, would be a usurpation of the office of the jury. The only case in which the court can make such inferences, and pass upon the sufficiency of the evidence, is by a demurrer to evidence. This would be the case, even if the bill of exceptions professed to state all the evidence ; but the one which we are now considering does not profess to do this, and we cannot assume that it was all. For aught that appears on this record, there was other evidence ; it is enough, however, that it does not appear, that the evidence stated, upon which the instruction was asked, was all. [*31

Having now finished our examination of the several exceptions, we will very briefly notice some points which were pressed upon the consideration of the court. It was said, that the deed of trust from Orr to Elgar, under which the lot in question was sold, was made to indemnify Lane as indorser of Orr's note ; that the Patriotic Bank had no right to call upon the trustee to sell ; that its only right was in a court of equity, to ask to be substituted to the rights of Lane : but upon examining the deed of trust, we find in it a provision, that upon Lane's being sued, the trustee shall sell the lot, and after paying the expenses of the sale, apply the proceeds to the discharge of the notes of Orr, indorsed by Lane, of which the note on which the suit was brought against Lane, was one ; so that this argument fails in its foundation. We entirely concur with the doctrine laid down in 1 Johns. Ch.

205; 3 Ibid. 261, that where a trust is created for the benefit of a third party, though without his knowledge, at the time, he may affirm the trust, and enforce its execution. The truth is, that although the object of the deed of trust was to secure Lane, its provision, that, in the event which happened, of his being sued, the property should be sold, and the notes which he had indorsed should be paid, was the most effectual means of attaining that *32] *object; these notes were due to the bank, were held by it, and in paying them, therefore, the money must be paid to the bank. Hence the trustee was authorized to sell, at its instance, and to pay it the amount.

It was also argued, that the judgment against Lane was barred by the act of limitations, and that, therefore, the trustee was not authorized to sell, for the purpose of paying a debt which could not be enforced; the provision of the deed which we have already referred to, furnishes an answer also to this objection; for even if it were barred, the claim was in full force, under the trust in the deed. For, although the judgment extinguished the right of action upon the note, yet upon well-established principle, it did not operate at all, by way of extinguishment of the collateral remedy under the deed of trust, though it had relation to, and was intended to secure the payment of the same note. The result, then, of this state of things is, that the property bought by the defendant in error, of the plaintiff in error, was legally sold under an elder subsisting lien; and thus he was utterly divested of all title, so as to show an entire failure of the consideration for which he paid his money, and to enable him to maintain an action for money had and received, to recover it back. 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 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 cent. per annum.

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*33] *Elias Kane, Plaintiff in error, *v.* Gabriel Paul, Executor of Edward Coursault, Deceased.

Letters-testamentary.—Powers of executors.—Actions by executors.

Letters-testamentary to the estate of Edward Coursault, a merchant, who died at Baltimore, were granted to Gabriel Paul, one of the executors named in the will; the other executor, Aglae Coursault, the wife of Edward Coursault, did not qualify as executrix, nor did she renounce the execution of the will; afterwards, on the application of Aglae Coursault, stating that she was executrix of Edward Coursault, accompanied wtth a power of attorney, given to her by Gabriel Paul, the qualified executor, who had removed to Missouri, the commissioners under the treaty of indemnity with France, awarded to the estate of Edward Coursault, a sum of money, for the seizure and confiscation of the Good Friends and cargo, by the French government. During the pendency of the claim before the commissioners, Aglae Coursault died; and letters of administration, with the will annexed, were, on the oath of Thomas Dunlap, that the widow and executrix of Edward Coursault was dead, granted by the orphans' court of the county of Washington, in the district of Columbia, to the plaintiff in error, Elias Kane, a resident in Washington; the sum awarded by the commissioners was paid to